

University of Zambia

School of Law

**The Protection of Cultural (Heritage) Property: How
effective is the Law in Zambia?**

By

COLLINS C. CHIPOTE

COMPUTER NUMBER: 90150091

UNZA - 2011

The Protection of Cultural (Heritage) Property: How effective is the Law in Zambia?

An Obligatory Essay submitted to the University of Zambia, Law Faculty, in partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LLB)

UNZA – 2011

DECLARATION

I, **COLLINS C. CHIPOTE**, do hereby solemnly declare that this work represents my own ideas and it is not a reproduction of any other work produced or submitted by any other person to the University of Zambia or to other institutions.

COLLINS C. CHIPOTE

A handwritten signature in black ink, consisting of a large, rounded initial 'C' followed by a stylized 'C' and 'P'.

APRIL, 2011

APPROVAL

I approve and recommend that the Obligatory Essay prepared under my supervision by **COLLINS C. CHIPOTE** entitled “**The Protection of Cultural (Heritage) Property: *How Effective is the Law in Zambia***” be accepted for Examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing directed research.

MS. M. WATULA – SUPERVISOR
2011

APRIL,

DEDICATION

This piece of work is dedicated to all those who are involved in the conservation and management of Zambia's heritage

ACKNOWLEDGEMENT

I wish to extend my thanks to all those who assisted me with all the information that I needed to make this work a reality. Special thanks go to the Board of Commissioners of the National Heritage Conservation Commission for their support and encouragement they gave me during my studies at the University of Zambia. In the same vein, it would be unforgivable if I fail to mention the members of staff of the Commission for their unqualified support when I was doing my research work.

I will be failing in my duties if I don't mention my Supervisor, Ms. M. Lwatula for her tireless and critical review of my work, for without her, this research would not have come to fruition.

TABLE OF CONTENTS

Declaration	i
Approval.....	ii
Dedication.....	iii
Acknowledgement.....	iv
Table of Contents.....	v
Cases.....	vii
Statutes.....	viii
International Instruments.....	ix
Abbreviations.....	x
Abstract.....	xi

Chapter One

1.0	Introduction.....	1
1.1.0	What is Heritage.....	4
1.1.1	Heritage as Property.....	6
1.2	International Instruments on Heritage.....	8
1.3	Statement of the Problem.....	9
1.4	Operational Definitions.....	12
1.5	Rationale.....	12
1.6	Methodology.....	12
1.7	Limitations.....	13

Chapter Two

2.0	Legal and Administrative Framework on the Conservation and Management of Heritage in Zambia.....	14
-----	--	----

2.1	Other Legislations providing for the Protection of Heritage.....	22
3.0	Discussion.....	24

Chapter Three

4.0	International Instruments on the Conservation of Heritage.....	36
4.1	Discussion.....	36

Chapter Four

5.0	Assessment of the Effectiveness of the Law on Concerning the Protection of Heritage in Zambia.....	42
5.1	Introduction.....	42
5.2	Assessment of Different Legislations.....	42
5.2.1	Protection of Immovable Heritage.....	42
5.2.2	Protection of Movable Cultural Property.....	45

Chapter Five

6.0	Recommendations and Conclusion.....	48
6.1	Recommendations.....	48
6.2	Conclusion.....	50

	Bibliography.....	51
--	-------------------	----

CASES

Attorney General of Canada v Attorney General of Ontario [1937] A.C 326

Attorney General of New Zealand v Ortiz Unreported Decision, Q.B.D 17 February 1988
(England)

Egypt v Southern Pacific Properties [1984] 23 ILM 1048

Environmental Council Zambia v Crushex (Z) Ltd [2005] HC/HP/06 Unreported

R v Secretary of State for the Home Department ex p. Brind [1991] 1 A.C. 696 House of
Lords

R v Heller [1983] 27 Acta. L.R (2d 346); (1984) 51 A.R 73 (Q.B) (Canada)

Trail Smelter Arbitration 3 R.I.A.A (1905)

Union of India v Bumper Development Corporation [1982] 1 Q.B. 149

Yuyi Sibote and Mwauluka Mubita v Inambao Sinatu, Cause No 2009/IT/54 (Unreported)

Zambia Sugar Plc v Fellow Nanzaluka, Appeal No. 82/2001

STATUTES

Ancient Monuments Ordinance, No. 36 of 1947

Archaeological Objects Ordinance, No. 5 of 1930

The Bushmen Relics Proclamation (Northern Rhodesia) No. 15 of 1912

The Draft Environmental Management Bill No. 52 of 2010

The Draft Water Resources Management Bill No 50 of 2010

The Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia

Environmental Impact Assessment Regulations, No. 28 of 1997

Lands Act, Chapter 184 of the Laws of Zambia

The Mines and Minerals Act, Chapter 213 of the Laws of Zambia

The Museums Amendment Bill of 2009

The National Heritage Conservation Commission Act, Chapter 173 of the Laws of Zambia

The National Museums Act, Chapter 174 of the Laws of Zambia

Natural and Historical Monuments and Relics Act, Chapter 266 of the Laws of Zambia

The Patents Act, Chapter 400 of the Laws of Zambia

South African National Heritage Resources Act

Statutory Instrument No. 28 of 1997

Town and Country Planning Act, Chapter 288 of the Laws of Zambia

The Water Act, Chapter 198 of the Laws of Zambia

The Zambia Wildlife Authority Act, No 12 of 1998 of the Laws of Zambia

INTERNATIONAL INSTRUMENTS

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage

Paris Convention for the Protection of Industrial and Intellectual Property

Resolution 4/7.6/5 UNESCO (1978) - Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in the Case of Illicit Appropriation

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

Vienna Convention on the Law of Treaties

ABBREVIATIONS

BCL	-	Barotse Cultural Landscape
G.M.A	-	Game Management Areas
ICCROM	-	International Centre for Conservation and Restoration of Cultural Property
ICUN	-	International Union for the Conservation of Nature
M.T.E.N.R	-	Ministry of Tourism, Environment and Natural Resources
N.H.C.C	-	National Heritage Conservation Commission
N.R.F.C	-	Natural Resources Consultative Forum
U.N.E.S.C.O	-	United Nations Education, Scientific and Culture Organization
U.N.O	-	United Nations Organization
UNDROIT	-	International Institute for the Unification of Private Law
VFWHP	-	Victoria Falls World Heritage Property
W.H.C	-	World Heritage Centre
W.H.C	-	World Heritage Convention
Z.A.W.A	-	Zambia Wildlife Authority

ABSTRACT

The principal objective of this study was to critically examine the laws pertaining the protection and management of Zambia's unique heritage in general and cultural heritage in particular. It was found that heritage generally shares the same definition worldwide and as such, there are similarities in the way heritage is protected and managed in various parts of the world. The first chapter underscored the fact that heritage concept is not properly understood and it is no surprise that there is paucity of legal literature on heritage conservation in Zambia.

The history of the legal and institutional framework in the protection and management of Zambia's heritage has been considered in chapter two and as observed, the law on heritage is one of the eldest laws in the country. The study has been able to show that the law has undergone numerous amendments since 1912 aimed at consolidating the protection of heritage and also as a response to emerging issues on environmental protection. Other legislations have also been considered while highlighting some of the overlaps potentially creating conflicts in institutional mandates.

Though Zambia is signatory to international instruments on the conservation of heritage, very little has been done to domesticate them into municipal law. International instruments concerning the conservation of cultural and natural heritage have been the focus of chapter three.

An assessment of the effectiveness of the statutes providing protection of cultural and natural heritage from a generic perspective has been articulated in chapter four while chapter five is premised on the discussion of the recommendations and conclusion. It is hoped that some of the recommendations made in this research will be useful when reviewing or proposals aimed at strengthening the laws on the protection of Zambia's heritage.

Chapter One

1.0 Introduction

The concept of heritage is a strange and nebulous topic to the minds of many people. This is particularly so with those countries that have short histories of Statehood. Nonetheless the subject matter of discussion, the cultural (and natural) heritage, which the research paper has termed “heritage property,” is increasingly becoming popular and a topical subject due to a number of factors which include inter alia, the views that heritage property is symbol for national or cultural identity, offers a fertile area for educational, scientific research and provides a viable resource for tourism investment, development and promotion/marketing. Despite the importance of the heritage property, there has been paltry scholarly work on the subject particularly in Zambia. The scarcity of legal scholarly work in Zambia is partly due to the fact that the heritage subject is a nebulous and esoteric topic. This study is therefore a seminal contribution towards bridging the gap.

Some scholarly works on the protection of cultural heritage have been taken a more regional approach. Such works have been noted in the Oceanic region¹ as well as in the Latin America.² The scenario is basically the same as both regions battle to control the illicit trade in antiquities and rare fauna and flora. This study has shown that the *Zambian* situation is not entirely different. This hypothetical position is premised on the understanding that where there are so many competing needs in a poor country like Zambia, enforcing legislation becomes a huge challenge. In the long term, heritage suffers due to the fact that the much needed financial and material resources which in most cases are meager, are channeled towards the provision of health and education services just to mention a few.

The establishment of legal and administrative frameworks for the protection and management of cultural heritage within the context of Africa³ has not barred the illicit trade in antiquities. Generally, laws on the protection of cultural heritage in Anglophone Africa are similar.⁴ However despite the similarities, the challenges of enforcement are diverse, some ranging from

¹ L. Prott and J. Specht, *Protection or Plunder: Safeguarding the Future of Our Cultural Heritage*. Page 27

² International Council of Museums (ICOM), *Illicit Trade in Cultural Property in Latin America*. ICOM, Paris, 1986

³ P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Indiana University Press, Indiana, 1996 at page 29

⁴ ICCROM, *Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Saharan Africa*. Rome, ICCROM, Rome, 2008 at page 39

lack of political will on the part of government to lack of professionalism and inadequate financial and material resources.

Zambia is signatory to numerous Conventions including those that regulate the protection and management of cultural and natural heritage. In particular and for the purposes of this study, Zambia is signatory to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property and the 1972 Convention on the Protection of World Cultural and Natural Heritage popularly known as the World Heritage Convention. These international instruments would be of no legal value or purpose if their provisions are not domesticated into municipal or national law. For instance, Zambia being signatory of the Covenant on Civil and Political Rights has domesticated most of the provisions contained therein and are provided for in the supreme law of the land, the Constitution.⁵ Article 6 of the Covenant provides for the inherent right to life while Article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment while 8 prohibits slavery and slave trade. Article 9 provides for the individual's right to liberty and security of person. These articles (6, 7, 8 and 9) have all been enshrined under Part III of the Constitution. Articles 12, 13, 14 and 15 respectively just to mention a few, do provide for these fundamental rights and freedoms as espoused on the Covenant.

Similarly, most of the provisions in the Paris Convention for the Protection of Industrial and Intellectual Property have been domesticated into municipal law. This is evident in the Patents Act.⁶ Section 8 (1) of the Act underscores this point and it provides that 'subject to the provisions of section eleven, any person who qualifies under Article 2 or 3 of the Convention and who has applied for protection in a Convention country or his legal representative or assignee (if such assignee is also so qualified) shall be entitled to a patent for his invention under this Act in priority to other applicants if application therefor is made in terms of this Act within twelve months after the effective date of the first application for the protection in the first Convention country in which he made such application or, where more than one such application for protection has been made, from the effective date of the first such application, and the patent shall have the same date as the effective date of the application in such Convention country but

⁵ Chapter 1 of the Laws of Zambia

⁶ Chapter 400 of the Laws of Zambia

the term of the patent shall run from the date on which the complete specification is lodged at the Patent Office.’

The two examples above illustrate how the international or global norms and standards are domesticated and given effect in national laws. As for the two Conventions in issue in the study, it is submitted that no clear or specific provisions have been given effect or operationalized into the municipal law in Zambia. The country’s principal law on the protection of both cultural and natural heritage, be it sites or objects, is the National Heritage Conservation Commission Act.⁷ In addition, there are other statutes besides heritage protection not being the principal in their provisions, do consider the protection of heritage resources. These include the Environmental protection and Pollution Control Act,⁸ the National Museums Act,⁹ the Zambia Wildlife Authority Act,¹⁰ the Mines and Mineral Act,¹¹ the Town and Country Planning Act¹² and the Water Act.¹³ The study has also delved into any laws that cover issues of heritage and environment which are under review in order to establish the thinking of government on the importance of conserving the country’s heritage. On the other hand, some draft bills such as the draft Environmental Management Bill,¹⁴ the Water Resources Management Bill¹⁵ and the Museums Bill¹⁶ are in the process of being enacted into law and such statutes may contribute either to enhancing the protection of heritage resources are creating conflicting in institutional mandates.

The study has established that in the light of the need for economic development the protection of heritage which is mainly part of the environment has faced serious challenges and the call for international support against spoliation of heritage can remain unheeded without the ratification of the relevant conventions. In the midst of non-domestication of international convention on the conservation property, the disappearance of heritage cannot be ruled out due to lack of international voice.

⁷ Chapter 173 of the Laws of Zambia
⁸ Chapter 204 of the Laws of Zambia
⁹ Chapter 174 of the Laws of Zambia
¹⁰ No. 12 of 1998
¹¹ Chapter 213 of the Laws of Zambia
¹² Chapter 288 of the Laws of Zambia
¹³ Chapter 198 of the Laws of Zambia
¹⁴ No 52 of 2010
¹⁵ No 50 of 2010
¹⁶ Draft Bill of 2009

While it may be appreciated that other statutes do provide for protection cultural and natural heritage, the study has shown that these laws require harmonization to avoid conflicts. The study has shown the prevalent of legal overlaps resulting in conflicts in institutional mandates.

1.1.0 What is Heritage?

Heritage is such concept that defies definition but to define it appropriately calls for a closer look at its categories. The heritage property or resource is divided into two broad categories, namely Cultural and Natural Heritage. Cultural heritage comprises “things” fashioned by the hands of man and may have been in existence for thousands of years. This heritage is in form of objects / artefacts, structures, buildings, sites, etc.¹⁷ The United Nations Education, Scientific and Cultural Organization (UNESCO) defines it as present manifestation of human past.¹⁸ The World Heritage Convention (WHC) defines cultural heritage as “monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwelling and combinations of features, which are of outstanding universal value from the point of view of history, art or science; group of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites which are works of man or the combined works of man and nature, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”¹⁹

From the above definition, two types of cultural heritage can be identified; movable and immovable heritage. Movable heritage otherwise called objects or artefacts is usually found in museums while immovable, as the name suggests is heritage that cannot be moved from in-situ.²⁰

In Zambia, the principal legislation dealing with cultural heritage is the National Heritage Conservation Commission Act.²¹ Section 2 of this Act defines cultural heritage as:

¹⁷ World Heritage Centre, Operational Guidelines for the Implementation of the World Heritage Convention (WHC), UNESCO, Paris. Page 13

¹⁸ World Heritage Centre, Operational Guidelines for the Implementation of the WHC, WHC, Paris, 2008

¹⁹ Article 1 of the WHC

²⁰ ICCROM, Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Saharan Africa. Rome, ICCROM, Rome, 2008. Page 39

²¹ NHCC Act Chapter 173 of the laws of Zambia

- (a) Any area of land which is of archaeological, traditional or historical interest or contains objects of such interest;
- (b) Any old building or group of buildings or architectural interest;
- (c) Any relic, national monument or ancient heritage and;
- (d) Any other object constructed by man, other than a relic, of aesthetic, archaeological, historical or scientific value or interest.

National monument is any heritage that the Minister, may declare by statutory instrument as heritage of national importance or significance. This is provided for by section 27 of the National Heritage Conservation Commission Act.²² Except for a relic, this definition is in consonance with the definition provided for by UNESCO. Natural heritage on the other hand represents naturally occurring features, sites or objects. A good example of natural heritage is a waterfall or fossilized/petrified wood (paleontological objects). Article 2 of the World Heritage Convention defines natural heritage as “natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of universal value from the point of view of science or conservation; and natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.”

In Zambia, natural heritage is defined in the NHCC Act²³ as:

- (a) Any area of land which has distinctive beautiful scenery or has a distinctive geological formation, and includes any paleontological area;
- (b) Any area of land containing rare distinctive or beautiful fauna or flora;
- (c) Any waterfall, cave, grotto, old tree or avenue of trees;
- (d) Any other natural object with aesthetic, or scientific value or interest;
- (e) Any natural relic and natural monument.

From these definitions, it is observed that a relic can be either natural or cultural heritage. From the Interpretation section²⁴ comprised in section 2, a fossil is also a relic but the only difference

²² The NHCC Act, Chapter 173 of the Laws of Zambia

²³ Section 2 of the NHCC Act Cap 173

with a relic under cultural heritage is that a fossil is a naturally occurring object. In other words, a relic means any fossil of any kind and any implement, ornament or article which is of archaeological, geological, anthropological, ethnological, pre-historical, artistic or scientific value or interest.²⁵ In addition, the definitions as provided for under the NHCC Act are similar with those found in the World Heritage Convention. The question as to whether or not the similarity is confirmation that the country has acceded to, and domesticated the convention would be discussed in the subsequent chapter.

1.1.1 Heritage as Property

In today's international parlance, all heritage, be it natural or cultural, is commonly referred to as property. It is this heritage that forms the basis of this research study, though much emphasis has been placed on cultural heritage.

From Zambian legal context, this heritage is capable of being owned, leased, mortgaged or transferred thus justifying the reference of heritage as property. In general terms, the owner of property may wish to use it as he wishes and nobody else can lawfully use his property without his authorization.²⁶ Heritage property is divided into movable and immovable property. In Zambia, like in many other nations, heritage may be owned by the state or an individual or organization. In supporting the notion that heritage is actually property, sub-section 1 of Section 31 of the National Heritage Conservation Commission Act²⁷ states that "the Commission, except with the written of the Minister²⁸ shall not, mortgage, charge, sell, transfer, assign, or in any manner whatsoever encumber or part with the possession of any national monument or "relic".

Since the Commission can mortgage, sell or assign heritage, it is submitted that to call heritage as property therefore justifies this nomenclature. Therefore, in this study, property would be used to connote heritage whether cultural or natural heritage site or object. From other jurisdictions, there are also heritage objects (particularly movable ones) that are owned by individuals and can either be sold or bequeathed or donated as the case may be.

²⁴ The NHCC Act, Cap 173

²⁵ ICCROM , Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Sahara Africa. Page 26

²⁶G. M. Kanja, Intellectual Property Law. Lusaka, University of Zambia Press, Lusaka, 2006. Page 26

²⁷ NHCC Cap 173 of the Laws of Zambia

²⁸ In the context of the current situation, it is the Minister of Tourism, Environment and Natural Resources

Article 3 of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in the Case of Illicit Appropriation²⁹ defines “cultural property” as historical and ethnographic objects and documents including manuscripts, works of the plastic and decorative arts, palaeontological and archaeological objects and zoological, botanical and mineralogical specimens. Unlike the NHCC Act or the 1970 Convention, this statute considers particular naturally occurring specimen as cultural property as well. Under Article 1 of the 1970 UNESCO Convention, the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and 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;

²⁹ Adopted by 20C/Resolution 4?7.6/5 of the 20th Session of the General Conference of UNESCO, Paris, 24 October to 28 November 1978

- (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.

The fundamental question the paper addresses mainly hinge on whether the law in Zambia in its current form protects the country's heritage property adequately. It is important to note that most of the heritage particularly, cultural heritage is fragile and non-renewable.

1.2 International Conventions on Heritage

From the international point of view, the United Nations Education, Scientific and Cultural Organization (UNESCO), one of the specialized agencies of the United Nations Organization (UNO) formulated Conventions to deal with matters of cultural and natural heritage. For the purpose of this study, only two conventions have been discussed. The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property to which Zambia is a signatory, deals with the illicit trade in cultural property. The 1972 Convention on the Protection of World Cultural and Natural Heritage provides for the nomination of sites with outstanding universal value as world heritage properties. All heritage sites covered under this Convention are of universal outstanding value and this can be attested from the definitions provided for under Articles 1 and 2 of the convention. Such sites do have global significance or importance such that their protection is not left to the State Parties hosting them but that the rest of the world has a say in their management and conservation. In other words, these sites or properties need to be preserved as part of the world heritage of mankind as a whole.³⁰ The Convention provides operational guidelines and monitoring mechanisms of the state of conservation of world heritage properties. Heritage of outstanding universal value is said

³⁰ Preamble of the World Heritage Convention

to be a shared heritage with shared responsibility.³¹ The aspirations shared in the Convention are high and call for human and financial resources from States Parties for management and conservation of world heritage properties/sites. The need for domestication of these two Conventions cannot therefore be over-emphasized. Related to the above Conventions, is the 2003 Convention on Intangible Heritage. As the name suggests, this Convention however deals with intangible heritage. In this paper, this convention has only been discussed where tangible heritage has some aspects of intangible heritage.

1.3 Statement of the Problem

Countries worldwide have formulated legal and policy frameworks designed to deal with the protection of heritage property particularly cultural heritage property. Cultural heritage property ranges from objects or artefacts of cultural or scientific value to places or sites and buildings.³² This heritage plays a significant role in defining a country's cultural or national identity and contributes to socio-economic development.³³ In fact, there are countries today whose economies are largely dependent on the tourism sector, of which the heritage forms a part. It must be stressed that the heritage property particularly cultural heritage is fragile and a non-renewable resource and thus need proper care and management.

It is a notorious fact that many objects of cultural value have been lost *inter alia* due to the illicit trade of these properties and do fetch millions of US dollars.³⁴ Recently, a Chinese Vase of thousands of years old discovered in the United Kingdom fetched about eight million dollars at the Christie and Sotheby Auction House,³⁵ while a Picasso painting was sold for US 40.7 million dollars at Christies and Sotheby Auction House in London.³⁶ Due to its lucrative nature, the trade has become even more sophisticated as some fakes have been produced to fool unsuspecting clients. As a result, there has been a belief that all cultural objects are goods of commerce.³⁷ This calls for alternative legal strategy and closer cooperation among nations in order to curb this illicit trade. In colonial Africa, millions of objects were illegally removed to western nations.

³¹ B. Felden and J. Jokilehto, *Management of World Heritage Properties*. Rome, ICCROM, Rome, 1998

³² ICCROM, *Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Saharan Africa*. Page 28

³³ C. Chipote, *Challenges in Archaeological Heritage Management. A Case Study of Zambia*. (Unpublished Masters of Philosophy Degree, Fitzwilliam College, University of Cambridge, 2003).

³⁴ P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Indiana University Press, Indiana, 1996

³⁵ www.aljazeera.com/news/2011/01/18-january-2011, 18 January 2011

³⁶ Sunday Mail, February 13, 2011

³⁷ P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Page 32

However, even where such flight was largely lawful, African people had no say or control over the removal or expatriation of their heritage objects. For instance, the famous skull of Broken Hill man discovered in 1921 in the then Northern Rhodesia was shipped to the United Kingdom under colonial legislation over which the natives had no say. Some heritage objects have been destroyed or looted amidst civil or international conflicts. This picture is not entirely confined to the African continent but did affect many other regions including Europe.

The problem has been compounded by the fact that most countries especially developed ones, even though they may have ratified the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, have not yet domesticated it into national law and their citizens form the majority of the consumers of cultural objects. If domesticated, the Convention puts control on all import or export of cultural property and provides for the return of illegally exported property to their countries of origin.³⁸ What is important to underscore is the fact that by ratifying the Convention, States Parties have committed themselves to be bound by the provisions of the treaty and in the case of cultural heritage, this entails *inter alia* adopting policies, and establishing institutional and legal frameworks that preserve and promote that heritage.³⁹ However, due to differences in legal frameworks around the world, the prevention of illegal trade in cultural property has ever been a challenge.⁴⁰

The plunder of Cultural Property deprives citizens of aspirations to their right to a cultural heritage, which fundamentally forms part of their human rights.⁴¹ The African Charter on Human and Peoples Rights does recognize the right to cultural heritage as it promotes national identity. Article 22 (1) provides that 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. This common heritage of mankind is basically the world heritage properties, a common heritage for all.

³⁸L. Prott and J. Specht, *Protection or Plunder: Safeguarding the Future of Our Cultural Heritage*. Canberra, Australian Government Publishing Service, Canberra, 1982. Page 6

³⁹ICCROM, *Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Saharan Africa*. Page 14

⁴⁰P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Page 3

⁴¹P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Page 27

Be that as it may, cultural and natural heritage property have become a resource for tourism promotion and marketing, investment and development as well a tourism product. As explained earlier, heritage resource today is playing a pivotal role in the tourism industry. Millions of people are traversing the world to visit heritage sites; from the Robben Island in South Africa to the Great Chinese Wall in China, from the Victoria Falls in Zambia/Zimbabwe to the Pyramids of Egypt. All these constitute a world heritage package whose significance transcends national boundaries. In Zambia for instance, the Mighty Victoria Falls, the country's only world heritage property is the pinnacle or beacon of tourism promotion and development. In addition, there are more tourism developments around the Victoria Falls than any tourist attraction in Zambia. In 2005, a Natural Resources Consultative Forum (NRCF) research found that well over 54 per cent of the total tourist arrivals⁴² in the country came to have a glimpse of this property which is also one of the Seven Wonders of the World. It's for this reason that Zambia's tourist capital is actually Livingstone town, the home of the Victoria Falls.

The conservation of cultural and natural heritage is not without controversy. Conflicts have always arisen especially on the choice over whether or not to preserve heritage or permit a development project. Choices here do not mainly hinge on the law but the ultimate result of either decision. For instance, some waterfalls are ideal areas for the generation of hydro power whereas others lay over minerals. This calls for decision as to whether to allow construction of hydropower station on a waterfalls or allow mining activities thereby destroying the sites altogether. In other words, should heritage be removed or destroyed in order to pave way for agriculture, mining or generation of hydro power? It must be borne in mind that heritage whether cultural or natural form part of the built or natural environment. The question of removing the heritage in order to pave way for development which could result into job creation, income and wealth has no clear answers. However, it is submitted that current trends on environmental protection require a proactive, sympathetic approach and robust legislation for the reason that environmental degradation has serious future consequences. The '*polluter pays principle*'⁴³ is a call for the price to be paid for those that harm the environment, for which the heritage property is a part. This paper submits that the National Heritage Conservation Commission Act require review to make it more effective in conserving Zambia's heritage, whether cultural or natural.

⁴² NRCF, The Real Economic Impact of Nature Tourism in Zambia, 2005

⁴³ Section 2 of the Draft Environmental Management Bill, No 52 of 2010

1.4 Operational Definitions

The key terms in the study have been defined in order to ensure that they are understood by readers of this research paper.

1.5 Rationale

In Zambia, there has been little or no scholarly work on the legal framework for the protection of heritage protection particularly cultural heritage. Whereas there has been legal scholarly research generally on environmental protection⁴⁴ and remedies in environmental cases in Zambia⁴⁵ no such work has been done on heritage in general. This study therefore, will form part of the general academic undertaking in heritage and law in Zambia. This work constitutes a seminal academic work on heritage and the law in Zambia and it is submitted that the need for revision of the existing legislations on the protection of Zambia's heritage particularly the cultural heritage cannot therefore be over-emphasized.

Additionally, this paper being seminal could trigger debate on Zambia's performance in terms of the protection of heritage property in general and the conservation of world heritage property in particular. This is cardinal especially in light of Zambia's accession to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property and the 1972 Convention on the Protection of World Cultural and Natural Heritage.

1.6 Methodology

The study has employed mainly the gathering of data in form of books and publications, the majority of such collected information being secondary in nature. Various statutes were also assessed to ascertain whether or not heritage particularly cultural heritage in Zambia do have a future premised on the effective legal protection and enforcement.

In addition, international instruments such as conventions to which Zambia is party have also been consulted, the object being to appreciate Zambia's commitment in joining the international community in protecting and conserving heritage properties of outstanding universal value. In analyzing this aspect, the study has considered the Victoria Falls World Heritage Property as the

⁴ C. Mulenga, An Analysis of Environmental Protection and Pollution Control Act visa vis Industrial and Technological. A Case Study on Zambia. Unpublished Dissertation, 2006

⁵K. Musaila, Remedies in Environmental Cases in Zambia. Unpublished Dissertation, 2006

focus in the country's adherence to international guidelines as espoused by the World Heritage Convention.

1.7 Limitations of the Study

The study mainly concentrated on statutes due the paucity of case law on the protection of heritage in general and cultural heritage in particular.

Chapter Two

2.0 Legal and Administrative Framework on the Conservation and Management of Heritage in Zambia

The conservation and management of cultural and natural heritage goes as far back as 1912 when after the establishment of Northern Rhodesia, a law called the Bushmen Relics Proclamation⁴⁶ was passed. This law forms the genesis of the management of heritage particularly cultural heritage as we know it today. It did not only cover Bushmen relics as the name suggests but equally covered ancient ruins. In the Proclamation, section 1 defined the Bushmen Relic as:

“any drawing or painting on stone or petroglyph of the kind commonly known or believed to have been executed by the Bushmen or other aboriginals and shall include any of the anthropological contents of the graves, caves, rock-shelters, middens or shell mounds of such Bushmen or other aboriginals.”

The first part of the definition deals purely with rock paintings or engravings associated with the Bushmen and like it has been shown later in this study, the definition has been maintained in subsequent legislations. The second part of the definition dealt with content of graves or other repositories of anthropological nature. However, the problem with this definition is that it failed to define what anthropological meant. Being what it is, it may suffice to conclude that all skeletal remains including material culture of the aboriginals could be considered to have been protected under this law. The definition as provided here does provide the genesis of what was later to be known as cultural heritage. Within this Proclamation, ancient ruin⁴⁷ is defined as any building or remains of a building constructed either of stones packed loosely or otherwise which is known or believed to have been erected by the people who preceded the Native tribes now in occupation of the territory or any material which has been used in the construction of such a building. Whereas the definition of Bushmen relics covered Bushmen paintings and anthropological material, ancient ruin considered building and materials used for such building of the native tribes. The native tribes here include ancestors of the people currently occupying Zambia. Again, this was what to constitute cultural heritage.

⁴⁶ Northern Rhodesia No. 15 of 1912

⁴⁷ Section 1 of Northern Rhodesia No. 15 of 1912

The Bushmen Relics Proclamation however had limitation since it did not provide administrative framework. In other words, the law did not provide for an institution to enforce it. However, the Administrator of Northern Rhodesia then was entrusted to regulate as the case may be, and give effect to the law. In terms of making regulations, section 4 provided that the Administrator may make regulations for the better carrying out of the objects and purposes of this Proclamation.

This is the law as it was at the time when the famous skull of Broken Hill man was discovered in 1921 in Broken Hill. Since the law provided for the protection of anthropological remains of other aboriginals, it is a fair conclusion to state that the remains of Broken Hill man were actually covered under this statute since they were remains of a grave. Of late, there have been incessant calls for the return of the remains of Broken Hill Man⁴⁸ and the calls have been premised on the fact the remains were discovered in Zambia. At the time the remains were shipped to the United Kingdom, the Administrator of the territory (Northern Rhodesia) regulated the movement of Bushmen relics. Subsection 1 of section 2 stated that “no person shall remove, cause or allow to be removed from the territory any Bushmen relic or any ancient ruin or portion thereof without first having obtained from the Administrator a written permit to do so.”

Permits were required for any removal of a relic or ruin as provided for by section 2 (ii) while section 3 provided penalty for contravening section 2. There being no institution mandated to carry out the function of administering this law, the Administrator enforced the preservation of what was to become as heritage some 77 years later. There is no evidence to show that a permit was issued for the shipment of the skull of Broken Hill Man. The skull was discovered by miners in 1921 and according to the report, the purpose for the shipment to the United Kingdom of the remains of Broken Hill Man was for it be investigated and studied.⁴⁹ When pressed by Zambia for⁵⁰ the return of the remains of Broken Hill Man, the Natural History Museum claimed that the remains were donated to its trustees. This is consistent with the report of 1921 where it was said that the specimen were taken to England by a Mr. Ross McCartney, the Managing Director of the Rhodesia Broken Hill Development Company and added to the many generous gifts of the company to the British Museum.⁵¹

⁴⁸ Zambia Daily Mail Tuesday's Edition of March 1, 2010

⁴⁹ A. S. Woodward, A New Caveman from Rhodesia. *South Africa Nature Journal* Vol. 108, 1921, at page 371-372

⁵⁰ A. S. Woodward, A New Caveman. Page 372

⁵¹ A. S. Woodward, A New Caveman. Page 372

The Bushmen Relics (Northern Rhodesia) Proclamation 1912 was repealed after the Governor with the consent of the Legislative Council passed the Preservation of Archaeological Objects Ordinance in 1930.⁵² Besides the preservation of archaeological objects and sites, the Ordinance also took care of objects of paleontological interest, which unfortunately is not defined. Section 8 of the Ordinance provided for the acquisition of land under the Public Lands Acquisition Ordinance 1929, if such land contained any object of archaeological or paleontological interest. The task of enforcing the Ordinance was left in the hands of the Native Authority and the Chief Secretary or his/her Deputy as provided for by sections 3 and 4 respectively. It must be mentioned the fact that the two statutes discussed so far never mentioned the phrase '*heritage*' as well as the notion of cultural or natural heritage. However, it is submitted that all what the two laws were attempting to conserve constituted what was to become known as cultural heritage as we know it today.

Having submitted the above, it may suffice to state that management and conservation of heritage was revolutionized in 1947 after the passage of the Ancient Monuments Ordinance.⁵³ This ordinance provided for the "better preservation of ancient, historical and natural monuments, relics and other objects of aesthetic, historical, archaeological or scientific interest." As can be seen, the 1947 Ordinance introduced four important features in the history of the management and conservation of Zambia's heritage. It introduced ancient monument, monument, natural (heritage) and the administrative framework. Section 2 defined ancient monument as "as any building, ruin, stone, circle, alter, pillar, statue, tumulus, grave, rock-shelter, midden, shell mound, or other site or thing of a similar kind or any remains thereof, which is or used before the first day of January 1890 but does not include any ancient working." The same section defined monument as:

- (a) Any ancient monument;
- (b) Any area of land which is of archaeological or historical interest or contains objects of such interest;
- (c) Any area of land which has distinctive or beautiful scenery or a distinctive geological formation;
- (d) Any area of land containing rare or distinctive or beautiful flora or fauna;

⁵² No. 5 of 1930

⁵³ No. 36 of 1947

- (e) Any waterfall, cave, grotto, avenue of trees, old trees or old building; and
- (f) Any other object (whether natural or constructed by man) of aesthetic, archaeological, historical or scientific value or interest.

The concept of monument therefore has its genesis in this ordinance. Going by the definitions provided in the first chapter, it is submitted that paragraphs (c) to (e) form the genesis of what was to be called natural heritage. Natural heritage as we know it was therefore introduced and first provided for under the laws in Zambia by this Ordinance.

The Ancient Monuments Ordinance 1947 brought in an administrative framework for the management and conservation of heritage in Northern Rhodesia. Section 3 provided that “as from the commencement of this Ordinance, there shall be established a Commission (to be known as the Commission for the Preservation of Natural and Historical Monuments and Relics) consisting of such persons as the Governor in Council may from time to time appoint.”

This body, by virtue of section 5, was to be a body corporate capable in law of suing and being sued in its corporate name. One of its fundamental duties was to advise the Governor on declaration of sites as national monument. By section 7 (d), the Commission could recommend to the Governor the declaration of any monument as national monument and by section 9, the Governor had the power to declare by notice in the Gazette, any monument as national monument. By declaration as national monument, it was meant that the site or area was of national importance or significance. Section 15 gave the Commission powers to make by-laws in managing monuments, relics and objects. For its association with monumentality, the Commission became popularly known as the National Monuments Commission. Section 5 gave the Commission powers to pass by-laws to regulate the movement of relics and objects. This Ordinance was amended in 1953⁵⁴ to provide for the appointment of Honorary Commissioners.⁵⁵ The law of 1948 also introduced the provision for the export of ancient monument (or heritage) or relic to apply for a permit. The export provision survives up to the present day in the current law.

⁵⁴ Amendment No. 29 of 1953

⁵⁵ Section 7A of Natural and Historical Monuments and Relics Ordinance, 1948

This law continued in this format and content after independence and was then called the Natural and Historical Monuments and Relics Act.⁵⁶ However, in the 80s, the statute underwent fundamental changes that were to keep conservation issues in tandem with emerging environmental management trends. In 1989, the Natural and Historical Monuments and Relics Act was repealed and replaced by the National Heritage Conservation Commission Act.⁵⁷ After having been under different ministries, the Commission was finally settled under the Ministry of Tourism, Environment and Natural Resources (MTENR). It is this statute that introduced the concept of “heritage.” Accordingly, this was “an Act to repeal and replace the Natural and Historical Monuments and Relics Act; to establish the National Heritage Conservation Commission; to define the functions and powers of the Commission; to provide for the conservation of ancient, cultural and natural heritage, relics and other objects of archaeological, aesthetic, historical, pre-historical or scientific interest; to provide for the regulation of archaeological excavations and export of relics; and to provide for matters connected with or incidental to the foregoing.” For the purposes of this study, this new Act introduced three important features or provisions namely ancient, cultural and natural heritage, polluter pays principle and lodgment of site survey plans with the Registrar of Lands and Deeds.⁵⁸ What was previously ancient monument, ruin, anthropological material (from the Bushmen Relics (Northern Rhodesia) Proclamation) or objects or any ancient monument together with historical buildings, became known as cultural heritage in the National Heritage Conservation Commission Act.⁵⁹ This Act brought in the phrase ‘ancient heritage,’ a concept which has a wider definition. Section 2 defines it as:

- (a) Any building, ruin, or remaining portion of a building or ruin;
- (b) Any pillar;
- (c) Any settlement, cave or natural rock shelter with traces showing that people once lived there, any house site or church site of any kind, or remains or part of these, any mound representing the midden of an ancient settlement, and any other site with concentrations of buildings, such as trading centres, town sites and the like, or remains of these;

⁵⁶ Chapter 266 of the Laws of Zambia

⁵⁷ No. 23 of 1989, later Chapter 173 of the Laws of Zambia

⁵⁸ As provided for under the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia

⁵⁹ Chapter 173 of the Laws of Zambia

- (d) Any site and remains of working and any other place of work of any kind, such as a quarry or other mining site, iron extraction site, charcoal kiln and any other trace of a craft or industry;
- (e) Any trace of any kind of cultivation of land, such as a pile of stones heaped up when land was cleared, a ditch and any trace of ploughing;
- (f) Any fence or dry stone wall, and any enclosure or arrangement for hunting, fishing or snaring;
- (g) Any road or other track unpaved or paved with stones, wood or other materials;
- (h) Any dam, weir, bridge, ford, harbor works, landing place or ancient slip way or the remains of such;
- (i) Any bar made of sunken vessels;
- (j) Any landmark for use on land or on water;
- (k) Any kind of defense such as a fort, entrenchment, fortress and remains of these;
- (l) Any site for holding council, any cult site or any place where objects were thrown for the purposes of magic, any well, spring or other place with which archaeological finds, tradition, belief, legends or customs are associated;
- (m) Any stone or solid rock with inscriptions or pictures such as rock engravings, rock paintings, cup marks, ground grooves or any other rock art;
- (n) Any monolith, cross or other such heritage;
- (o) Any stone setting, stone paving or the like;
- (p) Any burial place of any kind, individually or in collected sites, such as a burial mound, burial cairn, burial chamber, cremation patch, urn burial and coffin burial;
- (q) Any place or thing which is designed by the Commission as an ancient heritage; which is known or believed to have been erected, constructed or used as the case may be, before 1st January, 1924 whether above ground, underground or underwater.

This list is however not exhaustive. Some heritage may not be as ancient but recent and can still, in the opinion of the Commission be considered as significant. The best examples include the Football Heroes Burial site and the Embassy Park where the late president Dr. Levy Patrick Mwanawasa is buried.

In this Act, cultural heritage is defined as:

- (r) Any area of land which is of archaeological, traditional or historical interest or contains objects of such interest;
- (s) Any old building or group of buildings or architectural interest;
- (t) Any relic, national monument or ancient heritage and;
- (u) Any other object constructed by man, other than a relic, of aesthetic, archaeological, historical or scientific value or interest.

Perhaps in the entire continent of Africa, this is one of the few statutes that clearly states in its mandate the conservation of ancient, cultural and natural heritage, relics and other objects of aesthetic, archaeological, historical or scientific value or interest.⁶⁰ Unlike laws of other African countries, the Zambian law includes within its scope the conservation of cultural heritage.⁶¹ Natural heritage is defined as:

- (a) Any area of land which has distinctive beautiful scenery or has a distinctive geological formation, and includes any paleontological area;
- (b) Any area of land containing rare distinctive or beautiful fauna or flora;
- (c) Any waterfall, cave, grotto, old tree or avenue of trees;
- (d) Any other natural object with aesthetic or scientific value or interest;
- (e) Any natural relic and natural monument.

According to the Act, heritage is defined as:

- (a) Any ancient heritage
- (b) any cultural heritage
- (c) Any natural heritage
- (d) Any national monument
- (e) Any relic

What has been defined above is what constitutes the heritage property in Zambia.

⁶⁰ ICCROM, Cultural Heritage and the Law. Page 28

⁶¹ ICCROM, Cultural Heritage and the Law. Page 28

It is important to note that most of this heritage exist spatially as part of either the built or natural environment and can comprise large tracts of land. Where such heritage is of national significance, in pursuant to section 27, the Minister can declare by statutory instrument such heritage, as national monument. However, survey plans or site plans ought to be made and deposited with the Registrar of Lands and Deeds. This has been provided for under sections 29 and 30 of the Act. This is one innovation the new law introduced and is aimed at ensuring that private land does not encroach on protected heritage. The requirement for export permit of cultural property has been retained and is provided for under section 34 of the Act. Another important feature or provision introduced is the “polluter pays principle” and the environmental impact assessment. In section 42 (a) and (b), any person who discovers what appears to be ancient heritage or relic, is mandated to report to the Commission within 14 days of discovery and suspend all operations in the immediate vicinity. Under section 43, the Commission may examine the relic or ancient heritage and order the person to continue. Paragraphs (c) and (d) are important here: the Commission may:

- (c) order suspension of the operations not in excess of thirty days to carry out an environmental impact assessment or archaeological survey or recovery analysis of the discovery area, or
- (b) order the mining, engineering or agricultural project to pay for the cost of the assessment, survey or analysis.

Fundamentally, the National Heritage Conservation Commission Act is one of the pioneer legislation to introduce the *polluter pays principle* as well as the environmental impact assessment in its provisions and this was done even before the enactment in 1990 of the Environmental Protection and Pollution Control Act,⁶² the principal legislation on the protection of the environment in general. Environmental Impact Assessment has mainly been provided for under the Environmental Impact Assessment Regulations No. 28 of 1997. Though it was not defined in the National Heritage Conservation Commission Act where it first appeared, the *polluter pays principle* means that the person or institution responsible for the

⁶² Chapter 204 of the Laws of Zambia

pollution or any other damage to the environment shall bear the cost of restoration and cleanup of the affected area to its natural or acceptable state.⁶³

2.1 Other Legislations Providing for the Preservation of Heritage

Besides the NHCC Act which is the principal legislation on Zambia's heritage, there are other statutes that also provide some measures of protection for cultural and natural heritage. Though many of them do not mention the cultural and natural heritage, what they protect is basically part of what is heritage as we know it. The Zambia Wildlife Authority (ZAWA) Act⁶⁴ also provides for the protection of objects of heritage interest or value. Section 22 of the Act states that "except as is otherwise provided for by this Act, any person who, without the consent of the Director General, removes from, or damages within, any national park any object of geological, pre-historical, archaeological, historical or scientific interest, or who causes or permits any such objects to be so damaged or removed, shall be guilty of an offense."

Under the Town and Country Planning Act,⁶⁵ the Second Schedule Part V Amenities, preservation of views, and places or features of natural beauty and interest is underscored without providing any further details. Similarly, the National Museums Act⁶⁶ does provide for the establishment, control and management of national museums and section 6 (1) (c) of the same Act grants the Board of the National Museums powers to dispose or sell objects under its custody. Some of these objects are of heritage significance. The preservation of heritage particularly cultural heritage is also provided for under the Environmental Protection and Pollution Control Act.⁶⁷ Under the First Schedule of the Environmental Impact Assessment Regulations No. 28 of 1997, Regulation 3 (2) Projects that require Project Briefs, *12 Others* (f) states that projects located in or near environmental sensitive areas such as:

- (iv) Areas supporting population of rare and endangered species
- (vi) Areas of historical and archaeological interest
- (viii) Areas of cultural or religious significance.

³ Defined in the Draft Environmental Management Bill No. 52 of 2010

⁴ No. 12 of 1998

⁵ Chapter 283 of the Laws of Zambia

⁶ Chapter 174 of the laws of Zambia

⁷ Chapter 204 of the Laws of Zambia

The last two are part of cultural or ancient heritage and what this implies here is that any project that is likely to negatively impact on any of the above cannot be allowed to proceed. The Mines and Minerals Act⁶⁸ also does provide for the protection of cultural and natural heritage in areas where mining is likely to take place. Section 56 states:

(1) The holder of a licence or permit shall not exercise any of his rights under this Act or the licence or permit-

(a) without the written consent of the appropriate authority, upon-

(i) any land dedicated as a place of burial;

(ii) any land containing any ancient monument or national monument, as defined in the National Heritage Conservation Commission Act;

In addition, section 76 provides 75 that in deciding whether or not to grant any mining right, the Minister shall take into account the need to conserve and protect-

(a) the air, water and soil, flora, fauna, fish, fisheries and scenic attractions; and

(b) the features of cultural, architectural, archaeological, historical or geological interests;

in or on the land over which the right is sought, and the Minister may cause such environmental impact studies and other studies to be carried out as the Minister considers necessary to enable such a decision to be made.

Another legislation that provides though remotely, for the protection of heritage sites or objects is the Lands Act.⁶⁹ Section 3 (4) states that “notwithstanding the subsection (3), the President shall not alienate any land situated in a district or an area where land is held under customary tenure, (c) without consulting any other person or body whose interest might be affected by the grant.” Whereas national monuments are known and well documented, myriads of heritage particularly cultural heritage are discovered after being exposed from the subsoil. This section does help to protect heritage because the President cannot grant land to anyone without consulting the Commission when such land is rich in either cultural or natural heritage. In such a case, the Commission becomes an interested body.

⁶⁸ Chapter 213 of the Laws of Zambia

⁶⁹ Chapter 184 of the Laws of Zambia

The Draft Water Resources Management Bill⁷⁰ proposes to protect national heritage site or monument as provided for under section 30 while the Draft Environmental Management Bill⁷¹ also does the same under sections 30 (d), 24 (4) (a, c – d) and 76 (1)(h).

3.0 Discussion

From what has been revealed above, it ought to be appreciated that the law on heritage conservation as we know it today has gone through consistently progressive development taking into account emerging trends in environmental and heritage preservation. It is the submission of this study that this very law is one of the most elderly legislation in Zambia coming just after the establishment of Northern Rhodesia. While some commentators on heritage law in Africa commend the Zambian law for taking into account specifically cultural heritage, suffice to state that the tendency to itemize what needs to be protected particularly ancient heritage, means that what is not mentioned lacks heritage significance and therefore risks being destroyed. From what has been defined, it is clear that emphasis has been placed on immovable and monumental heritage thereby leaving out emerging heritage places such as cultural landscapes. Cultural landscapes are particularly important because they may reflect some cultural practices that may have been in existence for a long time. Acceptance of the importance of indigenous cultures is a crucial aspect in defining the heritage of the country.⁷² Under the definition of ancient heritage, an attempt has been made to take into account the beliefs of the people associated with heritage site as section 2 (i) states: “any site for holding council, any cult site or any place where objects were thrown for purposes of magic, any well, spring or other place with which archaeological finds, traditional beliefs, legends or customs are associated.” This definition however fails short in taking into account cultural landscapes.

Bearing in mind that the Zambian law on heritage has ancestry in the English legislation, its support for private ownership of relics is not surprising. Sections 45 to 47 show that private ownership of relics is possible but does not provide for ownership of sites as these mainly are owned by the Commission on behalf of the people of Zambia. The support for ownership of relics by individuals does encourage illicit trade in antiquities particularly in jurisdictions where it is difficult to prove the relics’ record of provenance as people can always claim ownership

⁷⁰ No. 52 of 2010

⁷¹ No. 50 of 2010

⁷² ICCROM, Cultural Heritage and the Law. Page 31

even when the relics may have been stolen or looted from sites. In addition, the National Heritage Conservation Commission Act tends to support landowners or developers with title or license to the detriment of the heritage particularly cultural heritage such as archaeological objects which are more often than not discovered during works on land. Section 41 is the case in mind. It states that “nothing in sections thirty-three to thirty-seven, inclusive, shall be construed as prohibiting any person in the normal course of mining, engineering or agricultural operations from doing any act which would otherwise be an offense under those sections if that person:

- (a) Was the owner of land acquired or held under customary law; or
- (b) Was the holder of a valid mining licence or certificate of title; and the ancient heritage or relic affected had not been known or the heritage has not been declared to be a national monument before the performance of the act.

The above provision implies that as long as one is a legal owner of land or is a licensed developer, she/he can destroy heritage if it has not previously been known or declared as national monument. Since the Commission cannot be everywhere, heritage is left at the mercy of the landowners or developers many of whom are reluctant to report any find on their land or area of operation. However, there is hope for known heritage which is associated with a given cultural or tribal grouping as the people themselves can help police the sites if the Commission is non-existent in the area. This still has its own difficulties. The case of *Yuyi Sibote and Mwauluka Mubita v Inambao Sinatu*⁷³ illustrates this postulation. The defendant was sued for instigating the eviction of the plaintiffs from Barotse plains for allegedly being trouble makers and that they were guilty of cutting down the tree where the 10th Litunga of the Lozi People, Mulambwa was buried. Without delving into the details of the facts of the case, the traditional authority was indirectly invoking the provisions of the National Heritage Conservation Commission Act to find the plaintiffs guilty of causing damage to heritage site. A burial such as the one in issue is actually an ancient heritage. Accordingly, paragraph (p) of section 2 also defines ancient heritage as ‘any burial place of any kind, individually or in collected sites, such as a burial mound, burial cairn, burial chamber, cremation patch, urn burial and coffin burial.’ Under the Act, this ancient heritage enjoys automatic protection, and Mulambwa’s burial site is no exception and in felling trees at or around this site constitutes an offence under section 40. Unfortunately, the defendant put more weight on the plaintiffs’ disobedience than the destruction of the heritage burial site.

⁷³ Cause No 2009/IT/54 (Unreported)

From the author's own assertion, the destruction of the tree was an afterthought because, as the Resident Magistrate observed, the defendant failed to prove on the balance of probability that the tree (s) were actually cut down or that it were the plaintiffs who had caused damaged or procured to cause damage to the tree thereby damaging the burial site. Had the defendant proved that the trees were actually cut down by the plaintiffs and that the plaintiffs knew about the existence of the site, then under the National Heritage Conservation Commission Act, they must have been proved and found guilty of an offence. Section 40 states:

- (1) No person shall excavate, collect or export, as the case may be, any ancient heritage, any relic, or part thereof, or alter, destroy, damage or remove from its original site any ancient heritage, national monument or relic contrary to sections thirty-three to thirty-nine.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding two thousand five hundred penalty units, or to imprisonment for a term not exceeding four year, or to both.
- (3) The Court in addition to any fine or imprisonment may order that person –
 - (a) To pay the Commission such sum as the Court may determine for the repair of any damage caused to, or for the value of, anything specified in subsection (1):

As for the regulation of the movement of objects or relics of geological, pre-historical, archaeological, anthropological historical or scientific interest value, it is difficult to ascertain their age especially in the absence of conservation laboratories. This heritage does not have year of manufacture thereby making identification by age difficulty. Though “looking old” is recommended⁷⁴ as the only option given the circumstances, the problem of controlling the movement of objects/relics still remains a challenge. To expect Customs Officials at points of exit out of or entry into, Zambia to know whether or not an object is of heritage value, is asking too much from them because most of them lack training in the identification of objects of heritage value. Moreover, some objects might not entirely look different from the curios and crafts sold on the open market for tourists.

While the ZAWA Act does make provision to regulate the movement or protection of objects within national parks, this however is not extended to objects that may be found or located within Game Management Areas (GMA). Objects in such protected areas therefore are at risk of

⁷⁴ NHCC, Guidelines for the Export, Collection and /or Removal of Heritage Objects (Relics) in Zambia. NHCC, Livingstone, 1995, at page 17

wanton destruction or removal. However, the NHCC Act grants the Commission powers to enter any land, private or public to check for heritage sites or objects. As for the National Museums Act, very little is provided for in terms of protection of objects of heritage value unless such objects are already stored or exhibited in gazetted museums. However, the proposed amendments to the National Museums Act may contribute to the creation of conflicts of laws. For instance, currently, any export of cultural property requires a permit and only NHCC can issue such a permit. Ironically, this requirement is also being proposed in the National Museums Amendment Bill. Section 38 (2) (a) of the draft amendment provides that 'any person who attempts to remove registered or unregistered movable heritage from the country under circumstances other than those provided for in this Act or any other prescribed law shall be punishable by confiscation of the materials by the Government. The offence shall attract a charge under the theft of movable heritage and shall be liable to a fine of thirty thousand penalty units or imprisonment not exceeding three years or both.' This is what is basically provided for under section 34 of the NHCC Act. The proposed Bill is overbroad and will introduce new functions such as regulation of movement of cultural property, a function currently performed by the National Heritage Conservation Commission.

In terms of the Environmental Protection and Pollution Control Act, emphasis has been placed on archaeological, historical or culturally significant objects or sites. There is no mention of natural heritage or its affinities. The provisions under the Lands Act in the practical sense are untenable due to lack of coordination or corruption. For instance, in 2003, Chakeluka Archaeological National Monument site was allegedly sold to a charitable organization by some officers at the ministry of lands.⁷⁵ A title deed was even issued despite the fact that it's a known national monument. When it concerns land under customary tenure, examples abound; the Chinyunyu Hot spring site and its environs are currently under title deed, yet this is one of the most famous hot springs in the country. Though the Mines and Minerals Act does expressly under section 56, provide for the protection of national monuments in mining or mining exploration areas, in practice, this is entirely different. This is because unlike other development activities that do provide alternative or options in terms of project site location or direction, minerals can only be mined where they are found and therefore do not provide flexibility in

⁷⁵ The Post Newspaper, January 4, 2003

terms of alternatives or options. Under the Forests Act,⁷⁶ a licence for forest produce can be granted; section 44 thus states ‘unless contrary intention is expressly stated on the licence, rights under a licence shall not extend to-

- (a) any land dedicated as a place of burial;
- (b) any National Park as defined in the National Parks and Wildlife Act;
- (c) any land within thirty metres of the centre line of any public road;
- (d) any land within thirty metres of the boundary of any rail reserve;
- (e) any land within thirty metres of the bank or edge of any river, dam or lake;
- (f) any way-leave registered by the Commissioner of Lands.

The difficulty with this provision is that it implies that a licence can be granted with regard to collection of forest produce from a heritage site. There are sites such as the Zambezi River Source and Kalambo Falls which are located within protected forest areas and the fact that heritage sites are not mentioned under this section suggests that cutting of wood in such protected areas, for instance can be a subject of a licence. This has the potential of negatively impacting on the values for which the sites’ significance are premised. Whereas as the Preservation of Archaeological Objects Ordinance under section 8 provided for compulsory acquisition of land in order to provide for scientific study or preservation of such objects, subsequent amendments or new laws omitted this provision altogether. This provision ought to have been sustained considering the fact that the protection or preservation of the country’s heritage is done in public or national interest.

In conclusion, though it is submitted that from the pieces of legislations discussed so far, the preservation of Zambia’s heritage particularly cultural heritage can be guaranteed, there is more to be done especially in consolidating the protection of natural heritage as well because most of this type of heritage equally represents the cultural values of the people. Additionally, culturally important heritage is particularly likely to suffer in a system based on ranking where, as in many African countries cultural heritage is not only evident through monuments but beliefs and norms associated with monuments or landscapes

⁷⁶ Act No. 29 of 1995

Chapter Three

4.0 International Instruments on the Conservation of Heritage

International Conventions or treaties are also generally regarded as sources of law. They may create particular or general rules of international law.⁷⁷ These Conventions/treaties advance the principle *pacta sunt servanda*, meaning that obligations in the treaties must be carried out⁷⁸ or put it other words, that the treaty or agreement must be respected or carried out. Conventions establish rules expressly recognized by States concerned, and States consent to be bound by them. Article 2 (1) of the Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between (sic) states in a written form and governed by international law.” Zambia being part of the international community is party to a number of treaties or conventions. For the purposes of this study, emphasis has been put on Conventions relating to the preservation of heritage, and two have been considered in detail.

Adopted in November 1972, the Convention concerning the Protection of the World Cultural and Natural Heritage entered into force in December 1975, when the stipulated twenty States had ratified and by 2008, 183 States out of 192 Member States had ratified the Convention.⁷⁹ This Convention has been aptly summed up as ‘a unique legal instrument based on the idea that some cultural and natural heritage sites are of universal and exceptional importance and therefore need to be protected as part of the common heritage of humanity.’⁸⁰ The underlying principle of the World Heritage Convention is an intergenerational one, that member States have an obligation to protect sites they host, which are of outstanding universal value and to transmit that heritage to future generations. In its preamble are various elements, but only two have been considered here:

- (i) That parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole;
- (ii) That the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong.

⁷⁷ T, Hillier, *Principles of Public International Law*. Cavendish Publishing Ltd, London, 1999. Page 17

⁷⁸ D. J. Harris, *Cases and Materials in International Law*. Sweet & Maxwell Ltd, London, 2008. Page 43

⁷⁹ ICCROM, *Cultural Heritage and the Law*. Page 15

⁸⁰ ICCROM, *Cultural Heritage and the Law*. Page 15

The strategy adopted by this Convention is a call for global or collective effort in preserving heritage, a heritage which is part of the world heritage of mankind as a whole. As discussed earlier in Chapter II, Articles 1 and 2 define cultural and natural heritage respectively while Article 3 enjoins States Parties to the Convention to identify and delineate the different properties situated in its territory as provided for in Articles 1 and 2 so that they can be put on the World Heritage List. The global strategy was observed as early as 1959 even before the Convention came into being when millions of US dollars were raised to save the archaeological sites and treasures in Nubia, Egypt from flooding and destruction arising from the construction of the Aswan High Dam.⁸¹ The campaign was a resounding success raising more than \$80 million dollars and saving the heritage of mankind and it was the driving force that was to lead to the formulation and incorporation of the cultural dimension in the 1972 World Heritage Convention.⁸²

The criteria and conditions for the inscription of properties on the World Heritage List have been developed to evaluate the outstanding universal value of properties and to guide States Parties in the protection and management of the world heritage properties.⁸³ Outstanding universal value is defined as “cultural and or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for the present and future generations of all humanity.”⁸⁴ Once a heritage meets these criteria, it is put on the list and when it comes to management, it calls for the involvement of the international community as a whole. Clause 77 of the Operational Guidelines lists the criteria for assessing outstanding universal value. Accordingly, nominated properties shall:

- (i) Represent a master piece of human creative genius;
- (ii) Exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on development in architecture or technology, monumental arts, town-planning or landscape design;
- (iii) Bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;

¹ ICCROM, Cultural Heritage and the Law. Page 16

² ICCROM, Cultural Heritage and the Law. page 16

³ World Heritage Centre, Operational Guidelines for the Implementation of the World Heritage Convention. Paris, UNESCO, Paris. Page 21

⁴ WHC, Operational Guidelines for the Implementation of the World Heritage Convention. Paris. Page 14

- (iv) Be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage (s) in human history;
- (v) Be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;
- (vi) Be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance;
- (vii) Contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
- (viii) Be outstanding examples representing major stages of earth's history, including the record of life, significance on-going geological processes in the development of landforms, or significant geomorphic physiographic features;
- (ix) Be outstanding examples representing significance on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;
- (x) Contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

In addition, Clause 78 stresses the fact that “to be deemed of outstanding universal value, a property must also meet the conditions of integrity and or authenticity and must have an adequate protection and management system to ensure its safeguarding.” This is twofold: there must be adequate legislation to safeguard the property and administrative framework or some management regime whether traditional or otherwise. Accordingly, Article 5 provides that to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated in its territory, each States Party to the Convention shall endeavor, in so as possible, and as appropriate for each country: (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of the heritage. The Convention acknowledges the fact that without adequate legal and administrative framework, the conservation of heritage would be unattainable. In other words, sites on the World Heritage List

require adequate long term legislative, regulatory, institutional and as the case may be, traditional protection and management to ensure their safeguarding. In this endeavor, States Parties would count on the world community because “such heritage constitutes a world heritage for whose protection is the duty of the international community as a whole to cooperate.”⁸⁵ In view of this and in pursuant to Article 15 of the Convention, a World Heritage Fund had been established to assist States Parties when called for financial assistance.

States Parties nevertheless are entrusted to ensure that the protection and management of world heritage sites meet the minimum standards as contrary to this expectation, the sites in issue could be either put on the List of World Heritage in Danger or removed from the List altogether.

The Convention also considers what the study might be permitted to say the Ryland-Fletcher principle.⁸⁶ Article 6 (3) is instructive: “each State Party to the Convention undertakes not to take any deliberate measures which might damage directly, or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated in the territory of other States Parties to this Convention.” This provision is made with the understanding that the heritage in issue is a common heritage for mankind. How deliberate those measures are is something that is not explained in the Convention.

The other UNESCO Convention that deals with heritage particularly movable cultural property is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This Convention was basically enacted as an international legal instrument to counter the illicit trade in antiquities or cultural property.⁸⁷ Most countries particularly some western nations and few African states were reluctant to join the Convention. The reason for market and collectors’ states’ reluctance are stark, ranging from profound to venal. Many States have a firm belief in the free circulation of goods as a fundamental tenet of their economies and legal systems. To make an exception for cultural objects goes against the belief that all goods are fundamentally objects of commerce.⁸⁸ Article 1 of the Convention defines Cultural Property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, pre-history,

ICCROM, Cultural Heritage and the Law. Page 19

[1868] L.R 3 H.L

P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Indiana, Indiana University Press, Indiana, 1996 at page

P. R. Schmidt and J. McIntosh J, *Plundering Africa's Past*. Page 31

history, literature, art or science . . .” Article 2 provides that States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting each country’s cultural property against all the dangers resulting therefrom. On the other hand, the Convention envisages situation where cultural property can freely move from one jurisdiction to the other. Article 6 provides that States Parties to the Convention undertake:

- (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
- (b) To prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
- (c) To publicize the prohibition by appropriate means, particularly among persons likely to export or import it.

Article 7 enjoins States Parties to take measures consistent with national legislations to prevent museums and similar institutions from acquiring cultural property originating in other States Parties which have been illegally exported after entry into force of the Convention. In addition, States Parties are prohibited from importing cultural property stolen from a museum or a religious or secular public monument or similar institutions in another State Party to the Convention after the entry into force of the Convention for the State Party concerned, while at the same time encouraging States Parties to take appropriate steps to recover and return any cultural property imported after entry into force of the Convention. In terms of instituting penalties against any involvement in the illicit trade, Article 8 stipulates that States Parties to the Convention undertake to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under Articles 6 (b) and 7.

The 1970 Convention however cannot deal with problems of private law because of lack of mandate in this area. Yet some crucial aspects in private law shelter the illicit trade, most notably the protection accorded in many legal systems to the bona fide purchaser. Bona fides are in many cases presumed, thereby protecting the acquirer, because the original owner of a stolen object

would have to prove lack of bona fides which is difficult to prove.⁸⁹ In view of the above dilemma, in 1984, UNESCO asked the International Institute for the Unification of Private Law (UNIDROIT) to take up the issue of cultural heritage and private law. UNIDROIT's work led to the establishment of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Chapter 2 of the UNIDROIT Convention provides that stolen objects must be returned and that compensation will only be given where the acquirer has used a high degree of diligent inquiry.⁹⁰ The UNIDROIT Convention prevents the traffickers from taking advantage of the variety of the current laws in the various countries, while effectively reinforcing the statements of principles of the UNESCO Convention. The Convention affords every justifiable owner a legal tool providing the resources to assert their rights in front of a common court to locate cultural property that has been stolen or illicitly exported. If a foreign owner (private individual or State) asserts rights of restitution, it would be up to the courts and to the national judges to decide on the legitimacy of these rights. Contrary to the UNESCO Convention, the UNIDROIT Convention is self-executing. States don't have to embody these provisions in their own legislation.⁹¹ Interestingly, the Convention considers that all materials removed from their country for study or research and not returned would amount to illegally exported cultural property. Article 5 paragraph 2 is instructive and provides that "a cultural object which has been temporarily exported from the territory of the requesting State, for the purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported." The Convention lacks global membership as only about 40 countries have ratified the Convention and Zambia signed the Convention only on June 24, 1995.⁹²

In 1978, UNESCO adopted by Resolution,⁹³ and by this Resolution, an Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in the Case of Illicit Appropriation was established and its aim was to seek ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin. By Article 4 of its Statute, the Committee can utilize mediation or

⁸⁹ P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Page 35

⁹⁰ P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Page 35

⁹¹ www.unidroit.org

⁹² www.unidroit.org

⁹³ Resolution 4/7.6/5 (UNESCO, November 1978)

conciliation in order to settle the problem of restitution or return of cultural property brought before it. In addition, Article 4 (2)⁹⁴ the Committee is responsible for promoting bilateral and multilateral cooperation among Member States with a view to the restitution and return of cultural property to its countries of origin.

The 1970 and 1972 Conventions and the Statutes of the Intergovernmental Committee must be seen as an express desire by the international community to preserve the movable and immovable heritage. This is in realization that heritage is not only important to States Parties where they are located but are also important to the world as a whole.

4.1 Discussion

For the aspirations contained in the above Conventions to be realized, the requirement of domestication into municipal law cannot be over-emphasized. Although Zambia ratified the 1972 Convention in 1984, there is no express provision in any law to show that the contents of the Convention are part of Zambian law. Zambia being a dualist demands that the Legislature perform its legislative function by domesticating the terms of the Convention. In *Attorney General of Canada v Attorney General of Ontario*,⁹⁵ the Dominion Parliament of Canada legislated to implement certain international labour conventions, the Judicial Committee stated that 'within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.' This was confirmed in *R v Secretary of State for the Home Department ex p. Brind*.⁹⁶ In *Zambia Sugar Plc v Fellow Nanzaluka*,⁹⁷ the respondent's employment was terminated without notice but was paid three months' salary in lieu of notice. He brought an action in the Industrial Relations Court and this court accepted that the conditions of service had been complied with but held that the action was contrary to the International Labour Convention No. 158 of 1982 which forbids termination of workers' employment without valid reasons. On appeal to the Supreme Court, it was held that international instruments on any law although ratified and assented to by the state cannot be applied unless they are domesticated;

⁹⁴ Statutes of Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in the Case of Illicit Appropriation

⁹⁵ [1937] A.C 326

⁹⁶ [1991] 1 A.C. 696 House of Lords

⁹⁷ Appeal No. 82/2001

Zambia had not domesticated the Convention. The terms contained in the Conventions on heritage therefore need to be domesticated into municipal law for them to have legal effect.

For instance, the ZAWA Act provides that “it’s an Act to . . . provide for the establishment, control and management of National Parks; . . . , to provide for the implementation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Convention on Wetlands of International Importance Especially as Water Fowl Habitat, the Convention on Biological Diversity” This is missing in the preamble of the National Heritage Conservation Commission Act, the principal law on the protection and management of immovable heritage and regulation of the movement of relics. Despite the definitions of cultural and natural heritage being similar with those in the Convention, there is no mention of world heritage in the Act. However, it may suffice to state that by submitting the declaration of the Victoria Falls as a world heritage property, Zambia was basically consenting to be bound by the Convention. Moreover, currently, it was revealed that National Heritage Conservation Commission was preparing a dossier for the nomination of the Barotse Cultural Landscape (BCL) as a world heritage site.⁹⁸ This is testimony that the country has indeed agreed to follow, and be bound by, the Convention. Moreover, Zambia has been submitting to the World Heritage Committee Reports on the State of Conservation of the Victoria Falls in line with the Operational Guidelines provided for by the World Heritage Centre. The Committee’s monitoring and assessment work through among others, the Reports on the State of Conservation, is undoubtedly worthwhile in the sense that it results in reports evidencing state conduct and requires states to defend themselves at the Committee’s annual sessions. This, Zambia has been doing each year.⁹⁹

By Article 6 (3), States Parties are prohibited from taking any measures or activities in their territory that might impact negatively or diminish the values or integrity of a world heritage property in the neighbouring States Party. This provision is in consonant with Regulation 13 (1) of the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997.¹⁰⁰ It states: “the Council may transmit a copy of an Environmental Impact Statement to the neighbouring State, through the appropriate Ministry, whose environment may be affected, with a request of comments to be received within a specified period.” This arises out of the realization of the fact that world heritage properties are considered a common heritage of

⁹⁸ Draft Nomination Dossier for Barotse Cultural Landscape, 2010

⁹⁹ World Heritage Committee Annual Congresses Reports 2006-2010

¹⁰⁰ Statutory Instrument No. 28 of 1997

the whole of mankind. A perfect illustration of the above provision was a recent case involving Mana Pools in Zimbabwe. Mana Pools National Park, Sapi and Chewore Safaris was declared a world heritage site in 1984¹⁰¹ and is located opposite Zambia's Lower Zambezi National Park in Chiawa Area. According to reports reaching the World Heritage Centre (WHC) and the International Union for the Conservation of Nature (ICUN), alleged mining exploration activities and the proposed hotel development in the Lower Zambezi in Zambia were going to affect the values and integrity of the Mana Pools World Heritage Property in Zimbabwe.¹⁰² In consequent to the above concerns raised by the WHC, the hotel development was scaled down while the WHC Mission to Zambia early this year found that the alleged mining activities were actually incorrect.¹⁰³ The Convention imposes specific obligations on States Parties on how the sites ought to be managed¹⁰⁴ and anything to the contrary could result in the sites being deregistered or put on the List of Heritage Sites in Danger, an indication of failure by States Party to manage its own heritage. At one time, the Victoria Falls World Heritage Property (VFWHP) was threatened with the above sanctions due to uncontrolled urban expansion and uncoordinated tourism development.¹⁰⁵ Any defense advanced for failure to adhere to international normative actions fails in the teeth of Article 13 of the Draft Declaration on the Rights and Duties of States 1949 which states that 'every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.'

As for the 1970 Convention, some of the provisions contained therein were already part of the Zambian law long before the Convention came into force. Zambia ratified the Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on 21 September 1985.¹⁰⁶ Just to consider the salient provisions of the Convention, the requirement for an export certificate under Article 6 is well provided for under sections 37 and 38 of the National Heritage Conservation Commission Act. Some jurisdictions have however enacted specific statutes to regulate or control the export of cultural property, with Canada being a good example. The Cultural Property Export and Import Act was

¹⁰¹ WHC 10/34.COM/7B

¹⁰² WHC 10/34.COM/7B (2010 Brasilia, Brazil)

¹⁰³ UNESCO/WHC Mission 12 January 2011

¹⁰⁴ T. Hillier, Principles of International Law. Page 333

¹⁰⁵ WHC 31COM 7B.4

¹⁰⁶ L. Prott and J. Specht, Protection or Plunder: Safeguarding the Future of Our Cultural Heritage. page 125

passed for this purpose.¹⁰⁷ Both the Convention and the law in Zambia nevertheless do not outlaw trade in cultural property but only require that a permit or certificate be obtained. On the other hand, the fact that some countries particularly the importing ones have not yet domesticated the Convention or ratified it is in itself problematic.

The Convention's demand that illegally removed cultural property be returned to their countries of origin suffers difficulty of proving identity of the objects since most of the objects are products of clandestine archaeological excavations or looting of sites.¹⁰⁸ This has been compounded by the fact that Member States to the Convention cannot enforce export controls of other States. Perhaps most importantly, since it is usually not possible to discover the date of illicit export, the acquirer will always claim that it was exported before the date of the legislation, and because the burden of proof is on the claimant, such claim is generally difficult to conclude.¹⁰⁹ In *R v Heller*,¹¹⁰ a Canadian court held that there was no evidence that the *Nok* Sculpture from Nigeria had been exported since the date of imposition of export control, even though the export control had existed since 1984 and the remains of the *Nok* culture had not been discovered until 1943.¹¹¹ On the other hand, in *Attorney General of New Zealand v Ortiz*,¹¹² New Zealand was able to provide evidence of the carvings she was claiming while in *Union of India v Bumper Development Corporation*,¹¹³ the Indian government brought evidence of the style of an idol, its metallurgical composition and even the termite tracks over its surface to prove that it was the missing idol from a suite of twelve excavated illegally at the same time.

As for UNDRIT Convention, very few countries have signed and ratified and non-members cannot therefore invoke its provisions. Most of the cultural property purchasing countries have not signed it either. However, the Convention besides promoting judicial settlement of problems also provides for diplomatic solution to issues of restitution and return of cultural property. For instance, Article 16 (1) states that each Contracting State shall at the time of signature, ratification, acceptance, approval or accession, declare that claims for the restitution, or requests

¹⁰⁷ 23-24 Elizabeth II, Chapter 50

¹⁰⁸ P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. Page 65

¹⁰⁹ P. R. Schmidt and J. McIntosh J, *Plundering Africa's Past*. Page 35

¹¹⁰ [1983] 27 Acta. L.R (2d 346); (1984) 51 A.R 73 (Q.B) (Canada)

¹¹¹ P. R. Schmidt and J. McIntosh, *Plundering Africa's Past*. page 35

¹¹² [1982] 1 Q.B. 149

¹¹³ Unreported Decision, Q.B.D 17 February 1988 (England)

for the return, of cultural objects brought by a State under Article 8 may be submitted to it under one or more of the following procedures:

- (a) directly to the courts or other competent authorities of the declaring State;
- (b) through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State;
- (c) through diplomatic or consular channels.

The invocation of this Convention is untenable as long as States particularly cultural property purchasing countries are unwilling to ratify it. Assuming that many countries including Zambia were members of the UNIDROIT Convention, all cultural property exported for research/studies and not returned would have been requested for by invoking article 5 of the Convention.

Sometimes where litigation had failed, negotiations or bilateral cooperation even where one of the members is not party to the Convention has actually yielded positive results. For instance, bilateral cooperation between the United States and Mali had resulted into close monitoring of any export into the US of Mali's cultural property while negotiations between the US and Cameroun led to the return of the *Afo-a-Kom*, a royal life-size figure stolen from Cameroun in 1973, was returned in 1989.¹¹⁴ Unfortunately, requests for the return of the remains of Broken Hill Man from the United Kingdom have yielded nothing while the Greek government has failed to get back the Parthenon Marbles (Elgin Marbles) from the British Museum.¹¹⁵ The importance of bilateral or multilateral cooperation in the return or restitution of cultural property is well recognized by the Intergovernmental Committee on Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in the Case of Illicit Appropriation. Article 2 of the Statute of the Committee provides that 'a request for the restitution or return by a Member State or Associate Member of UNESCO may be made concerning any cultural property which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation.' Zambia could as well use this forum in requesting for the return of the remains of Broken Hill Man from the United Kingdom since it covers property lost even during

¹¹⁴P. R. Schmidt and J. McIntosh , *Plundering Africa's Past*. Page 102

¹¹⁵ Google/Wikipedia/elgin marbles

colonial occupation. Moreover, this statute is not limited to cultural property so-called but covers naturally occurring items such as zoological, botanical and mineralogical specimen.

One defect with the 1970 Convention is found in its emphasis on cultural property stolen or looted after the Convention came into force, yet there are many objects which were looted or stolen well before 1970. It is here where bilateral cooperation or agreement could be applied and *proved effective if the Convention cannot apply.*

Chapter Four

5.0 Assessment of the Effectives of the Law Concerning the Protection of Heritage in Zambia

5.1 Introduction

As it had been shown, there are various laws that provide protection of heritage in Zambia. While conceding that this is evidently positive and can foster 'mainstreaming' of heritage issues in other legislations, this is a potential source of conflicts if done in an uncoordinated manner.

5.2 Assessment of Different Legislations

5.2.1 Protection of Immovable Heritage

In terms of the law on the environment in general, the Environmental Protection and Pollution Control Act does offer protection of heritage particularly cultural heritage from development related projects. Any project whether small or large scale, require to submit either a project brief or an environmental impact statement in order to determine how the project would impact on the environment.¹¹⁶ It is at this point that the issue of cultural heritage protection is assessed as well. However, the protection of natural heritage is not particularly and expressly provided for under this legislation. This is a serious omission because natural heritage is equally susceptible to destruction, though in practice, natural heritage is also considered. For instance, Legacy Holding's intention to build a '22 hole' golf course near or within the Victoria Falls World Heritage Property was actually denied due to the fact that the activity was not in consonant with conservation of the site.¹¹⁷ Arising from the threat by UNESCO to deregister the site, it had to take the late President Dr. Levy Mwanawasa to impose a moratorium on all future developments within the world heritage property, which according to the World Heritage Committee was considered a positive step.¹¹⁸ In the *Egypt v Southern Pacific Properties case*,¹¹⁹ the proposed project to construct a tourist complex near the site of the Pyramids of Giza in Egypt, a world heritage (cultural) property, was abandoned due inter alia to objections by environmentalists that the project was going to negatively impact on the property.

¹¹⁶ Environmental Impact Assessment Regulations, No. 28 of 1997

¹¹⁷ Environmental Council of Zambia Decision Letter September 18, 2006

¹¹⁸ WHC 32 COM 7B.4

¹¹⁹ [1984] 23 ILM 1048

Since there is no jurisprudence from the courts on heritage issues, case law on the environment in general may suffice. In *Environmental Council Zambia v Crushex (Z) Ltd*,¹²⁰ the defendant was required upon cessation of quarry activities to clean up the quarry area and remedy any damage caused to the environment. In this case, the defendant was found liable for causing dust pollution in the nearby village of Siloto in Sesheke District due to activities at its quarry. The holding may not have been entirely different if a heritage site was affected.

As it has been explained above, the 1972 Convention provides for the '*neighbour principle*' under Article 6 (3) and this has been reinforced by virtue of the provision in Regulation 3 of the Environmental Impact Assessment Regulations.¹²¹ Therefore, it is submitted that this may be another example of limited territorial sovereignty. This was well articulated in the *Trail Smelter Arbitration case*.¹²² In this case, the company had caused damage in the State of Washington by sulphur dioxide emitted from a smelter plant at Trail on the Columbian River, 10km from the US/Canadian border on the Canadian side and the company was held liable. The Tribunal's decision recognized a general principle of international law that 'a state owes at all times a duty to protect other states against injurious acts by individuals within its jurisdiction.'¹²³ Assuming that the Mana Pools National Park issue was to be taken to a court or tribunal, the holding may not be different due to the fact that what might have negatively impacted upon the values or universal attributes of the site were emanating from Zambia.

The tendency of some statutes to itemize what heritage is meant to be covered thereunder seems to be consistent. Take for instance the Mines and Minerals Act,¹²⁴ what is provided for in terms of protection within a mining or mining exploration area is ancient or national monuments as against any heritage. This neglect to mention other heritage implies that they are of no significance at all and could result in the destruction of the country's heritage. Nevertheless even if national monuments are secured under this law, in practice there is no guarantee against spoliation. The position with mining is unique in the sense that minerals can only be mined where they are located and as such has no flexibility of options available to other development projects. For instance, the ancient graves at Kansanshi Mine in Solwezi had to be salvaged

¹²⁰ [2005] HC/HP/06 Unreported

¹²¹ No. 28 of 1997

¹²² 3 R.I.A.A (1905)

¹²³ R. M. M. Wallace, *International Law*. Thomson Sweet & Maxwell, London, 2005. Page 215

¹²⁴ Chapter 213 of the Laws of Zambia

because the copper vein passed under them and removal was the only option available.¹²⁵ Be thus as it may, the statute alludes to the fact that when granting and deciding whether or not to renew, the mining permit, the issue of protection of heritage sites or objects need be taken care of. Section 76 (1) provides that ‘the conditions subject to which the right is granted or renewed shall include such conditions as may be prescribed by the Minister, by statutory instrument, or as the Minister may, in a particular case, otherwise determine, in relation to -

- (a) the conservation and protection of-
 - (i) the air, water and soil, flora, fauna, fish, fisheries and scenic attractions; and
 - (ii) the features of cultural, architectural, archaeological, historical or geological interest;

In terms of protection under the ZAWA Act, what is only secured are the objects of object of geological, pre-historical, archaeological, historical or scientific interest and only those located in national parks whereas the game management areas are not mentioned. Considering the extent of national parks and bearing in mind that the Commission cannot be everywhere, this provision appear to complement the work of National Heritage Conservation Commission. However, this is a potential source of conflict. Section 37 provides that:

- (1) states that ‘any person who desires to excavate any ancient heritage or collect relics shall apply to the Commission for a permit to excavate or collect.
- (2) The applicant shall give details of –
 - (a) The project;
 - (b) The exact location;
 - (c) The problems, scope and objectives of the investigation or collection; and
 - (d) Any other relevant problem.

Section 38 gives the conditions that accompany the permit and these are mandatory. On the other hand and under the ZAWA Act, what is provided for is that no one can collect, remove or injure any object from the national park without the consent of the Director General. The provisions under the NHCC Act appear wide as no specific area is mentioned and seems to cover any area, national park inclusive. If not coordinated well, these provisions can cause serious regulatory conflicts. The lack of detail of the regulation of objects of geological, pre-historical,

¹²⁵ Salvage of Ancient Graves at Kansanshi Mine, Solwezi. NHCC, Solwezi, 2005

archaeological, historical or scientific interest in the ZAWA Act may be construed that the provision was meant to complement the NHCC Act since the Commission has greater jurisdiction in this area. Take for instance the definition of natural heritage which also mean ‘any area of land containing rare distinctive or beautiful flora or fauna;’ this could mean unique fauna or flora which could be under the management of the Zambia Wildlife Authority since its mandate mainly deals with areas of wildlife. The only plausible conclusion that can be advanced here is that the statutes were meant to complement each other since there could be areas that have rare birds, trees etc. yet due to their sheer small size, they cannot be designated as national parks or national forests and this is where the Commission comes in. This view however may perhaps be a teleological approach in the interpretation of the two statutes. What may perhaps be considered as the best example of the interface between the two legislations is the management of the Victoria Falls World Heritage Property. The property lies right within the national party, yet it has its own defined boundary and is protected by both national heritage and wildlife life statutes.¹²⁶ However, conflicts have arisen when it comes to collection of user fees as both the statutory instruments¹²⁷ of both institutions provide for collection of fees from the same users.

5.2.2 Protection of Movable Cultural Property

The protection of movable cultural heritage (objects) possesses an immense challenge to many countries, Zambia not being exceptional. Most laws in different jurisdictions do not prohibit trade in cultural property but that it should be regulated by issuance of permits. Probably to legitimize trade in antiquities or cultural objects, the 1976 Supreme Decree No. 863 of Nigeria established fees for masterpieces which are liable for export licence.¹²⁸ In Vietnam, article 23 of the Constitution provides for removal (for sale) of cultural property in special cases only while issuance of permits under the NHCC Act is taken care of under sections 37 and 38. The ZAWA Act only regulates the removal of objects from national parks whereas as removal outside the country is provided for under the NHCC Act. In countries such as Canada, by virtue of the Cultural Property Export and Import Act, export permits are issued by customs officers.¹²⁹ In addition, the law provides for appointment of expert examiners to view cultural objects for which

¹²⁶Legal and Management Status of the World Heritage Site, Livingstone, NHCC

¹²⁷See Statutory Instrument No. 6 of 2010 made in pursuant to section 49 of the NHCC Act Cap 173 of the Laws of Zambia

¹²⁸L. Prott and J. Specht, Protection or Plunder. Page 70

¹²⁹L. Prott and J. Specht, Protection or Plunder. page 70

an export permit has been applied and to advise customs officers whether a permit should be issued or should be refused in the national interest as defined in the Act.¹³⁰ In the case of Zambia, the examination is done by staff of the Commission but relies on the customs or postal services officials do request for examination of the objects for export. Without the vigilance of customs or postal services officials and since the Commission officials are not at points of entry or exit, cultural property could be lost through illicit trade. Just like it is the case in Zambia, in Colombia, customs agents lack knowledge about the value of 'patrimonial' objects¹³¹ and distinguishing cultural objects from modern curios/crafts is a difficult task.¹³²

One major weakness of the Zambian law is the lack of express prohibition of illegal import of cultural property into the country. Article 12 of the 1970 Convention states that 'States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories.' The lack of prohibition of illicit import into the country has the potential of making Zambia a conduit of illegally exported cultural objects to other countries. This could be voided where there are vigilant customs or postal services staff. For instance, the Postal Services demanded for confirmation from the Commission as to the authenticity of a permit purportedly granted to a dealer in curios by the Congolese Patrimony Bureau in Lubumbashi.¹³³ The permit in issue involved the passage of some masks to California, US whose significance or value the Postal Services workers did not understand. Such cases are however quite rare.

In some jurisdictions, legal measures, being one sided, are not adequate enough to control illicit trade; extra measures such as policies governing collecting institutions are vital. In 1973 for instance, the Smithsonian Institution, one of the largest collectors and curators of cultural property in the world, based in the US adopted a policy that prohibits the acquisition and or display of material that has been unethically acquired unscientifically excavated, or illegally removed from its country of origin after the date on which the policy went into force.¹³⁴ Other

¹³⁰ L. Prott and J. Specht, Protection or Plunder. page 70

¹³¹ ICOM, Illicit Trade of Cultural Property in Latin America. page 71

¹³² Export Guidelines for Cultural Property in Zambia

¹³³ Clearance Permits for Congolese Patrimony Bureau, 18 October 2008

¹³⁴ P. R. Schmidt and J. McIntosh , Plundering Africa's Past. Page 91

countries have gone into bilateral cooperation particularly with major collecting nations as seen from the cooperation between the US and Mali.

Without the major collecting nations ratifying the 1970 Convention and the non-unification of private and public laws on heritage, the protection of heritage particularly movable cultural property will still remain a challenge. This also applies to the UNDRIT Convention. Despite having positive provisions that can help minimize the illicit trade in, and promote the return of illegally exported, cultural property, many countries have not yet ratified the treaty and this includes even countries that have had their cultural property looted from soil. On the other hand, the reluctance to ratify the convention by developing nations is well understood since as long as countries particularly the developed states most of which have been holding on to illicitly acquired cultural property. The convention can be of little help to requesting Parties if the major exporting nations are not members as most conventions only bind Member States.

Chapter Five

6.0 Recommendations and Conclusion

The law on the protection of cultural and natural heritage in Zambia is relatively effective and appears not to show any departure from what is found in most British Commonwealth countries. *The Zambian law on heritage conservation can be commended for having pioneered the 'polluter pays principle' long before the main law on the protection of the environment was enacted.* This principle is cardinal for environmental protection generally and is based on the premises that those responsible, from a heritage conservation context, for negatively impacting upon the heritage must pay for the action or omission and take remedial measures. This has been taken into account under section 40 (3) (a).

6.1 Recommendations

One difficulty in enforcing the preservation of heritage is found in its lack of interface with the Lands Act which has resulted in the allocation of land to persons whose land either encroaches into heritage sites or simply engulfs the entire site. For instance, this scenario has posed a potential danger of diminishing the values of Victoria Falls World Heritage Property as private land parcels have either encroached into the property or part of the land within the property, has been granted by the Commissioner of Lands¹³⁵ to individuals or enterprises. The allocation of land to persons has the potential of resulting into the destruction of heritage sites. It is submitted that there must be an express provision in the Lands Act that prohibits the granting of land to any person where such land is within a protected heritage site. Alternatively, section 7 of the Lands Act need to be amended so that in alienating land, the President takes measures such as 'to set aside land for the development and control of heritage sites of national importance, and that public purpose should also be taken to mean 'for or in connection with the preservation of heritage resources.'

However, though protection of heritage sites particularly cultural heritage is provided for under the Environmental Protection and Pollution Control Act, there must be an express provision for the protection of natural heritage as well. Likewise, the Mines and Minerals Act should also take into account any heritage, whether or not it is ancient monument or national monument. This

¹³⁵ The State of the Victoria Falls World Heritage Property, 2010 Report

provision could work to the detriment of sites which are not ancient or national monument but may be significant to a local or regional community.

As for the protection of movable cultural property, enforcement is a challenge due to the fact that cultural property experts are not stationed at points of entry into or exit out, Zambia. At the expense of repetition, it is worthwhile repeating that enforcement is therefore reliant on the vigilance of customs or postal services officials. However most of these officials, if not all, lack knowledge about the value of the cultural objects exiting out of the country. In other instance, they may not be in a position to isolate or distinguish objects of cultural value from objects meant for the tourist market such as curios or crafts.

There is also need for harmonization of laws that also concern the protection of heritage sites and objects. The overlaps in statutes can result into administrative conflicts which could work against the very resource the laws were meant to safeguard, and in some respects, the Commission's power overlaps considerably with that of ZAWA in relation to regulation of movable cultural property and fossils. For instance, the ZAWA Act and NHCC Act both regulate the movement of objects of heritage value whilst only the NHCC law has provision for permits such as excavation licence yet under the former, no objects could possibly leave any national park without the consent of the Director General. The same applies to some provisions in the Draft Environmental Management Bill; what is basically referred to as environmentally sensitive areas and /or conservation of biological diversity constitute most of the elements found in the NHCC Act, ZAWA Act and Forests Act. Most of the provisions in this Draft Bill therefore need to be reconciled with what is already provided for in these statutes as maintaining the status quo could create conflicts in laws as well as in management regimes.

For effective enforcement and prosecution of any offence under the NHCC Act, there is need for the introduction of the office of prosecution with the Commission. This proposal is cardinal since currently, all prosecutorial duties are performed by the Police, which more often than not are ever overburdened and lacks the needed resources to take the cases to their conclusive end. Most of the cases reported to the Police concerning either the destruction of heritage sites or cultural objects have died a natural death even before being seized by the courts of law.¹³⁶ For instance, the laws in Botswana, Namibia, Uganda and South Africa provide for the appointment of

¹³⁶ National Heritage Conservation Commission Annual Report, 2005

monument or heritage inspectors whose powers include entering properties where heritage places are located and to search without warrant for relics or antiquities and also make arrests.¹³⁷ In particular, section 50 (11) of the South African National Heritage Resources Act states that a heritage inspector may require any person who he or she has reason to believe has committed an offence in terms of this Act to supply his or her name and address and reasonable evidence of his or her identity, and may arrest a person who refuses to comply with those requirements.

In the Kenyan situation, the legislation gives heritage wardens powers to arrest without a warrant. The granting of arresting and investigative powers to inspectors may save time in finalizing cases, as police investigations in Africa can be hampered by a number of constraints and problems such as bureaucracy, insufficient resources and corruption.¹³⁸ Whereas under the NHCC Act, power to enter any property or area is provided for, the powers to search with or without warrant and make arrest is not provided for.

Even though Zambia ratified both the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage, again there is no express provision for their implementation. Even though in pursuant to Articles 3, 4 and 5 of the World Heritage Convention, Zambia submitted the dossier for the nomination of Victoria Falls as a world heritage site, there is no provision in the Zambian statutes for such an undertaking. For example, there is a specific law in South Africa dealing with the conservation of landscapes on the World Heritage List.¹³⁹ The need to domesticate expressly the World Heritage Convention and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property cannot therefore be over-emphasized.

Whereas Article 5 (a) of the World Heritage Convention encourages States Parties to adopt measures that allow for community participation in the protection of world heritage sites, the NHCC Act however does not provide for such. In the case of South Africa, section 41 (1) (a) of the South Africa Heritage Resources Authority Act underscores the need for community participation in the conservation, improvement or presentation of heritage resources. Zambia has

¹³⁷ ICCROM, Cultural Heritage and the Law. Page 81

¹³⁸ ICCROM, Cultural Heritage and the Law. Page 81

¹³⁹ ICCROM, Cultural Heritage and the Law. Page 98

a lot to learn from the South African experience especially in view of the fact that most of the heritage sites are located in rural areas. The NHCC Act therefore needs to be reviewed in order to provide a legal provision for the participation of local communities in the management and conservation of heritage sites particularly the sites they host.

6.2 Conclusion

The paper has been able to show that the law on the protection of Zambia's heritage goes as far back as 1912 when the first law was passed. This law underwent major amendments from the 30s to late 80s when it saw the birth of the National Heritage Conservation Commission. Besides the NHCC Act, however there are other statutes that equally provided for the protection of the cultural and natural heritage of Zambia. The paper has been able to show that if implementation is not coordinated well could result in overlaps in both statutory and administrative regimes. Although Zambia is Party to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage, there is no express provision that these have been domesticated into municipal law. However, the fact that Zambia has adhered to the provisions of the two Conventions does imply that the country has consented to be bound by the Conventions.

BIBLIOGRAPHY

BOOKS

Harris D. J, **Cases and Materials in International Law**. Sweet & Maxwell Ltd, London, 2008

Hillier T, **Principles of Public International Law**. Cavendish Publishing Ltd, London, 1999

Felden B and Jokilehto J, **Management of World Heritage Properties**. ICCROM, Rome, 1998

Kanja G. M, **Intellectual Property Law**. Lusaka, University of Zambia Press, Lusaka, 2006

International Centre for Conservation and Restoration of Cultural Property (ICCROM), **Cultural Heritage and the Law: Protecting Immovable Heritage in English Speaking Countries of Sub-Sahara Africa**. Rome, ICCROM, Rome, 2008

International Council of Museums (ICOM), **Illicit Trade in Cultural Property in Latin America**. ICOM, Paris, 1986

Prott L and Specht J, **Protection or Plunder: Safeguarding the Future of Our Cultural Heritage**. Australian Government Publishing Service, Canberra, 1982

Schmidt P. R, and McIntosh J, **Plundering Africa's Past**. Indiana University Press, Indiana, 1996

Wallace R. M. M, **International Law**. Thomson Sweet & Maxwell, London, 2005

Woodward A. S, 'A New Caveman from Rhodesia.' South Africa Nature Journal Vol. 108, (1921), 371-372

PUBLICATIONS/PERIODICALS/DOCUMENTS

Chipote C, Challenges in Archaeological Heritage Management. *A Case Study of Zambia*. (Unpublished Masters of Philosophy Degree, Fitzwilliam College, University of Cambridge, 2003).

Clearance Permits of the Congolese Patrimony Bureau, Lubumbashi DR Congo

Draft Nomination Dossier for Barotse Cultural Landscape, 2010

Export Guidelines for Cultural Property in Zambia

Guidelines for the Export, Collection and /o r Removal of Heritage Objects (Relics) in Zambia

Legal and Management Status of the World Heritage Site 1999, Livingstone, NHCC

Mulenga C, An Analysis of Environmental Protection and Pollution Control Act visa vis Industrial and Technological. A Case Study on Zambia. University of Zambia, Unpublished Dissertation, 2006

Musaila K, Remedies in Environmental Cases in Zambia. University of Zambia, Unpublished Dissertation, 2006

National Heritage Conservation Commission Annual Report, 2005

NRCF, The Real Economic Impact of Nature Tourism in Zambia, 2005

NHCC, Salvage of Ancient Graves at Kansanshi Mine, Solwezi. North West Office, Solwezi, 2005

NHCC, The State of the Victoria Falls World Heritage Property, 2010 Report. NHCC Public Relations and Information, Livingstone, 2010

World Heritage Committee Annual Congresses Reports 2006-2010

World Heritage Centre, Operational Guidelines for the Implementation of the World Heritage Convention (WHC), UNESCO, Paris, 2008

NEWSPAPERS

The Post Newspaper

Sunday Mail

Zambia Daily Mail

WEBSITES

www.aljazeera.net/english

[www.google/Wikipedia/elgin marbles](http://www.google/Wikipedia/elgin%20marbles)

www.unidroit.org