



WITNESSES TO HISTORY

Documents
and writings
on the return
of cultural
objects



United Nations
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Cultural Organization

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Witnesses to History

A Compendium of Documents and Writings
on the Return of Cultural Objects

Edited by Lyndel V. Prott

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Witnesses to History

A Compendium of Documents and Writings on the Return of Cultural Objects

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

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

Amadou-Mahtar M'Bow
1978

When these words were written there was strong debate about the return of cultural heritage items to States who had recently achieved independence after a period of colonial rule. They wanted to retrieve cultural objects which had been taken away during that period and remained in the colonizing State. But this sentiment is equally felt by other peoples who have lost significant witnesses to their culture by other means: conflict, occupation, theft, clandestine excavation, looting, punitive raids – the list is a long one. New developments such as the acceptance and promotion of cultural diversity, and the belief that every people should be able to see at least a representative collection of their own cultural achievements, has led to a renewed interest in this topic in the twenty-first century. These objects have become witnesses to another history in their years of wandering. This book seeks to give a reflection of the present debate.

L.V. Prott

No historical grievance will rankle so long, or be the cause of so much justified bitterness, as the removal, for any reason, of a part of the heritage of any nation. It is our duty, individually and collectively, to protest against it, and there are obligations to common justice, decency, and the establishment of the power of right, not of expediency or might, among civilized nations.

Members of the Monuments,
Fine Arts, and Archives Section
of the United States Army
Wiesbaden, Germany, 1945

Acknowledgements

First and foremost I must thank each and every contributor to this book for agreeing to the inclusion of their articles and to the somewhat vigorous editing necessary to ensure both the maximum exposure of as many points of view as possible and a coherent publication.

Secondly, I thank all those willing hands which worked hard to prepare this book within a very short timeframe for presentation at the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its 1st ordinary session since the thirtieth anniversary of its formation in 1978. These include, at UNESCO, Edouard Planche and Tatiana Villegas, who negotiated its technical production and who have put in many hours on the text and the illustrations, as well as being a constant source of support for an editor far away. I also thank Sophie Delepierre for her help with the index and the UNESCO Editorial Committee for its input. As to the substance and necessary choice and collation of items, for the Selected Bibliography, as well as the checking of the text and tables, Patrick O'Keefe has made a heroic contribution.

I am particularly grateful to the government of the Republic of Korea which proposed and financed this publication as well as a Meeting of Experts and an Extraordinary Meeting of the Intergovernmental Committee, held in Seoul 25–28 November 2008, at which the outline of the book was presented and many of the issues discussed in it pursued at a high level. The ideas floated during those four days provided useful suggestions for the future reflections and work of the Committee. The United States Delegation to UNESCO has also provided substantial financial support for the publication of this book.

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Preface

Witnesses to history

Documents and Writings on the Return of Cultural Objects

The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.

Extract from the plea of M. Amadou-Mahtar M'Bow,
Director-General of UNESCO 7 June 1978.

6 **I**NANIMATE OBJECTS, DO YOU HAVE A SOUL ...¹ asks this famous verse penned by French poet Lamartine. This oxymoron, in the form of a question, suggests that the souls of individuals, groups or even of an entire people are invariably associated with certain objects that become an integral part of their identity, and thus their essential being.

Objects can often be ambivalent. Removed from their sources, they bear the soul of those who created or cherished them to the point of identifying with them, thus creating, on the one hand, excessive influence or fame in the eyes of other nations and on the other, a deprivation sometimes felt very cruelly by those who held them dearly, in the most literal sense of the verb.

This ambivalent situation inherent in the circulation of cultural property arises whenever that circulation takes place against the wishes of the communities that created the property. The impact of that question exceeds by far the simple legal aspect under which it can be approached, and it was UNESCO that has taken up the challenge and has provided two strong responses.

The first response is of a legal nature. In 1970, the Organization decided to adopt the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. UNESCO will soon commemorate the fortieth anniversary of this pioneering normative instrument of universal scope, which has been ratified by 120 States Parties and is rightly recognized as the leading convention in the fight against illicit trafficking in cultural objects.

1 Extract from "Milly ou la terre natale" by Alphonse de Lamartine, in *Harmonies poétiques et religieuses*, third book.

In 1995, the UNIDROIT Convention completed this international protection mechanism constituting for the past fifteen years, a solid set of instruments that has made real progress possible by combining strict rules with a negotiation framework.

The second response is of a political nature. Mindful that the 1970 Convention is not retroactive and under the impetus of UNESCO's Director-General, at the time, Mr M'Bow, the 1978 General Conference created the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation to deal with cases outside the scope of international regulations. The thirtieth anniversary of the Committee was celebrated in Seoul and provided an opportunity to draw up its outcomes and analyse the activities and the methods of the Committee in order to reinforce its actions.

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

Fighting this threat is a long and demanding enterprise, which requires convincing at all levels – national and international, individual and collective, governmental and associative, civil society as well as local communities – that the preservation of cultural heritage and the fight against pillaging are in the common interest and are a matter of collective ethics.

It is in the context of this action that the present publication *Witnesses to History – Documents and writings on the Return of Cultural Objects* has been conceived

By making available to the general public, as well as to decision-makers, scholars, scientists and researchers, the most significant writings on the question of return of cultural property, UNESCO wishes to share the historical, philosophical, legal, political and ethical foundations of international work in this field and to present the most recent relevant developments.

Françoise Rivière
Assistant Director-General for Culture

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Abbreviations

AD	Anno Domini (Latin: in the year of the Lord, dating system in Christian countries, widely adopted from eighth century AD.) See below 'CE'
ADR	Alternative dispute resolution
AJDA	Actualité juridique de droit administratif (Current administrative law) (France)
aka	also known as
ATF	Arrêts du Tribunal fédéral (Judgments of the Federal Court) (Switzerland)
BC	Before the birth of Christ, equivalent to BCE
BCE	Before the Common Era, equivalent to BC Christian Era
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the German Federal Court in Civil Cases)
BvR	Verfassungsbeschwerden (suits before the German Constitutional Court)
CC	Civil Code
CE	Common Era, international date equivalent to AD (Anno Domini, Christian era)
CE	Conseil d'Etat (France)
CEDH	Cour européenne des Droits de l'Homme (European Court of Human Rights)
CEEJ	European Convention on Mutual Assistance in Criminal Matters
CIE	Civil Information and Education Section in SCAP
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CITRA	International Conference of the Round Table on Archives
CLO	Central Liaison Office of SCAP
CoE	Council of Europe
CPIA	Convention on Cultural Property Implementation Act
Crim. LR	Criminal Law Reports (UK)
CS	Recueils de jurisprudence du Québec, Cour supérieure (Law Reports of Quebec Superior Court, Canada)
D	Dalloz (a system of law reports for France)
DCMS	Department of Culture, Media and Sport (United Kingdom)
DS	Department of State (United States)

EIMP	Loi fédérale sur l'entraide internationale en matière pénale (Federal Law on Mutual <i>Assistance</i> in Criminal Matters) (Switzerland)
EWCA	England and Wales Court of Appeal (Civil Division) Decisions
F. Supp. 2d	Federal Supplement (US law reports) Second Series
F.2d	Federal Reporter, (US) 1880–1924 Second Series
GA	General Assembly
HRAP	Human Remains Advisory Panel (United Kingdom)
ICA	International Council of Archives
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
ICTY	International Criminal Tribunal for the former Yugoslavia
IIHSC	International Institute of Higher Studies in Criminal Sciences (Italy)
ILA	International Law Association
IMF	International Monetary Fund
JdT	Journal des Tribunaux (Switzerland)
L.Ed 2d	United States Supreme Court Reports, Lawyers' Edition
MFA&A	Monuments, Fine Arts and Archives Section of the US Army
NSPA	National Stolen Property Act
OMMSA	Organization of Museums, Monuments and Sites of Africa
PCA	Permanent Court of Arbitration
Pers. Comm.	Personal communication
RS	Recueil systématique du droit fédéral (official collection of Swiss (federal) law)
RSDIE	Revue suisse de droit international et européen (Swiss review of international and European law)
S. Rep.	Report of the Senate (United States)
SDNY	Southern District of New York
SCAP	Supreme Commander Allied Powers
SCAPIN	SCAP (IN is part of the document reference)
SWNCC	State-War-Navy Coordinating Committee
T	Beschwerden in Zivilsachen (Civil suits) (Germany) (United States occupation forces in Japan)
USC	United States Code
WCO	World Customs Organization
WLR	Weekly Law Reports (United Kingdom)

Note on Terminology

Discussions on the relocation of cultural property at the request of a ‘State of origin’, or of a prior owner, use many different terms.

‘Return’ is a fairly neutral term, though perhaps focusing on action by the requested State or institution. ‘Recovery’ is also a relatively value-free term, though it clearly focuses on the interest of the requesting party. ‘Restitution’ is much more controversial. In the first place, it is a legal term with precise meanings in many legal systems. Its significance is not the same across all legal systems. For example, in Civil Law systems (Code law systems generally based on Roman law) it may mean either specific restitution of an object or reimbursement.

In Common Law systems (English law and systems derived from it) the remedies of restitution aim to return parties to the position they occupied before a transaction took place: this might well mean transfer of an object back to its original holder. A Writ of Restitution would reverse the result of a judgement that was challenged or result in the return of stolen goods to their true owner.

The Oxford English Dictionary gives several meanings for the term ‘restitution’, among which the relevant ones are: ‘restoring a thing to its proper owner’ and ‘reparation for an injury’. These meanings sit uncomfortably with current practice, the aim of which is increasingly to see the issue not as one of ‘ownership’ but as one of justice; not as a matter of legality, but as one of legitimacy (see the discussion on this point at the UNESCO Forum on ‘Memory and Universality’ included in Part 2). Neither is it a question of reparation for injury, but rather one of ensuring adequate national collections of local cultures.

The use of the word ‘restitution’ has therefore been contentious. The term was used in the United Nations General Assembly Resolution 3187 of 1973. The Committee of Experts convened by UNESCO in Venice in 1976 added the phrase ‘return’, with the intention of also covering objects that had been the subject of illicit traffic. When the draft Statutes came to the General Conference of UNESCO, a joint French and German draft amendment would have deleted ‘restitution’ and used only ‘return’. The compromise negotiated was to use ‘return’ and to retain the word ‘restitution’ with the addition of ‘in case of illicit appropriation’, thus resulting in the present unwieldy title of the Committee: Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. At that time many former colonizing States were very sensitive to the vigorous criticism of colonization then taking place, and were uncomfortable with any implication that the cultural items being sought from

their museums had been stolen or that their taking was an injury for which reparation was due. Perhaps they thought that the unadorned use of the word ‘restitution’ might concede that their actions during the colonial period were invalid or improper: in their view of international law at the time they were legal. This is an odd usage, however, since in general ‘return’ seems to simply speak of the act of ‘handing over’, whereas the words ‘or its restitution in case of illicit appropriation’ in the title of the Committee seems to suggest that ‘return’ does not cover wrongdoing (otherwise, why would it be necessary to add the words ‘in case of illicit appropriation’?). Yet if ‘restitution’ were thought to imply wrongdoing, these last five words were equally unnecessary. However, as can be seen from the present debates in this volume, and from the practice of the Committee itself, the nature of the taking of the cultural property is never the sole concern in the dispute and often only a minor issue, compared, for example with cultural arguments.

The word ‘restitution’ remains controversial, as will be seen from the discussions concerning the Russian Duma.² It is, however, still used in the biennial Resolution on cultural property of the United Nations General Assembly.

Individual authors have also used their own meanings for ‘restitution’. Elazar Barkan (Part 1), for example uses the word ‘restitution’ to include the entire spectrum of attempts to rectify historical injustices, including not only the return of the specific belongings that were confiscated, seized, or stolen, such as land, art, ancestral remains, and so on but also ‘reparations’ (some form of material recompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity), and ‘apology’ (an admission of wrongdoing, a recognition of its effects, and, in some cases, an acceptance of responsibility for those effects and an obligation to its victims). For him the concept means something more like ‘making amends’ as the result of a sentiment of guilt. He sees restitution not just as a legal but also as a cultural concept. Wojciech Kowalski discusses particular legal meanings of ‘restitution’ in relation to takings in wartime and belligerent occupation (Part 3). Patrick O’Keefe and Marc-André Renold have also discussed these terms in their contributions.

It is useful to keep these different shades of meaning and different usages in mind while reading this book. But terminological exactness does not heal the ‘anguish’ of which Amadou-Mahtar M’Bow spoke in his moving Plea (Part 1).

‘Reconstitution of dispersed heritages’ was a phrase adopted by the International Council of Museums (ICOM) in its specialist report ‘Study on the Principles, Conditions and Means for the Restitution and Return of Cultural Property in view

2 Discussed by Grimsted in Part 3 concerning archives.

of Reconstituting Dispersed Heritages' 1977.³ The focus of ICOM was to examine the issue from the point of view of the requesting States and the museological justification for their requests. This phrase places emphasis on the cultural and moral factors that are so strongly felt by States and communities that have been significantly denuded of major parts of their cultural heritage.

'Retrieval' like 'recovery' and 'recuperation' frames the issue from the requester's point of view. States and institutions with major losses are likely to use these terms when setting up specific programmes to identify, locate and request cultural items abroad. See, for example, the establishment of an official Russian programme for the retrieval of Russian archives abroad discussed below.⁴

'Repatriation' is a useful term, but in discussions on cultural heritage it does not only apply to returns (whether inter-State or inter-institutional) between countries but also between institutions and communities in the same country. For example, consider its use in the name of the United States 'American Indian Ritual Object Repatriation Foundation'. This usage occurs very often in discussions between an institution and a tribal or indigenous community in the same country.

'Repatriation', however, does not do justice to the concept of recovery for indigenous peoples. To enter this frame of mind takes a particular effort.

There are special resonances turning around 'repatriation' or 'return to country' in the Indigenous context. There are the associations of being a return to the indissolubility, rotation and twining of ideas: of interconnections between person-being-identity-kin-site-language-ancestral emanation of belief, 'law-and-lore', embodiment of identity, people and belief brought together in the idea of 'country'. Here the relationship to 'Country' is by no means a term of property, ownership, civil law or citizenry. It is an ethical (and often religious) term of profound calling, dutiful obligation, and affectionate relationship: 'our/my country' is social embodiment of kinship, language and history. This relationship is often expressed in variations among indigenous people as: We do not own our land, the land owns us. So repatriation 'back to country' of human remains (if it is historically interpreted) is much more reverberative than mere physical return. It is restoration of connections and histories that have been ripped asunder. It is about release of the spirit into the realm of eternal 'law' and reconnection to the ancestral spirit world.⁵

There is another significant use of the word 'repatriation' in the phrase 'digital repatriation'. This does not mean the transmission of images of objects as a substitution

3 'Study on the Principles, Conditions and Means for the Restitution and Return of Cultural Property in view of Reconstitution dispersed Heritages' 1977 published as UNESCO Doc. CC-78/CONF. 609/3 Annex 1, also in UNESCO Doc. CC-86/WS/3 Annex 2 and in *Museum* (1979) 62.

4 See n.1 above.

5 I am indebted to Bernice Murphy for this wonderfully evocative description.

for the physical return of objects (a kind of ‘virtual’ repatriation of physical items of heritage). It means the transmission of knowledge to enhance the value of the physical objects being returned, or already returned, and includes such materials as photographs, recordings, field notes and museum research, so as to enrich the experience of the physical repatriation by ensuring its maximum effect. An extended example is given in Part 3. It is never a substitute for the return of physical objects but a supplement to them. Some of the terms discussed above have been more fully described elsewhere.⁶

This compendium is intended as a source of general reference so it seems wise to avoid, in any editorial discussion, a term which is already controversial, such as ‘restitution’. I have opted in my comments simply to talk of ‘return’ as the most neutral and unemotive term available. It is also the one that comes closest to representing the views of both the requested and the requesting party.

6 L.V. Prott and P.J. O’Keefe *Law and the Cultural Heritage: Vol. III* (Butterworths, London, 1989) p. 830.

Introduction

THE YEAR 2008 marks the thirtieth anniversary of the establishment of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.

The last ten years have seen renewed interest in the Committee, and a desire to intensify and improve its activities. This renewed interest is seen in the holding of a meeting in Athens in March 2008 of an International Conference on the Return of Cultural Objects to their Countries of Origin at the invitation of the Greek Directorate of Antiquities. The papers of that conference are in press.¹

In November 2008 an Extraordinary Meeting of the Committee was held in Seoul at the invitation of the Government of the Republic of Korea.

The Republic of Korea offered to support a UNESCO project to produce a book that would illustrate the development of views on the issue of return, which could be presented to the Committee at its 15th Ordinary Session at UNESCO in June 2009. This compendium is the result of that collaboration with additional support from the Government of the United States of America.

Almost all the items in this compendium have already been published. A wealth of material now exists, illustrating the diversity of views, the variety of heritage affected and the different ethical, philosophical and legal aspects as well as the history of the subject. Choosing between the many writings and writers, taking extracts from arguments developed with some complexity and doing justice to all cultures, regions and points of view has been an extremely difficult task, and for that reason a Bibliography has been included which will enable readers to follow further their particular interests in this debate and to appreciate the amount of scholarship currently available on these issues.

The book commences with a historical overview on the handling of requests for the return of cultural heritage, including the text of some of the key documents in the development of the subject. The second part starts with the Forum on Memory and Universality which was held in UNESCO on 5 February 2007 and

1 Papers to be published in 'Return and Restitution of Cultural Properties' 241/242 *MUSEUM International* forthcoming 2009.

which included speakers from the fields of philosophy, ethics and museology, recording the current vigorous debate about the place of universal museums and the claims for return of heritage items. This forum neatly summarizes the issues raised in the following extracts by other thinkers. Extracts are included by two other writers who have developed more extensive general theories that apply to the return of cultural objects as well as many other things. The first is Barkan's theory of restitution (in the sense of 'making amends'), a mixture of morality and political realism based on observable international practice, which has resulted in major developments with regard to a number of different kinds of disputes. The second is Appiah's theory on the ethics of 'Cosmopolitanism' represented here by a chapter on cultural objects.

The third part illustrates the great variety of different kinds of heritage and their social, political and geographical context, and demonstrates that different rules may apply to the process of return. These include cultural objects displaced during war, hostilities or occupation, colonial cases, dismembered objects, sacred objects, human remains, objects needed for the revival of intangible heritage and not least, archives.

A short fourth part on legal issues represents some aspects of current legal thinking. Lawyers will be aware of the very considerable, and often complex, sets of debates on issues that have proven particularly difficult to resolve with respect of cultural property: the effect of time limitations on claims, the presumption of good faith which protects acquirers of illicitly trafficked objects and the incompatibility of national legal systems. All of these require radical rethinking with respect to this special category of objects.

The fifth and final part deals with ways in which disputes over cultural heritage items can be solved and includes examples. There are clearly unique features in many of these cases and many kinds of practical compromise have resulted. This section should demonstrate that with goodwill solutions should present themselves. It should also highlight the fact that legal solutions may well be disadvantageous to the parties involved in the dispute and other forms of solution may well prove more advantageous.

This volume can hardly do justice to the many writers and thinkers working on these problems. Hopefully its readers will go on to peruse many of the other authors whose work could not be included because of the constraints of space.

L.V. Prott
Toowoomba, March 2009

Part 1

The History of Return of Cultural Objects

Editor's Preliminary Note

THIS CHAPTER PROVIDES a brief historical survey of returns of cultural property and of attitudes towards such claims as well as certain key documents in the development of these changing attitudes. The practices and rules as to return were first developed in connection with takings during conflict and occupation and that context still provides a major impetus to their clarification and improvement. They have served as a catalyst for the development of rules relating to other contexts such as colonization and its reversal, succession of States, and some anomalous situations such as nineteenth-century punitive raids. As in other areas of international law, the development of public attitudes as to the ethics of such situations generally precedes the development of legal rules. Changing attitudes, ethical pronouncements and legal rules all find their place in this part covering the sixteenth to the twenty-first century.

Lawmakers, administrators, artists, museum professionals and lawyers have all had a hand in changing public attitudes. For example, a key figure in changing attitudes at the end of the eighteenth century was Antoine Chrysotome Quatremère de Quincy, respected as the father of architectural theory, who pleaded against French removal of artworks from Rome. Rome itself was a museum, and he argued that so much of its context was essential to the understanding of art – the foundation of the culture of all of Europe – that it was uncivilized to remove it. Much quoted, not always well understood, he provided an essential background to the modern view concerning the loss to all humanity by the dismemberment of sites and the wholesale removal of cultural treasures from their countries of origin.

The Director-General's Plea in 1978 was another such ethical stance. In more recent times, international non-governmental organizations such as the International Council of Museums (ICOM) and the International Law Association (ILA) Cultural Heritage Law Committee have been at the forefront of formulating new standards of conduct in respect of cultural heritage.

The History and Development of Processes for the Recovery of Cultural Heritage¹

L. V. Prott

Early history

CURRENT DISCUSSION on the return of cultural property sometimes seems to assume that this is only a recent issue, which acquired significance with the Second World War. In fact issues of return go back very much further, having been discussed in detail by the Spanish theologian and lawyer Francisco de Vitoria in the sixteenth century when deploring the spoliation of goods from the indigenous people of Spanish America.²

The Treaty of Westphalia in 1648 made provision for the return of objects looted during the Thirty Years' War.³ In the aftermath Sweden returned, at the end of the eighteenth century, 133 Bohemian archival records taken in 1648 and in 1878 twenty-one manuscripts were transferred as a gift to *Landesarchiv* in Brünn (Brno) in what was then Austro-Hungary, today part of the Czech Republic. Most recently *The Gigas Code*, the largest known Mediaeval manuscript, created in 1229, transferred to Prague in 1594 and then looted by Swedish soldiers in 1648, was returned to Prague on loan from the Swedish National Library from September 2007 to January 2008 – a gap of 359 years after it was taken.

These early cases were the basis for rules for the legal protection of cultural property in time of armed conflict formalized in the nineteenth and twentieth centuries (the 1863 *Lieber Code: Instructions for the Government of Armies of the United States*

1 15 *Art Antiquity and Law* (2008) 175. Chapters 15 and 16 of L.V. Prott and P.J. O'Keefe *Law and the Cultural Heritage: Vol.3 – Movement* (Butterworths, London, 1989) include more material on this subject.

2 <http://www.constitution.org/vitoria/victoria.txt>

3 *Treaty of Westphalia*, signed at Munster, Germany in 1648, Article CXIV.

in the Field, drafted for the use of the Union Army in the American Civil War and the 1907 Hague *Convention concerning the Laws and Customs of War on Land*).

Rules adopted in treaties made by the Principal Allied and Associated Powers with the separate States of Austria and Hungary after the First World War reflected some of earlier inter-State practice. The *Treaty of Trianon* 1921 with Hungary included in Article 177 an obligation to give up all records and historical material relating to the territories which it had been required to cede. In addition, the Article provided as follows:

With regard to all objects or documents of an artistic, archaeological, scientific or historic character forming part of collections which formerly belonged to the Government or the Crown of the Austro-Hungarian Monarchy and are not otherwise provided for by the present Treaty, Hungary undertakes –

To negotiate, when required, with the States concerned for an amicable arrangement whereby any portion thereof or any objects or documents belonging thereto which ought to form part of the intellectual patrimony of the said States may be returned to their country of origin on terms of reciprocity.

The *Treaty of St. Germain* 1919 with Austria included a similar provision in its Article 196, but it also included a more far-reaching clause (Art. 195), which provided for the setting up of a special Committee to

examine the conditions under which the objects or manuscripts in possession of Austria, enumerated in Annex I hereto, were carried off by the House of Habsburg, and by the other Houses which have reigned in Italy. If it is found that the said objects or manuscripts were carried off in violation of the rights of the Italian provinces the Reparation Commission, on the report of the Committee referred to, shall order their restitution.

Belgium, Poland and Czechoslovakia were also entitled to submit claims for other objects listed in the Annexes. Among the objects listed in the Annexes were Medici heirlooms, furniture and silver plate and the Crown jewels of the Princess Electress of Medici taken from Tuscany; bronzes, manuscripts and drawings taken by Duke Francis V from Modena in 1859 and various documents taken from the state archives of Milan, Mantua, Venice, Modena and Florence; objects and documents removed from Belgium between 1770 and 1794; the gold cup of Ladislas IV removed from territory which had been part of Poland after the first partition of Poland in 1772; documents, manuscripts and maps removed from Czechoslovakia by order of the



The 'Gigas Code', the largest known medieval manuscript dating from 1229, looted by Swedish soldiers in 1648 and temporarily returned to Prague by the Swedish National Library in 2007. © The National Library of Sweden

Austrian Empress Maria Theresa (who reigned from 1740–1780) and documents and works of art removed from the royal castle of Prague about 1718, 1723 and 1737.

The 1921 *Treaty of Riga* between Russia and Poland required Russia and the Ukraine to restore to Poland all war trophies, libraries and archives, collections of works of art, collections of any nature and objects of historical, national, artistic, archaeological, scientific and general educational value.

The 1943 Declaration of London

The effort of the victors of 1918 to undo the wrongful displacement of cultural heritage was drawn on by the Allies in response to the Nazi looting of Europe during the Second World War in the form of the *Declaration of London* of 1943. Its text reads as follows:

The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxemburg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The Governments making this Declaration and the French National Committee solemnly record their solidarity in this matter.

Immediately after the war measures were taken to implement this Declaration in a number of countries.

Allied implementation

The Declaration of London was implemented by a number of other legal instruments that ensured that the international principle of restitution asserted by the Allies would not be negated by conflicting provisions in national law. France, the United Kingdom, the United States and the USSR each issued a law on restitution for their respective zones of occupation. These Laws overrode provisions of the German *Civil Code* which would have protected a transferee in certain circumstances. In the United States zone, for example, *Law No. 59 Restitution of Identifiable Property* (s.3.75(2)) provided that:

Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of this Law No. 59, even though the interest of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where Law No. 59 provides otherwise.

Two other provisions of this Law provide interesting precedents in the context of restitution: property was considered confiscated where a person was deprived of it as the result of 'a transaction *contra bonos mores*, threats or duress, or an unlawful taking or any other tort' (s.3.76(1)).

Furthermore it was not permissible

to plead that an act was not wrongful or *contra bonos mores* because it conformed with a prevailing ideology concerning discrimination against individuals on account of their race, religion, nationality, ideology or their political opposition to National Socialism (s.3.76 Proviso (2)).

Similar provisions occurred in the Law enacted for the British zone.⁴ In 1954 when the zones of occupation ended, the German government agreed to adopt the same provisions.⁵ Restitution did not in fact occur in all cases covered by these rules. Poland complained in 1947 to that effect, but to little avail, and some of the pieces lost were irreplaceable.⁶

The Allies also put pressure on the neutral States, who had not been Parties to the Declaration, to adopt similar legislation. There was apparently some resistance from Sweden and Switzerland, who argued that protection of the good faith purchaser prevents restitution.⁷

4 N. Bentwich 'International Aspects of Restitution and Compensation for Victims of the Nazis' 32 *British Yearbook of International Law* (1955–56) 206–7.

5 *Id.* 214.

6 S. Nahlik 'La protection internationale des biens culturels en cas de conflit armé' 1 *Recueil des cours de l'Académie de droit international de La Haye* (1967) 61, 113.

7 I. Vasarhelyi *Restitution in International Law* (Akademiai Kiado, Budapest, 1964) 114.

Switzerland

On 8 March 1945, the Swiss Government signed an Agreement with France, the United Kingdom and the United States concerning, inter alia, the discovery and restitution of property taken in occupied territories during the war. By this agreement Switzerland undertook to facilitate the recovery of such goods in Switzerland.⁸

A Swiss Decree of 10 December 1945 concerning actions for the recovery of goods taken in occupied territories during the war (known as the Booty Decree) provided that a person in occupied territory who had had movables expropriated or been dispossessed of them in a manner contrary to international law by violence, confiscation, requisition or similar methods whether by military or civil units or the armed forces of the occupying power, could recover them, if they were in Switzerland, from the present possessor in good or bad faith (Art. 1). It also provided that, where restitution of the goods was ordered, a good faith possessor had a right to be repaid the purchase price from the person from whom it was acquired. If that person had also been in good faith, he or she had further recourse against the person from whom it was acquired. Most importantly, Article 4 also provided that ‘Where a transferor in bad faith is insolvent or cannot be sued in Switzerland, the judge may allow the good faith acquirer who has suffered damage, an equitable recompense at the cost of the Confederation.’

The Decree, like the Agreement of 10 March 1945, seems to have been made under some pressure from the Allies. One Swiss commentator thought that recovery should be not allowed to a claimant where the civil law of his domicile would not allow recovery in the same circumstances (i.e. against possessors in good faith).⁹ This was the position in the law of the Netherlands, though many of the other formerly occupied lands – France, Belgium, Luxembourg, Denmark and Norway – had laws similar to that adopted in Switzerland.¹⁰

Numerous actions were brought before the Swiss Federal Court, which set up a special ‘Booty Chamber.’ Its first and most significant case was that of *Rosenberg v. Fischer*.¹¹ Rosenberg, a French citizen, was an art dealer in Paris. After France was invaded, Rosenberg moved a large number of his artworks to the country and, fearing persecution as a Jew, left for New York. His property was seized by the Germans before it could be sent on to him. A large number of works went to art galleries in Germany, others to leading members of the Nazi Party, and a third group of paintings of so-called ‘degenerate art’ were exchanged for ‘more valuable’ ones. Of this last

8 D. Schindler ‘Relations de la Suisse avec les puissances alliées et les puissances de l’axe, avant et après les capitulations – Accord du 8 mars avec les puissances alliées’ *Annuaire suisse de Droit international* (1946) 199.

9 E. Thilo ‘La revendication de biens se trouvant en Suisse, dérobés en pays occupés pendant la guerre’ I *Journal des Tribunaux (JdT)* (Switzerland) (1946) 29.

10 G. Weiss ‘Beutegüter aus besetzten Ländern: Die privatrechtliche Stellung des schweizerischen Erwerbers’ 42 *Schweizerische Juristen-Zeitung* (1946) 265–74, 268.

11 *JdT* n. 7, 1946 I 25; Note, 1949.

group a considerable number found their way to Switzerland, including a Corot, a Picasso and paintings by Cezanne, Courbet, Daumier, Ingres, Manet, Matisse, Monet, Pissaro, Renoir, Seurat, Sisley and van Gogh. Some of these passed through several hands before being acquired by the defendant. The Swiss Compensation Office in 1948 estimated their value at the time of the case to be about SF 893,200. The Swiss dealer Theodor Fischer in Lucerne and a number of private individuals had acquired a good many of the works. The Booty Chamber allowed the suit and ordered the return to Rosenberg of thirty-seven pictures, twenty-two of which were in the hands of Fischer. (It is not without interest that in 1939 Fischer had conducted a major auction of art works confiscated by the Nazi Government.)¹² Rosenberg transferred to Fischer any right to compensation which he might have had under Law No. 59 of the Allied Control Council against the German transferor who had taken other works in exchange.

In the course of its decision, the Swiss Federal Court made some important findings. The Booty Decree had been enacted under a special provision allowing the Swiss Federal Council urgent temporary legislative measures. The defendants claimed that the decree retroactively affected lawfully acquired rights. The court held that the conditions required of a law affecting acquired rights, namely public interest and compensation of the person affected, had been met. Changes to the right of recovery were minimal, since a possessor in bad faith would have had to return the goods in any event,¹³ and even a good faith purchaser would have had to do the same, since goods taken in breach of the rules of international law are 'lost or stolen goods' in the sense of Article 934 of the *Civil Code*.

As to a possessor in good faith who would have been protected by the general law but was not protected by the Decree (such a person would, it seems, be a purchaser in good faith from a third party, where the original taking seemed to be a normal legal transaction, but under the rules of the *Declaration of London* would not have been so considered), he would be compensated by the State if he did not succeed in obtaining compensation from the transferor. This was an important extension of the Decree, which stated that the judge *could* award compensation, whereas the Court held that the good faith possessor *must* be fully compensated. The court took the view that the facilitative words merely gave the judge the power to award a lesser sum where the transferee had been less prudent than he should have been in making his acquisition.¹⁴ The court did reduce the amount of compensation on this basis in the case of *Fischer v. Schweizerische Eidgenossenschaft*.¹⁵

12 J.H. Merryman and A.E. Elsen, *Law, Ethics and the Visual Arts* (Kluwer, Boston 3rd edn, 1998) 435.

13 Swiss *Civil Code*, Art. 936.

14 E.Thilo 'La restitution des rapines de guerre' 1 JdT (1948) 418.

15 Unreported decision, Federal Court, Booty Chamber, 25 June 1952.

The Swiss Decree of 10 December 1945 was repealed on 23 December 1947. No doubt the Swiss Government wanted to limit its potential liability, which, as can be seen from *Rosenberg v. Fischer*, must have been considerable. It is doubtful, however, whether the allies intended the possibility of recovery to be so limited. Speaking of the United States recovery programme and the international arrangements for its implementation, Hall comments that the recovery programme ‘provides for an appropriate continuation of the cultural restitution programs. For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered.’¹⁶

As recent history has shown, cultural objects to which the *Declaration of London* would apply continue to be found.

The Swiss Decree was also limited in another way as was illustrated by the case of *Koerfer v. Goldschmidt*.¹⁷ Goldschmidt, being Jewish, left Germany for good shortly after the Nazis took power in 1933. In 1940 his German citizenship was withdrawn. In 1941 all his property was declared forfeit to the German Reich and his very valuable collection of paintings, including those in the possession of a bank, were auctioned in Berlin where Koerfer was the successful bidder for two paintings by Toulouse-Lautrec. Koerfer gave them to his wife, a resident of Switzerland, where they arrived in 1944.

In 1956, Goldschmidt’s heir sued in Switzerland for the return of the paintings. The Swiss Federal Court left open the question of whether the Federal German *Law on Restitution of 1954* applied. Whether it did or not, the court held that Goldschmidt’s claim was defeated by the prescriptive title of Frau Koerfer’s heirs under Article 728 of the Swiss *Civil Code* (five years possession in good faith). The repeal of the Swiss Booty Decree deprived Goldschmidt of the protection that the Decree might have given his claims. However, it is not clear that he or his heirs could have claimed under the Booty Decree, which expressly applied only to ‘goods taken in occupied territory.’ The morality of the taking of Goldschmidt’s paintings may have been no different to the taking of Rosenberg’s, but Germany was not ‘occupied territory’ and acts of deprivation there were acts of the State acting on its own territory. Despite the later efforts of the Federal German government to return property confiscated from German Jews, it seems that Switzerland, at least, saw no necessity to extend its protection of property rights to those who had property taken in Germany itself. Before the widespread adoption of international and domestic rules prohibiting discrimination on the grounds of race, such a taking of property within its own territory from one of its own nationals was not an offence against international law.

16 A.R. Hall ‘The Recovery of Cultural Objects Dispersed During World War II’ *Department of State Bulletin* (United States) (1951) 337.

17 *ATF* (Arrêts du Tribunal Fédéral Suisse) (Switzerland) 94 II 297.

Other Neutral States

Sweden also passed legislation with similar effect on 29 June 1945. The *bona fide* acquirer was not bound (though he was of course entitled) to pursue his predecessor in title but could claim full compensation for his loss directly from the Swedish government.¹⁸

Portugal likewise passed *Decree-Law No. 34.455 of 22 March 1945*, which declared null transactions relating to goods seized in occupied territories and applied the existing provisions of the *Civil Code* to *bona fide* purchasers. The Portuguese *Civil Code* at that date had reached a compromise of the interests of owners and *bona fide* purchasers, generally favouring the original owner, which was exceptional among European Codes. It seems that dispossessed owners would in any event have been protected: only the victim of an 'apparently legal' sale might have needed special protection. The Portuguese scheme was complemented by *Decree-Law No. 34.600 of 14 May 1945*, which declared inalienable and non-transferable any goods subject to proceedings under the first Decree-Law.

Peace Treaty with Italy

The 1947 Treaty of Peace with Italy required that (Art. 37): 'Within eighteen months from the coming into force of the present Treaty, Italy shall restore all works of art, religious objects, archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935.'

Neither the United Kingdom nor the United States sought to enforce that provision, and negotiations between Ethiopia and Italy for the return of various items continued. In 1982 the throne of Menelik II was returned by Italy to Ethiopia.¹⁹ The Aksum Obelisk has only just been recovered from Rome some seventy-eight years after it was taken. It can only be said that the Allies were extraordinarily dilatory in enforcing this provision of the Treaty of Peace with Italy, considering the pressure they apparently exerted on Portugal, Sweden and Switzerland in respect of the Declaration of London, even to the detriment of *bona fide* purchasers.

It is notable however that no such provisions were included in the Peace Treaty with Japan, and return of cultural property looted by Japanese soldiers, and in countries colonized by Japan before the war, such as Manchukuo (a Japanese puppet State in China) and Korea, is still a very painful and unresolved issue.

From this history it can be seen that developments during and since the Second World War on the return of cultural property began the process which led to the formal legal institution of returns of cultural property on a much more substantial scale than was the case after the First World War.

18 G. Weiss n.10, 271; I. Vasarhelyi, n. 7, 123.

19 J. Greenfield 'The Return of Cultural Property' 60 *Antiquity* (1986) 29, 30; see also R. Pankhurst, 'The Case for Ethiopia' 38 *Museum* (1986) 58, 60.

Significance

The history of the *Declaration of London* and its implementation in neutral countries provides an interesting precedent for the possible resolution of some difficult issues as to the return of objects of the cultural heritage. The *Declaration* gave advance warning to third parties who might acquire goods taken contrary to law, whether openly plundered or by transactions apparently legal in form, that their acquisitions might be declared invalid, and that they might have to return the goods so acquired.

The solution chosen by Switzerland, to restore the goods, but allow a *bona fide* purchaser recourse against a *mala fide* seller (thus avoiding the need for the original owner to compensate the purchaser where the sale was made at a public auction, from a dealer in property of that kind or from any other *bona fide* purchaser according to Article 934 of the Swiss *Civil Code*) is a precedent for a similar way around the *bona fide* rule. The ultimate guarantee of payment by the State ensured the rights of those who had trusted in the existing state of the law, while creating an incentive for the State to be more vigilant in testing *bona fides*, as the Swiss Booty tribunal did in later cases.²⁰

The principle was established that a warning in advance (in the *Declaration of London*) puts subsequent purchasers on notice that they would not be considered as *bona fide* transferees of illicitly taken property after that date and obliged the Governments of third States to at least warn their citizens of this possibility, if not to change the law immediately. The undertaking by the Swiss government to reimburse a good faith purchaser if, in the last resort, he could not recover from a *mala fide* transferor who was insolvent or outside the jurisdiction of the Swiss courts, showed that the State itself assumed responsibility for restoring the position which existed before the breach of international law which had occurred in the illicit taking. Those who have been watching developments in relation to the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 will immediately see a connection: for some time many have emphasized that acquirers should be aware of the need for diligence in provenance research from at least 1970, when the international community was put on notice that such a rule against reckless acquisition was in the course of adoption. This rule is now written into the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995, which expressly provides that acquirers take on the risk of loss if they do not act prudently.

The *Declaration of London* was an especially important precedent in its stress on the reality of the transactions, including those ‘apparently legal in form, even when they purport to be voluntarily effected.’ Under the German occupation this description covered not only forced loans and donations as well as those exacted by fear and

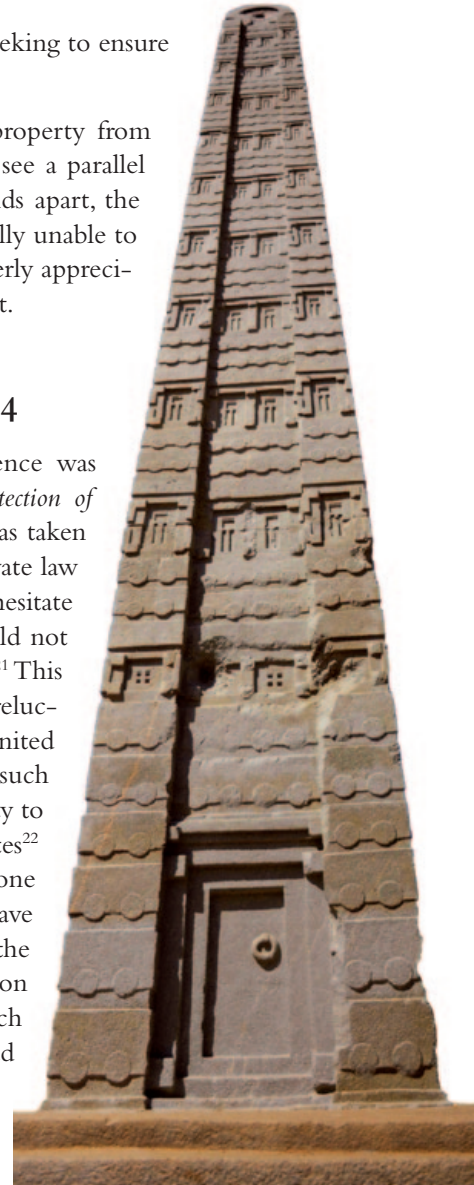
²⁰ *Bührlé v. Fischer* unreported decision, Federal Court, Booty Chamber – 5 July 1951; a Swiss case discussed by E. Thilo ‘La restitution des rapines de guerre’ *I JdT* (1952) 386.

intimidation, but also sales at unrealistic prices by persons seeking to ensure the physical safety of themselves and their families.

Post-1960 protagonists for the return of cultural property from colonizing to newly independent States were not slow to see a parallel to many transactions in the colonial situation. Punitive raids apart, the ‘value’ of goods being handed in exchange to someone totally unable to appreciate the Western market could hardly be seen as properly appreciated, and ‘gifts’ to powerful colonizers might also be suspect.

The Hague Convention and Protocol 1954

Not all the valuable practice acquired from this experience was enshrined in the 1954 UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict*. The view was taken by the United States and the United Kingdom that the private law aspects of restitution, which as we have seen they did not hesitate to interfere with in the internal law of neutral States, should not be included in the Convention, but relegated to a Protocol.²¹ This relegation to a separate instrument was made with some reluctance, following statements by the United States and the United Kingdom, that they could not sign a Convention including such provisions. Although all continental European States are party to the Convention and the Protocol, neither the United States²² nor the United Kingdom is party to either. Only twenty-one of the 118 States²³ that are now party to the Convention have not become party to the Protocol also. Switzerland and the Federal Republic of Germany are parties to the Convention and the Protocol although these were both States on which the Allies had brought pressure to return property which had passed into the hand of a *bona fide* purchaser and who might have been thought, therefore, less likely to accept the principle of return. Switzerland, as we saw, was anxious to limit as soon as possible the responsibility of the government to pay an indemnity to holders in good faith



The Aksum Obelisk, re-installed in Ethiopia after restitution by Italy in 2008. A testament to successful cooperation between Ethiopia and Italy. © UNESCO, photo by Michael Tsegaye

- 21 Nahlik 1967, n.6 above, 135–37; S. Nahlik ‘On Some Deficiencies of the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict’ 44 *Annuaire de l’Association des Anciens Auditeurs de l’Académie de La Haye* (1974) 100, 106.
- 22 Update: the United States deposited its Instrument of Acceptance of the Convention (but not the Protocols) on 13 March 2009. The united kingdom is not party to the Convention, nor its Protocols, but has announced that it intends to ratify the Convention.
- 23 Update: Only 23 of the 123 States party to the Convention have not become party to the 1954 Protocol.

where the State had the obligation to return the property to another country. Yet it accepted this obligation anew under the 1954 Convention. France, whose rules on the protection of the *bona fide* purchaser are strongest of all, nevertheless accepted this obligation also, being in that sense consistent with her stance on the 1943 Declaration. Japan, a long time laggard in this respect, has just become a Party to both the Convention and its Protocol.²⁴

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

After the Second World War, the newly independent States considered independence movements to be wars of liberation. In view of the early precedents relating to restitution of cultural property by Austria, Hungary and Russia after the First World War and the more recent ones applied to German acquisitions in the Second World War, these new Members of the United Nations wanted similar principles of restitution applied to them.

The newly independent States were anxious to recover important items from their cultural heritage, many of which were to be found in the museums of the former colonizing States. They were also very concerned at the continuing loss of cultural heritage due to exploitation by looters at a time when they had relatively few resources to control it. Many States which had lost significant cultural heritage during the hegemony of the European States, whether by colonial occupation or by other forms of force, very much resented the refusal of the holding States to accept these principles in relation to material taken in situations which the newly independent States regarded as foreign occupation.

The former colonial States were prepared, if reluctantly, to do something at the international level about the problem of continuing loss. UNESCO's work during the 1960s produced the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*. But the States holding the objects being sought were not prepared to do anything about material taken before the date of that Convention. At least one developing State said that the 1970 Convention was of very little interest to it, since all of its major items of cultural significance were already in other countries.

²⁴ States party to the Convention which have not yet become party to the First Protocol are Australia, Bolivia, Botswana, Chad, Côte d'Ivoire, Equatorial Guinea, Eritrea, Kyrgyzstan, Mauritius, Mongolia, New Zealand, Oman, Qatar, Rwanda, Seychelles, South Africa, Sri Lanka, Sudan, Tanzania, United States of America, Uzbekistan, Venezuela, Zimbabwe. Canada and all the European States which are party to the Convention are also parties to the First Protocol. It is difficult to see any common thread of political or legal systems linking these States which might explain their reluctance to become party to the Protocol.

A provision in the 1969 Preliminary Draft of the 1970 Convention that would have obliged States parties to recognize the ownership vested in a State or its nationals acquired *before* the Convention entered into force for the State in question²⁵ was deleted by the Special Committee of governmental experts in 1970.²⁶ China had proposed the inclusion of an article directly relating to restitution and return: ‘any State party which, when the Convention comes into force, is in possession of important cultural property, illicitly acquired, inalienable to, and inseparable from, the history and civilization of another State, shall, in the interest of international goodwill, endeavour to restore such property to that State.’²⁷

This was not accepted on the ground that the Convention was not intended to be retroactive.²⁸ Indeed, the holding States made it very clear that they would not participate in any Convention that included such a provision. Thus title to cultural property taken from colonies and recognized to that date by the domestic law of the holding States (and by that version of international law which they had insisted upon in the preceding centuries), was challenged, but nothing in the 1970 Convention decided this issue.

Dissatisfaction with this result was reflected at the Conference of Heads of State or Government of Non-aligned Countries at its Fourth Conference in Algiers in 1973, which adopted a Resolution²⁹ stating the desire of these countries ‘to safeguard their own personality, to revive and enrich their cultural heritage.’ The Fifth Conference of this body (Colombo, 1976), passed two further Resolutions on the subject³⁰ which urgently requested all States in possession of works of art and manuscripts to restore them promptly to their countries of origin and also reaffirmed ‘the principles of the Universal Declaration on Human Rights and the African Cultural Convention on the rights of States to recover the art treasures and manuscripts looted from them.’

Developments in the United Nations

The Conference of Heads of State or Government of Non-aligned Countries was responsible for raising the debate in the United Nations in 1973 when the United Nations General Assembly passed the first of a series of Resolutions on the subject. Resolution 3187(XXVIII) entitled ‘Restitution of works of art to countries victims of expropriation’ referred in its Preamble to the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (UNGA 1514(XV)), and deplored ‘the wholesale

25 UNESCO Doc. SHC/MD/3 Annex, Art. 4(f).

26 UNESCO Doc. 16 C/17 Annex II, 4.

27 UNESCO Doc. SHC/MD/5 Annex II, 10.

28 UNESCO Doc. SHC/MD/5 Annex II, 10.

29 Relevant extract in Preamble to UNGA Resolution 3187 UNESCO Doc. SHC/MD/5 Annex II, 10); UNGA Doc. A/9199, 2.

30 Published in UNGA A/31/1976 Annex IV). Resolutions 17 and 24.

removal, virtually without payment, of *objets d'art* from one country to another, frequently as a result of colonial or foreign occupation' and stated that 'the restitution of such works would make good the serious damage suffered by countries as a result of such removal.'³¹ The developing States, in particular, were concerned to preserve and develop traditional cultural values, despite the adoption of scientific and technological advances. This inspired them to seek the return of important objects of their cultural heritage that had been taken from them.

Developments within UNESCO

In response to UNGA Resolution 3187 of 1973, the eighteenth General Conference of UNESCO in 1974 passed a Resolution inviting the Director-General to contribute to the work of restitution 'by defining in general terms the most suitable methods, including exchanges on the basis of long-term loans, and by promoting bilateral arrangements to that end' (Resolution 3.428).

The Recommendation also quoted the *Declaration of London* as to the right to declare certain transactions null and void and noted that the various armistice conventions following the Second World War had made provision for the return of cultural property that had been removed.

UNGA Resolution 3391 of 1975 referred to the Committee of Experts that was to study the question of restitution of works of art, organized by UNESCO and was to be held in 1976.³² The Committee in its Final Report spoke of 'restitution or return' of cultural property and related it to material 'lost either as a consequence of foreign or colonial occupation, or through illicit traffic' prior to the adoption of the 1970 Convention. It also mentioned the need of some countries to constitute small representative collections, where such did not exist because they had been deprived of the cultural and ethnographic evidence of their history. The Committee also set out six general principles that should apply in cases of restitution,³³ but in addition it proposed the setting up of a special body to consider claims for restitution or return. Its status was to be defined by an international instrument.

Establishment of the UNESCO Intergovernmental Committee

The General Conference opted for an intergovernmental body.³⁴ The Director-General then consulted ICOM which prepared, in 1977, a 'Study on the Principles, Conditions

31 Full text below in this Part, p. 27.

32 Held in Venice from 29 March to 2 April 1976, Report UNESCO Doc. SHC-76/CONF615/3.

33 Discussed in Protz and O'Keefe *op. cit.* n. 1 at 881.

34 Resolution 4.128 C4/7.6/5, Statutes available at unesdoc.unesco.org/images/0014/001459/145960e/pdf.

and Means for the Restitution or Return of Cultural Property in view of Reconstituting Dispersed Heritages' adopted at Dakar in 1978.³⁵ This key document, prepared by an *ad hoc* Committee of seven experts, two of whom had been part of the Venice Committee, made a number of significant new contributions to consideration of the issues.

Statutes for the Committee were adopted by the twentieth session of the General Conference of UNESCO in 1978. One regrettable omission was the rule suggested by the Dakar Committee that individuals selected by States to serve as their representatives 'should be particularly competent in the conception and implementation of national policies with regard to the study, preservation and presentation of cultural property or have a major say in this field.'³⁶

Despite the view of the ICOM *ad hoc* Committee that the Committee should be composed of a limited number of participants, fifteen at most, who should be individuals particularly competent in the field and include multi-disciplinary members (legal as well as strictly cultural),³⁷ the General Conference appointed twenty States (as this was now an intergovernmental committee) with no limitation as to the number of representatives from each State and with only 'due attention to the terms of reference of the Committee' (Statutes, Art. 2(5)). The name of the Committee was also changed from an intergovernmental committee 'concerning restitution or return of cultural property' to the unwieldy 'Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.' In the meantime, on 7 June 1978, the Director-General of UNESCO launched *A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It*.³⁸ This appeal had been recommended to the Director-General by the Venice Committee of Experts 1976.³⁹

The work of the Intergovernmental Committee

These two developments, the establishment of the UNESCO Committee to deal with return of cultural property and the Director-General's appeal are important, because both, on the surface, apply equally to cultural heritage items taken during hostilities and those taken during colonial times. Whatever the legality of the original taking, the emphasis here rests on allowing each country an appropriate representation of its own national cultural heritage – a desire with which, it must be said, many museum curators have sympathy.

35 ICOM, 31 *Museum* 62 1979; discussed by J.A.R. Nafziger 'The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property' 15 *New York University Journal of International Law and Politics* (1983) 789, 803.

36 UNESCO Doc. CC-78/CONF609/6 Annex I, Art. 2(6).

37 ICOM n. 32 above, 10.

38 Full text given later in this Part, p. 30

39 UNESCO Doc. SHC-76/CONF615.5, 3.

The first session of the Intergovernmental Committee was held in Paris in May 1980 and generally every two years since then.⁴⁰ An examination of the historical documents reveals how much the expectations of the committee have changed since its inception. For example, the ICOM *ad hoc* committee recommended that the Committee's mandate should be limited to a ten-year period.⁴¹ Clearly, at least one school of thought considered that this would be sufficient to clear up all the demands of the States then involved in claims. This was not written into the Statutes of the Committee, and the work of the Committee over the last thirty years indicates clearly that no special time limit can be set for this process.

The Committee has now had fourteen sessions. Its reports form an invaluable survey of UNESCO's activities in the movement of cultural property; an update on the work of the Committee and a summary of the States' acceptance of the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 and the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995, as well as those provisions of *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954 and its *Protocols* which relate to destruction and illegal removal of cultural property in times of conflict.

The 1980 Committee Report of its First Session saw the repatriation of cultural property to countries of origin as part of a much broader context of cultural interchange, preservation of traditional cultures and adaptation to development. The use of 'foreign and colonial' takings covered situations such as punitive raids and the taking of the Parthenon marbles from Greece, which were not purely colonial situations.

Over the first three sessions, the Committee concentrated on developing the Standard Form concerning Requests for Return or Restitution and the Guidelines for its operation, which it was hoped would facilitate the many requests it expected to have before it. However, there have been no more than eight Requests lodged with the Committee. Of those eight cases two have been resolved by mediation (Thailand and United States, *the Phra Narai lintel*; Jordan and the United States, *the Panel of Tyche*); two are still pending (Greece and United Kingdom, *Parthenon marbles*; Turkey and Germany, *sphinx of Bogazköy*); one has been resolved by direct return (Turkey and the Democratic Republic of Germany, *Bogazköy cuneiform tablets*); one by litigation (Ecuador and Italy, *Pre-Columbian gold*); one appears to be suspended (Iran and Belgium, *Archaeological objects from the Necropolis of Khurvin*) and one has just been received (Tanzania and Switzerland, *the Makondé mask*). Of those eight cases only three have resulted in a direct return of the object sought (*the lintel, pre-Columbian Gold, cuneiform tablets*).

From this it is clear that the Committee's primary function has not been to process requests formally made through the Standard Form procedure. Interestingly,

40 Its reports are available at <http://unesdoc.unesco.org> (Documents).

41 Report cited n.31, 10.

States that had shown the most interest in the establishment of a system of return, with the exception of Greece, have never presented a request to the Committee. For example, twelve States spoke on Resolution 3817 in UNGA in 1973: Brazil, the Byelorussian SSR, China, Greece, Iceland, Ireland, Mali, Panama, Portugal, South Africa, the United States and Zaire. With the exception of Greece, none of these twelve States has ever submitted a request to the Committee. Twelve African States sponsored the Resolution; Tanzania is the only African State ever to lodge a Request (in 2006). Very few of these twenty-four States have ever been Members of the Committee. Two of the former Chairpersons of the Committee have reflected on the reasons why so little use has been made of the Committee's request procedure.⁴² However it is to be noted that many more returns are now taking place outside the Committee due to an evolution of attitudes in many holding countries. The Committee's achievements have rather been:



The 'Phrar Narai lintel', returned to Thailand from the United States in 1988.
© Mailinh Huynh

- to try to engender an atmosphere favourable to returns by any available means,
- to advise States of ongoing claims in or out of the Committee,
- to assist them in general protection of their movable cultural property (e.g. by encouraging the making of inventories and improvements in museum structure and practice),
- to promote *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954 and its two *Protocols* (1954 and 1999), the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970, the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995, and most recently the *UNESCO Convention on the Protection of the Underwater Cultural Heritage* 2001,
- to report on the implementation of these instruments,
- to promote processes which improve their effectiveness, such as the Object-ID (simple identification of cultural objects) and the UNESCO-World Customs Organization Model Export Certificate for Cultural Property, and
- to raise awareness of the issues by contact with the media.

42 S. Stétié 'Personal Observations' in UNESCO *The Cultural Heritage of Mankind: A Shared Responsibility* (UNESCO, Paris, 1984) Annex IV; L.V. Prott 'Statement by Outgoing Chairman' 31 August 1990 to the Committee 1991.

Developments since 1978

Since the establishment of the Committee there have been important further developments. These include the work of ICOM on repatriation. ICOM responded to the development of the 1970 Convention with a revised Code of Ethics, and the issue of return has been dealt with in increasing details in the revisions ever since.

In 1993 Erica Daes, the Rapporteur on Indigenous Rights for the Commission on Human Rights, developed the Principles and Guidelines for the Protection of the Heritage of Indigenous People (updated in 2000) and in 2007 the United Nations General Assembly finally adopted the United Nations Declaration on the Rights of Indigenous Peoples. Both these documents include important provisions on return.⁴³

Meanwhile efforts to improve the treaty basis for the return of cultural property continued. The *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995 was a landmark for the harmonization of national laws on acquisition and return, discussed in some detail by Lalive in Part 4 and by Shyllon in Part 5.

Issues of return have not gone away, but continue to surface and to persevere. The spoliation revealed by the looting of Kuwait by Iraq in 1990, the looting of Iraqi museums after the Western incursion of 1991, the looting of the contents of the Croatian Museum of Vukovar by Serbia during the collapse of Yugoslavia in the same year and the looting of the Iraq National Museum in 2003 and of archaeological sites during the 'Coalition' invasion of 2003 show that the problems raised by the theft of cultural objects and the dismemberment of sites during hostilities and the complex process of finding and returning these objects are still truly with us. The history of efforts to undo the damage are likely to be relevant to museums for many years to come. Former colonies and indigenous peoples continue to assert the importance of return of certain key items of cultural property.

The year 2008 marks the thirtieth anniversary of the establishment of the Intergovernmental Committee and of the Director-General's Plea. There is evidence in the last decade of renewed interest in the subject of repatriation. There have been meetings on the subject in Nuuk (Greenland, February 2007),⁴⁴ Sydney (March 2008), and Athens (April 2008)⁴⁵ and an Extraordinary Meeting of the Committee in Seoul, Korea towards the end of 2008. The General Assembly of the United Nations has always studied the reports of the Director-General of UNESCO on the work of the Committee and passes increasingly lengthy biennial Resolutions, the latest on 30 November 2006.⁴⁶ It will consider the work of the Committee again at the 64th session of the General Assembly in November 2009.

43 Relevant extracts from both these texts will be found in Part 4.

44 Papers presented at the meeting have been published in M. Gabriel and J. Dahl (eds) *Utinut: Past Heritage-Future Partnerships. Discussions on Repatriation in the 21st Century* (Eks-Skolens Trykkeri, Copenhagen, 2008).

45 Papers to be published 2009.

46 Resolution A/RES/61/52.

Extracts from Letters to General Miranda 1796⁴⁷

A-C. Quatremère de Quincy

Editor's Note

THIS AUTHOR had an extremely important role in the developments of attitudes, principles and law on the looting and destruction of cultural property. These famous letters were meant to deter the looting of Italy by Napoleonic troops during their invasion of the Italian peninsula. They were used in efforts to have the looted art returned after 1815. Though very influential in arguments on the removal and return of cultural property, the full text has nevertheless not been translated into English. Certain passages have, however, been used in discussions in English as well as in other countries. Charles de Visscher quoted the now famous passages from Letter No. 1 in his important essays before the Second World War.⁴⁸ John Merryman has noted the closeness of the wording used by Dr. Croke in the case of the *Marquis of Somerueles* in 1813, where the judge ordered that artworks seized by a British vessel should not be allowed as prize after seizure from an American vessel at a time when the two States were at war; they should be passed to the Pennsylvania Academy of Fine Arts in Philadelphia to which they were destined.⁴⁹ Stefan Turner has discussed Quatremère de Quincy's views in German.⁵⁰ These words from Letter No. 1, reproduced below, have been interpreted to justify different positions: by John Merryman to support wider trade in cultural objects, and in the opposite sense by Stefan Turner⁵¹ and myself.⁵²

I have included not only the most famous passages from Letter 1, but also some from the other letters that are less familiar to English language readers. It is regrettable that all of the letters have not yet been translated, since they have played a seminal role in the development of controls on the movement of cultural objects and in their return to countries of origin.

47 Second edn. Rome, 1815. 3, 4–7, (Letter No. 1); 20–21 (Letter No. 2); 24–29, 31–33 (Letter No. 3); 45–46, 50–51 (Letter No. 4); 55 (Letter No. 5); 88–89 (Letter No. 7) A translation of two paragraphs was made by the United States Department of State in 1949 (Foreword by Ardelia Hall) in *International Protection of Works of Art and Historic Monuments*, (translated from a revised text of the essays by Charles de Visscher first published in the *Revue de droit international et de législation comparée* in 1939. De Visscher quoted two paragraphs of Quatremère de Quincy.) Translation of the remaining text by UNESCO.

48 C. de Visscher 'La Protection internationale des Objets et des Monuments historiques' *Revue de Droit internationale et de législation comparée* (1935), revised edition translated into English by the United States Department of State and published as 'International Protection of Works of Art and Historic Monuments,' Publication 3580 (Department of State, 1949).

49 J. Merryman 'The *Marquis de Somerueles*' 5 *International Journal of Cultural Property* (1996) 319.

50 'Die Zuordnung beweglicher Kulturgüter im Völkerrecht' [The Classification of Movable Cultural Property in International Law] in Fiedler, W. (ed.) *Internationaler Kulturgüterschutz und deutsche Frage* (Gebr. Mann, Berlin, 1991) 53 and n. 162.

51 *Ibid.* at note 162.

52 'The International Movement of Cultural Objects' 12 *International Journal of Cultural Property* (2005) 225.



Portrait of Antoine Chrysotome Quatremère de Quincy (1755–1849). Miniature by François Bonneville (1787). © National Portrait Gallery, London.

When the author spoke of the ‘museum of Rome’ and the universal republic of arts and letters in Europe, he made arguments which, in today’s globalized world, apply much more widely: to any of the old centres of monuments and civilization which have suffered, and continue to be at risk of, dismemberment. His arguments about the losses to artistic understanding, science and education by dispersal today seem as convincing for Angkor, Luxor, Djenne-Djenno, Teotihuacán or Ghandara as they were for Rome.

The Letters

The arts and sciences belong to all Europe and are no longer the exclusive property of one nation. All considerations and endeavours of philosophy and sound policy must be directed towards maintaining, furthering and enlarging this community.

It is as a member of this universal republic of the arts and sciences, and not as an inhabitant of this or that nation, that I shall discuss the concern of all parts in the preservation of the whole. What is this concern? It is a concern for civilization, for perfecting the means of attaining happiness and pleasure, for the advancement and progress of education and reason: in a word, for the improvement of the human race. Everything that can help towards this end belongs to all peoples; not one of them has the right to appropriate it for itself, or to dispose of it arbitrarily. Whosoever would lay claim to a sort of exclusive right or privilege over education and the sources of education must soon be punished for this violation of common property by barbarism and ignorance: an ignorance is in essence extremely contagious. All nations are in such close contact with one another that nothing can occur in one without immediate repercussions for all the others.⁵³

If, then, a disturbance harmful to the sources of education, a dismantling of schools of art and taste, of models of the beautiful and of instruments of knowledge, a disassembling of objects that have offered lessons to Europe, the removal of models of antiquity from their native country and the ensuing loss of all points of reference that could explain and command respect for them, the disbandment of centres of study and the spoliation of collections were, by dispersing and isolating all sources of learning, to provide Europe with nothing but the imperfect means to an incomplete and

53 First Letter 3–5. For more information see <http://quatremere.org>

fragmentary education, do you not believe that such a genuine calamity for art and science would not also come to haunt those who had been its foolhardy perpetrators?

I shall subsequently demonstrate that all manner of ignorance and barbarism can be engendered by such foolhardiness, and I trust that some quite specific evidence and some arguments that you may not be anticipating will make this assertion particularly credible. For the time being, if you will concede the bare possibility that Europe's general education might be prejudiced by the removing of models and lessons which nature, through her all-powerful will, has placed in Italy, and in Rome especially, you must also concede that a nation which was guilty of wronging Europe in this way would itself be punished by the resulting ignorance that it had called down on its neighbours and which would soon be visited on itself.

There is here a general and mutual interest of the whole in each part, as of each part in the whole; this is the public interest in its true form, where each much needs be punished for a wrong and by a wrong done to another. In this first letter I am merely adumbrating the lines of argument that will be developed in my following letters. I trust that these arguments will lead to the happy consequence that only that which is right is useful.⁵⁴

So far I have spoken of the models of antiquity only in relation to the imitative arts and their various branches. But these monuments are connected diversely, extensively and in a highly significant manner with the history of the human intellect and its discoveries, errors and prejudices, and with the sources of all human knowledge. For discovering ancient customs, religious beliefs, laws and social institutions and for correcting, verifying and interpreting history, resolving its inconsistencies, making good its omissions and casting light on its obscurities, these monuments of antique art are an even greater source of inspiration than they are to the imitative arts. Thus philosophy, history, the science of languages, an understanding of the poets, a chronology of the world, scientific astronomy, and criticism are so many different parts of what is called the republic of the arts – all with an interest in the whole. Hence, where an artist may admire the genius who endows material with life, the scholar may discover a masterpiece of astronomy, a decision at a sad juncture in history, new scientific inductions, or parallels leading to a hitherto unknown truth. It is therefore in the interests of science, no less than art, that nothing should muddy, obstruct or dry up the source of this reproduction of the treasures of antiquity.⁵⁵

I believe, my friend, that I have discoursed sufficiently in my last letter on the irreparable harm to science and art that would be occasioned by recklessly coveting the treasures of antiquity to be found in Italy and especially Rome. I have shown you that the primary consequence of plundering them would be to dry up the sources

54 *Id.* 5–7.

55 Second Letter 20–21. See the example of the Mayan Temple façade in Part 3 below.

and block the channels that daily empty the progressive tribute of new discoveries into the common pool. For discoveries, in particular, there exists a sort of magnetism, a power of attraction, whose spell we must be careful not to break. Europe should, by every means possible, further the happy restoration now taking place every day of everything that time, barbarity and war has hidden and devoured: this is the desire of true friends of the arts.

In this letter I wish to speak of another even more lamentable consequence arising out of any dispersal of the ancient monuments of Rome. You are only too well aware, my friend, that to disperse means to destroy. You require no proof that the true root of destruction is disintegration: you are too educated to entertain any doubt that dispersing the elements and materials of a science is a perfect means of destroying and killing that science. Hence, the dissolution of the museum of Rome would mean the death of all the knowledge rooted in its totality. What is antique art in Rome if not a great book whose pages have been destroyed or scattered by time and whose blanks or omissions are daily being filled by modern research? Is not a power that chooses to export and appropriate some of the most interesting of these monuments acting exactly the same as an illiterate who tears the illustrated pages out of a book?

Are these collections in every branch of knowledge then constituted for the pleasure of amassing and accumulating? Are they then nothing but a puerile display of vanity or avarice, these repositories of books, machines and natural products, which the genius of science everywhere converts into schools of nations? Why take pains to supplement them and, as far as possible, to combine in a central repository the isolated and scattered treasures of minor collections? Is it not because all these objects, brought together, explain and cast light on each other? Is it not in order that the student may have various tools of study ready to hand and catch the divergent rays of the subject that he is studying as if they were focused on a single spot? What would you think of a plan to dismember the natural history museum in Paris in order that every city in France might have its own part of this national collection?

Dismembering the museum of antiquities in Rome would be a folly of a much higher order and with a much less remediable outcome. Other collections can always be rebuilt: that of Rome cannot. The places where other collections are to be found are quite often unconnected to their branch of knowledge; the collection of Rome was placed there by the order of nature herself, which means that it cannot exist anywhere else: the country is itself part of the museum. Any other public repository of knowledge can be transferred whole: that of the antiquities of Rome can be so only in part; it cannot be moved in its entirety. It is a colossus, from which some limbs may be broken off to be carried away as fragments but whose body, like the great sphinx of Memphis, cleaves firmly to the earth. Undertaking any partial transfer of this kind is tantamount to practising a mutilation as shameful to its perpetrators as it is vain.

The arts and sciences have long formed in Europe a republic whose members, bound together by the love of and the search for beauty and truth, which form their social contract, are much less likely to isolate themselves in their respective countries than to bring the interests of those countries into closer relation, from the cherished point of view of universal fraternity.

The true museum of Rome, the museum of which I speak, is indeed composed of statues, colossi, temples, obelisks, triumphal columns, baths, circuses, amphitheatres, triumphal arches, tombs, stucco, frescos, bas-reliefs, inscriptions, ornaments, construction materials, furniture, utensils, etc.; it is no less composed though of places, sites, mountains, quarries, ancient roadways, the respective positions of ruined cities, geographical relations, the relations of all objects among themselves, memories, local traditions, customs that have persisted, parallels and rapprochements such as can be made only within the country itself.

The discovery, or more accurately, recovery of antiquity, is in fact a resurrection, as I have already told you. Before there can be the final judgement, or the final end to criticism of this kind, all these mutilated and shattered bodies must retrieve their integrity. How many figures must still be sought from the ground, or from other figures, a head, a limb, a feature, whose presence or absence makes them unrecognizable! How many removals, how many replacements there are to be made! How many ridiculous misunderstandings have such transpositions caused! We have thick books on antiquity explained, the tragedy being that attempts were made to explain it before it was explainable: I lay down as a fact, that not one hundredth part of antiquity is revealed. There is work to be done beforehand that must lead to it; it means advancing at last in this science, from the known to the unknown, which has yet to be done: analogy might finally explain everything and if not all then at least many things; but the explanation of all is the goal to which we must aim. All these monuments are for philosophy nothing but signs, intelligence of which once acquired and whole, must be of great assistance in the search for the truth.⁵⁶

Now, do tell me if we would make this work easier, by moving, exporting and scattering that which we could not make too much effort to bring together and concentrate? Does it not seem to you, on the contrary, that instead of taking away this great laboratory of working instruments, or fragments of study, it would rather be better to return to it everything that a misapprehended curiosity could remove? Would you not agree that any object displaced is a stone removed from the edifice that is being rebuilt, and that accordingly, any project to dismantle a museum of Rome is an attack on science, a crime of *'lèse-education'*?⁵⁷

56 Third letter 28.

57 *Id.* 33.

The rest of my letters will destroy, I hope, even the pretexts that might colour such a ridiculous project. For today, as I am on the chapter on science, and I have mentioned to you the science of antiquity, allow me to touch briefly on the absurd pretension of encouraging its local teaching by the means I am combating.⁵⁸

In the gloomy opposition to a dismantling of the museum of Rome, it is probable that they will endeavour to deflower its collections, that they will remove the most beautiful statues at the risk of breaking them once more. What would be the result of such division? That one would lose what the other would not gain. The museum of Rome would lose, in losing the figures that form the crowning glory of its collections, that precious addition of lessons in parallels, that produces the practical theory of beauty. The museum that would be formed elsewhere from these dismembered pieces, would not acquire the whole that can give the requisite value to these fragments. Do you not feel that you are watching Morosini, stripping the façade of the Parthenon in Athens, to take the figures to Venice? I ask you, what would these fragments signify, detached from the mass and the ensemble to which they belong? But you know too what happened: the sublime piece was broken, and the Venetian General's cupidity deprived the world of one of Phidias' works.⁵⁹

You will not doubt then that these antique statues, thus removed from their surroundings, thus torn from that setting among objects of all kinds that so enhance them, all the comparisons that enhance their beauty, do not lose under foreign skies the educational virtue that artists would seek in Rome, and that they would find in no other city of Europe. Which artist has not felt in Italy that harmonious virtue between all the *objets d'art*, and the sky that lights them, and the country that serves as their backdrop; that kind of charm that beautiful objects communicate to each other, that natural reflection that all the models of the different arts take from each other side by side in their native country? I spoke to you in my last letter of the need for this contact between all the materials of study for what is the object of science. But as to the study of the arts, of drawing, it is still with more truth that one might say that the country itself is part of the museum of Rome. What am I saying, 'is part of'? The country is itself the museum. Eh! How greatly artists regret that these treasures of sculpture cannot be found in parallel with the temples of Greece, with the monuments of antiquity! Instead of making them emigrate to hyperborean regions, what would rather be the beneficent power that would restore them to their first native land? That is where the sky, the land, the climate, the forms of nature, usages, styles of buildings, the games, the feast days, the clothing, would be still in harmony with ancient sculpture. That would be what would happen if we were allowed to hope for their removal where the wish of an artist would move them.⁶⁰

58 *Id.* 34.

59 Fourth letter 45.

60 *Id.* 50.

For the case is that, placed outside their native lands, they were stripped of that harmony that enhances; that they were stripped of that accompaniment that adorns them, of this concert of things and ideas, forms and sentiments, public admiration, affections, sympathy, which form the very atmosphere of the models of beauty.⁶¹

Yes, my friend, as I told you in my last letter, the teaching of the arts and the virtue of its lessons are related far more than one would think to that ensemble, that reunion of models, of classical monuments, assembled in each genre, and for each part of the vast domain of imitation, in this great museum called Rome. When diverting a few of these models, one must always leave the greatest number of them there, that no power would be able to remove from their soil.⁶²

It is folly to imagine that with samples brought together in a warehouse of all the schools of painting, one could ever create the same effect produced by those schools in their countries.⁶³

We could not convince ourselves that the very principle by virtue of which every nation wants to add to its collections, to provide its pupils with more numerous parallels, is precisely that principle that must prevent the increasing impoverishment of the general centre of all points of study and comparison; that the true way of becoming rich in this kind would be to return to the centre, to give back finally rather than to take; that splitting up teaching, truncating the collections, and stripping the galleries of Rome and Italy is not spreading, but dispersing the Enlightenment, is not expanding instruction, but taking it apart; is not moving it, but banning it; is not developing the tree, but cutting off its branches; is not disseminating the principles of life, but burying, as they did in Egypt, in as many tombs as cities, the members of Isis.

We would see at last as the ultimate outcome, the renewed escape of that pecuniary and mercantile interest, to which we would have sacrificed the great interests of justice, honour, philosophy and public instruction.⁶⁴

61 *Id.* 53.

62 Fifth Letter 54.

63 Sixth Letter 69.

64 Seventh Letter 69.

The 'Wiesbaden Manifesto' 1945⁶⁵

US Forces, European Theater

Germany

7 November 1945

1. We, the undersigned, Monuments, Fine Arts and Archives Specialist Officers of the Armed Forces of the United States, wish to make known our convictions regarding the transportation to the United States of works of art, the property of German institutions or nationals, for purposes of protective custody.
2.
 - a. We are unanimously agreed that the transportation of those works of art, undertaken by the United States Army, upon direction from the highest national authority, establishes a precedent which is neither morally tenable nor trustworthy.
 - b. Since the beginning of United State participation in the war, it has been the declared policy of the Allied Forces, so far as military necessity would permit, to protect and preserve from deterioration consequent upon the processes of war, all monuments, documents, or other objects of historic, artistic, cultural, or archaeological value. The war is at an end, and no doctrine of 'military necessity' can now be invoked for the further protection of the objects to be moved, for the reason that depots and personnel, both fully competent for their protection, have been inaugurated and are functioning.
 - c. The Allied Nations are at present preparing to prosecute individuals for the crime of sequestering, under the pretext of 'protective custody' the cultural treasures of German-occupied countries. A major part of the indictment follows upon the reasoning that even though these individuals were acting under military orders, the dictates of a higher ethical law made it incumbent upon them to refuse to take part in, or countenance, the fulfilment of these orders. We, the undersigned, feel it our duty to point out that, though as members of the armed forces, we will carry out the orders we receive, we are thus put before any candid eyes as no less culpable than those whose prosecution we affect to sanction.
3. We wish to state that from our own knowledge, no historical grievance will rankle so long, or be the cause of so much justified bitterness, as the removal, for any reason, of a part of the heritage of any nation, even if that heritage may be interpreted as a prize of war. And though this removal may be done

65 Reproduced in E. Simpson (ed.) *The Spoils of War* (Abrams and Bard Graduate Centre, New York, 1997) 133.

with every intention of altruism, we are none the less convinced that it is our duty, individually and collectively, to protest against it, and that though our obligations are to the nation to which we owe allegiance, there are yet further obligations to common justice, decency, and the establishment of the power of right, not of expediency or might, among civilized nations.

Signed by 32 of the 35 members of the MFAA

United Nations General Assembly Resolution 3187 (XXVIII) 1973. Restitution of works of art to countries victims of expropriation

The General Assembly,

Aware of the paramount aims of the United Nations and particularly of its faith in fundamental human rights and in the dignity and worth of the human person,

Recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁶⁶

Considering the conclusions of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers from 5 to 9 September 1973, particularly paragraph 18 of the Political Declaration,⁶⁷

Noting with interest the work of the third Congress of the International Association of Art Critics held at Kinshasa-N'Sélé, Zaire, from 14 to 17 September 1973,

Recalling the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its sixteenth session, on 14 November 1970,

Stressing that the cultural heritage of a people conditions the present and future flowering of its artistic values and its over-all development,

Convinced that the promotion of national culture can enhance a people's ability to understand the culture and civilization of other peoples and thus can have a favourable impact on international co-operation,

⁶⁶ Resolution 1514 (XV).

⁶⁷ A/9330 and Corr.1, p. 9.

Deploring the wholesale removal, virtually without payment, of *objets d'art* from one country to another, frequently as a result of colonial or foreign occupation,

Convinced that the restitution of such works would make good the serious damage suffered by countries as a result of such removal,

1. *Affirms* that the prompt restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts and documents by another country, without charge, is calculated to strengthen international cooperation inasmuch as it constitutes just reparation for damage done;
2. *Recognizes* the special obligations in this connection of those countries which had access to such valuable objects only as a result of colonial or foreign occupation;
3. Calls upon all the States concerned to prohibit the expropriation of works of art from Territories still under colonial or alien domination;
4. *Invites* the Secretary-General, in consultation with the United Nations Educational, Scientific and Cultural Organization and Member States, to submit a report to the General Assembly at its thirtieth session on the progress achieved.

2206th plenary meeting, 28th Session, 18 December 1973

Comments on the Establishment of the Committee⁶⁸

J. Specht

THE UNESCO INTERGOVERNMENTAL COMMITTEE (IGC) to promote the return of cultural items resulted from two meetings of experts in 1976 and 1978, and a study by ICOM.

I attended the 1978 meeting in Dakar, which was charged with preparing draft Statutes of the Committee for submission to the Director-General and the General Assembly of UNESCO. In reality, the meeting did not draft the Statutes, but reviewed and modified slightly a set derived from the 1976 and ICOM deliberations and from the UNESCO Secretariat. Given the ideological gulf between participants of opposed political persuasions, it would have been impossible for the meeting to develop draft Statutes from scratch in the time available. The prepared version that it considered reflected a strongly European-centred view that found little support

⁶⁸ Extract from book review 15 *International Journal of Cultural Property* (2008) of A.F.Vrdoljak. *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, Cambridge, 2006). Extracts from text of this book below in Part 3.

among some participants and it was remarkable that the meeting completed its work. The final form of the Statutes, the deficiencies of the Committee's operations and its use of 'State,' 'nation' and 'peoples' as if they are interchangeable reflect, to my mind at least, the extreme difficulty of operating effectively in an environment where strongly opposed views and values have to be accommodated by compromise.

The concepts employed in the international legal instruments and their analysis are culturally constructed and mostly derived from the Western intellectual tradition. They do not have automatic universality, until and unless member States of the various international bodies agree on what they mean and how they should be used. Such agreement is clearly some distance away, even without considering indigenous minorities in settler States.

A View in 1981 on the Founding of the Committee

G. Lewis

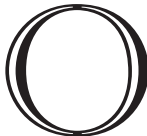
IT IS, IN MY VIEW, regrettable that it has been found necessary to establish the Intergovernmental Committee even though it only has advisory status. There is very considerable rapport between museums throughout the world both through the medium of ICOM and directly between institutions. The existence of the Committee does not, of course, prevent arrangements being made between museums and I believe that this method is to be preferred. I consider that the role of the Committee should be no more than a 'safety net' because reference to it will inevitably imply that the additional legal and political considerations involved in any transactions undertaken through its aegis have necessarily been forced on the parties concerned.⁶⁹

The report, *Return of Cultural Property to Their Countries of Origin: Bangladesh, Mali, Western Samoa – A Preliminary Survey of Three National Situations* (ICOM), drawn up in 1977, is a key document in the development of the issue of reconstituting dispersed heritages. The full text is found below in Part 3 under the section entitled Colonial Contexts.

69 G. Lewis 'Lost Heritage: Some Historical and Professional Considerations' in I. Staunton and M. McCartney (eds) *Lost Heritage: Report of the Symposium on the Return of Cultural Property held at the Africa Centre, London, 21 May 1981* (Commonwealth Arts Association, London, 1981) 7. Lewis was also a member of the committee working on its founding documents. See also his recent article 'A Debated Museum Concept: partnership in universality' 224 *Museum International* (2004) 40.

A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It⁷⁰

A-M. M'Bow

 ONE OF THE MOST NOBLE INCARNATIONS of a people's genius is its cultural heritage, built up over the centuries by the work of its architects, sculptors, painters, engravers, goldsmiths and all the creators of forms, who have contrived to give tangible expression to the many-sided beauty and uniqueness of that genius.

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

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

The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better.

Today, unbridled speculation, fanned by the prices prevailing in the art market, incites traffickers and plunderers to exploit local ignorance and take advantage of any connivance they find. In Africa, Latin America, Asia, Oceania and even in Europe, modern pirates with substantial resources, using modern techniques to satisfy their greed, spoil and rob archaeological sites almost before the scholars have excavated them.

The men and women of these countries have the right to recover these cultural assets which are part of their being.

They know, of course, that art is for the world and are aware of the fact that this art, which tells the story of their past and shows what they really are, does not speak to them alone. They are happy that men and women elsewhere can study and admire the work of their ancestors. They also realize that certain works of art have for too long played too intimate a part in the history of the country to which they were taken for the symbols linking them with that country to be denied, and for the roots they have put down to be severed.

These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish.

This is a legitimate claim; and UNESCO, whose Constitution makes it responsible for the preservation and protection of the universal heritage of works of art and monuments of historic or scientific interest, is actively encouraging all that needs to be done to meet it.

The return of cultural assets to their countries of origin nevertheless continues to pose particular problems which cannot be solved simply by negotiated agreements and spontaneous acts. It therefore seemed necessary to approach these problems for their own sake, examining both the principle underlying them and all their various aspects.

This is why, on behalf of the United Nations Educational, Scientific and Cultural Organization which has empowered me to launch this appeal, I solemnly call upon the governments of the Organization's Member States to conclude bilateral agreements for the return of cultural property to the countries from which it has been taken; to promote long-term loans, deposits, sales and donations between institutions concerned in order to encourage a fairer international exchange of cultural property, and, if they have not already done so, to ratify and rigorously enforce the Convention giving them effective means to prevent illicit trading in artistic and archaeological objects.

I call on all those working for the information media – journalists of press and radio, producers and authors of television programmes and films – to arouse worldwide a mighty and intense movement of public opinion so that respect for works of art leads, wherever necessary, to their return to their homeland

I call on cultural organizations and specialized associations in all continents to help formulate and promote a stricter code of ethics with regard to the acquisition and conservation of cultural property, and to contribute to the gradual revision of codes of professional practice in this connection, on the lines of the initiative taken by the International Council of Museums.

I call on universities, libraries, public and private art galleries and museums that possess the most important collections, to share generously the objects in their keeping with the countries which created them and which sometimes no longer possess a single example.

I also call on institutions possessing several similar objects or records to part with at least one and return it to its country of origin, so that the young will not grow up without ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors.

I call on the authors of art books and on art critics to proclaim how much a work of art gains in beauty and truth, both for the uninitiated and for the scholar, when viewed in the natural and social setting in which it took shape.

I call on those responsible for preserving and restoring works of art to facilitate, by their advice and actions, the return of such works to the countries where they were created and to seek with imagination and perseverance for new ways of preserving and displaying them once they have been returned to their homeland.

I call on historians and educators to help others to understand the affliction a nation can suffer at the spoliation of the works it has created. The power of the fait accompli is a survival of barbaric times and a source of resentment and discord which prejudices the establishment of lasting peace and harmony between nations.

Finally, I appeal with special intensity and hope to artists themselves and to writers, poets and singers, asking them to testify that nations also need to be alive on an imaginative level.

Two thousand years ago, the Greek historian Polybius urged us to refrain from turning other nations' misfortunes into embellishments for our own countries. Today when all peoples are acknowledged to be equal in dignity, I am convinced that international solidarity can, on the contrary, contribute practically to the general happiness of mankind.

The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.

The Nigerian Bronzes Case (*Allgemeine Versicherungsgesellschaft v. EK*)⁷¹

ANIGERIAN COMPANY had entered into an insurance contract with a German company covering the transport by sea of three African masks and six statues from Port Harcourt (Nigeria) to Hamburg. The contract was in breach of a Nigerian prohibition on the export of cultural objects. The plaintiff was seeking damages for the loss of six bronze statues.

German law will not enforce a contract contrary to public policy. In this litigation the German Federal Court held that a prohibition in the German *Civil Code* of contracts contrary to public policy included ‘international public policy.’


The court considered the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 and found that this represented the emerging international public policy on the issue. Therefore, even though the Federal Republic of Germany was not a party to the Convention, the German court held that the contract was unenforceable in Germany since, it said, ‘the export of cultural property contrary to a prohibition of the country of origin for that reason merits, in the interest of maintaining proper standards for the international trade in cultural objects, no protection from the civil law.’ Furthermore, it held that the disregard, which was both customary and tolerated in earlier times, of the desire of other nations to keep their cultural treasures, could not be regarded as the contemporary standard for public policy as to the enforcement of contracts.

Editor’s note

This and the following Swiss case are evidence of an interesting development in public attitudes to the major international treaties concerning the protection and return of cultural objects. In the German case the court found in 1972 that the 1970 UNESCO Convention represented ‘emerging public policy,’ even though Germany was not then a party to that Convention (Germany did not ratify the Convention until 2007). In the Swiss case set out below the court held in 1997 that the 1970 Convention and the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995 represented a significant international interest, though Switzerland only became a party to the 1970 Convention in 2003. It signed the UNIDROIT Convention in 1995, but has not yet ratified it.

⁷¹ BGHZ 59, 82 (1972) 86–87. Slightly modified from L.V. Prott and P.J. O’Keefe *Law and the Cultural Heritage: Vol. III – Movement* (Butterworths, London, 1989) 659.

*L. v. Indictment Chamber of the Canton of Geneva: Extracts from the Judgement*⁷²

 ON 13 DECEMBER 1994, the investigating judge at the Regional Court in Grasse requested mutual judicial assistance from the Federal Police Office for the purposes of the criminal investigation underway in France in respect of the theft of a painting by Desportes. The French judge requested investigation into various matters and seizure of the painting.

On 13 June 1996, the investigating judge in Geneva ordered that the painting and records of evidence taken from the persons questioned during his investigation be handed over to the French authorities.

By an order dated 1 November 1996, the Indictment Chamber of the Canton of Geneva rejected the appeal lodged by L. against the decision of 13 June 1996.

Filing on 16 December 1996 an appeal under administrative law, L., as the main issue, petitioned the Federal Court to quash the order of 1 November 1996 and to declare the request for mutual assistance ‘null and void.’ As the subsidiary issue, he called for the painting in issue not to be returned to the requesting State.

The Federal Court rejected the appeal.

Extracts from the arguments on the merits:

1. (a) The Swiss Confederation and the French Republic are both Parties to the European Convention on Mutual Assistance in Criminal Matters (CEEJ; RS 0.351.1), concluded at Strasbourg on 20 April 1959, which entered into force on 20 March 1967 in respect of Switzerland and on 21 August 1967 in respect of France.
5. It is established that the painting in issue is indeed that belonging to W., which was stolen on the night of 24 to 25 August 1994 from the Château de Clavary.
6. According to the Indictment Chamber, the appellant’s contention that he had purchased the painting in issue in good faith had not been convincing. It considered that, at the time of the purchase, the appellant, an experienced businessman and art connoisseur, was not concerned about the authenticity or the provenance of the painting; furthermore, the appellant had taken the risk of dealing with persons unknown, and had sought to ascertain that the paint-

⁷² First Public Law Division, 1 April 1997, appeal under administrative law *ATF* (Federal Court Orders) 123 II 134, 135, 141 and 143–44.

ing had been lawfully imported into Switzerland only on 19 December 1994, after the conclusion of the transaction and payment of the agreed price.

(c) It is for the purchaser to convince [the Court] of his good faith. The burden of proof of entitlement lies on the purchaser. The authority in charge of executing the mutual assistance measure and required to decide on handing over an object with a view to its restitution in the requesting State, merely investigates whether the purchaser's allegations are sufficiently precise and substantiated to admit the plausibility of his claims.

(d) (In view of all of the circumstances of the case, the Indictment Chamber found that the appellant had not adduced the requisite proof. The appellant had not proven that he had taken, before the transaction, the elementary precautions that a prudent person must take when purchasing a work of art of great value. In particular, he had not shown that he had taken in due time all steps necessary to ascertain the origin of the painting and its lawful import into Switzerland; he had not had the work examined by an expert, who could have certified its provenance, nor had he taken appropriate steps to check that the work had neither been stolen nor lost. Furthermore, the actual conditions of the transaction, including the sale price – far below the value of the painting – did not give credence to the appellant's contention.)

7. (a) As W. is the rightful owner of the stolen painting, there was no mandatory requirement to await the outcome of the criminal proceedings instituted in the requesting State in order to effect restitution to the person entitled.

(c) Lastly, it is not for the judge executing a mutual assistance measure to examine in depth purportedly applicable prescriptions of foreign law. If, as in the present case, the claim is for the restitution of an item of cultural property, the judge executing the mutual assistance measure must take into account the shared public international interest of Switzerland and France in protecting such property (see, in addition to Convention No. 141 mentioned above, in respect of France: Articles 1 (g), 2, 3, 13 and 15 of the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, adopted on 14 November 1970, and ratified by France on 7 January 1997; in respect of France and Switzerland, Articles 3 (1), 4, 5 (1), 6, 8 and 9 of the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, adopted on 24 June 1995, and signed by France and Italy in Rome on that date and by Switzerland on 26 June 1996). These standard-setting texts, drawing on the same source, all give expression to an existing or emerging international public policy (Article 1(a) EIMP;⁷³ see

73 Editor's note: EIMP (Loi fédérale sur l'entraide internationale en matière pénale) [Swiss federal law on international mutual assistance in criminal matters].

Martin Philip Wyss, 'Rückgabeansprüche für illegal ausgeführte Kulturgüter. Überlegungen zu einem kulturpolitischen *Ordre public*' ['Restitution Claims for Illegally Exported Cultural Objects. Considerations on Public Policy in Cultural Politics' (ed.)] in: *Tübinger Schriften zum internationalen und europäischen Recht*, Band 37, Berlin, 1996 p. 201 et seq., 206–08, 214 and 220 et seq.; see also Pierre Lalive, 'The *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*' (of 24 June 1995), *RSDIE*⁷⁴ 7/1997 p. 13 et seq., in particular p. 32/33 and 35–40, which lay particular emphasis on this instrument's shared parentage with Swiss law and practice on the subject; Article 3, paras. 2 and 934 CC; *ATF* 122 III 1). These standard-setting texts, which give substance to the need for effective international action to combat trafficking in cultural property, also make it possible to safeguard the procedural guarantees required to protect the legitimate interests of the *bona fide* possessor.

74 *Revue suisse de droit international et européen (RSDIE)*.

United Nations Security Council Resolution 1483 of 22 May 2003 on the Situation in Iraq and Kuwait

This lengthy resolution includes the following paragraph 7:

Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of Resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and *calls upon* the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.

Editor's note

This is the first time that the United Nations Security Council, whose decisions bind all Member States, has taken decisive action against illicit traffic and has required its Member States specifically to return cultural objects.

In pursuance of this resolution a number of States have banned import of such goods and others are using existing customs powers to seize and return them. For example, Switzerland and the United Kingdom have done so. Australia passed the *Iraq (Reconstruction and Repeal of Sanctions) Regulations* in May 2003 to implement this Resolution. On 7 December 2004 the US Congress passed the *Emergency Protection for Iraqi Cultural Antiquities Act* pursuant to which the President may exercise his authority under the *Cultural Property Implementation Act* (CPIA), the US's legislation implementing the 1970 UNESCO Convention, without the need for Iraq to bring a request to the US for import restrictions.

ILA Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material 2006⁷⁵

Preamble

Conscious that cultural material forms a part of the world heritage and should be cherished and preserved for the benefit of all;

Taking into account the significance of cultural material for cultural identity and diversity as well as of territorial affiliation;

Reaffirming the link between culture and sustainable development;

Being aware of the significant moral, legal, and practical issues concerning requests for the international transfer of cultural material;

Convinced of the need for a collaborative approach to requests for transfer of cultural material, in order to establish a more productive relationship between and among parties;

Emphasizing the need for a spirit of partnership among private and public actors through international cooperation;

Also emphasizing the need for a cooperative approach to caring for cultural material;

Expressing the hope that these Principles will provide an incentive for improving collaboration in the mutual protection and transfer of cultural material;

Recognizing as well the need to develop a more collaborative framework for avoiding and settling disputes concerning cultural material;

Building on current practice when articulating the following Principles to facilitate non-confrontational agreements:

1. Definitions

- (i) 'Requesting party' or 'requesting parties' refers to persons; groups of persons; museums and other institutions, however legally constituted; and governments or other public authorities that request the transfer of cultural material.
- (ii) 'Recipient' or 'recipients' refers to States, museums, and other institutions that receive a request for the transfer of cultural material.

⁷⁵ Adopted by Resolution No. 4/2006 on the Recommendation of the Cultural Heritage Law Committee by the 72nd Conference of the International Law Association, held in Toronto, Canada, 4–8 June 2006. Text and discussion in *Report of the Seventy-Second Conference, Toronto, 2006* (ILA, London, 2006) 337. Explanatory notes on each of these principles are also to be found in that report.

2. Requests and Responses to Requests for the Transfer of Cultural Material

- (i) A requesting party should make its request in writing, addressed to the recipient, with a detailed description of the material whose transfer is requested, including detailed information and reasons sufficient to substantiate the request.
- (ii) A recipient shall respond in good faith and in writing to a request within a reasonable time, either agreeing with it or setting out reasons for disagreement with it and, in any event, proposing a timeframe for implementation or negotiations.
- (iii) In the event of disagreement, the requesting party and recipient shall enter into good-faith negotiations concerning the cultural material at issue in accordance with principle 8.

3. Alternatives to the Transfer of Cultural Material

- (i) Museums and other institutions shall develop guidelines consistent with those of the International Council of Museums (ICOM) for responding to requests for the transfer of cultural material. These guidelines may include alternatives to outright transfer such as loans, production of copies, and shared management and control.
- (ii) Museums and other institutions shall prepare and publish detailed inventories of their collections, with the assistance of ICOM and other sources when they lack sufficient resources of their own to do so.
- (iii) Whenever a substantial portion of the collection of a museum or other institution is seldom or never on public display or is otherwise inaccessible, that museum or other institution should agree to lend or otherwise make available cultural material not on display to a requesting party, particularly a party at the place of origin, in the absence of compelling reasons to the contrary.

4. Cultural Material of Indigenous Peoples and Cultural Minorities

Consistent with the rights of indigenous peoples under the *United Nations Draft Declaration on the Rights of Indigenous Peoples*⁷⁶ and cultural minorities, recipients recognize an obligation to respond in good faith to a request for the transfer of cultural material originating with indigenous peoples and cultural minorities.

⁷⁶ Extracts from this document will be found in Part 4, p. 353.

This obligation applies even when such a request is not supported by the government of the State in whose territory the indigenous peoples or cultural minorities are principally domiciled or organized.

5. Human Remains

Museums and other institutions possessing human remains affirm their recognition of the sanctity of such material and agree to transfer such material upon request to any requesting party who provides evidence of a close demonstrable affiliation with the remains or, among multiple requesting parties, the closest demonstrable affiliation with the remains.

6. Registers of Cultural Material

- (i) All State museums and other institutions that hold or control holdings or collections of cultural material shall take steps to establish inventories and a register of such material. The register may take the form of a database of information that is available to interested parties.
- (ii) Museums and other institutions should submit annual reports of the information recorded in these registers for general publication to any national services that are established to manage and protect cultural material.
- (iii) A national service responsible for the maintenance of a State register, in a separate section of such register, shall record all inquiries by identifying the name of the party making the inquiry, the cultural material involved, and the response of the museum or institution concerned. Every three years each such national service shall submit up-to-date copies of registered items to the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in order to facilitate accessibility.
- (iv) Each register shall be made available to any requesting party that is interested in the transfer of cultural material, so as to help identify the location and provenance of such material and to facilitate claims.

7. Notification of Newly Found Cultural Material

Persons, groups of persons, museums, and other institutions possessing significant, newly-found cultural material should promptly notify appropriate government authorities, communities, and international institutions of their finds, together with as complete as possible a description of the material, including its provenance.

8. Considerations for Negotiations Concerning Requests

Good-faith negotiations concerning requests for transfer of cultural material should consider, *inter alia*, the significance of the requested material for the requesting party, the reunification of dispersed cultural material, accessibility to the cultural material in the requesting State, and protection of the cultural material.

9. Dispute Settlement

If a requesting party and a recipient are unable to reach a mutually satisfactory settlement of a dispute related to a request within a period of four years from the time of the request, upon a request of either party, both parties should submit the dispute to good offices, consultation, mediation, conciliation, *ad hoc* arbitration, or institutional arbitration.

10. Other Rights and Obligations

Nothing in these Principles should be interpreted to affect rights enjoyed by the parties or obligations otherwise binding on them.

Part 2

Philosophy and Ethics

Editor's Preliminary Note

THE TWENTY-FIRST CENTURY has seen renewed interest in the resolution of disputes over important cultural items. Undoubtedly some of this has been brought about by the effort to finally resolve a process begun in 1943 to undo the spoliations directed by the Nazi authorities during the Second World War. Appeals to conscience and ethical standards were heard and listened to during the 1990s and efforts made in a number of countries to properly trace the origins of claimed works and to return or compensate when it was proven, or even probable, that works had been acquired where the provenance should have been more closely examined.

This revived conscience has also been invoked by communities and nations which feel that they have been wrongfully deprived of some of their most important cultural icons. The great holding museums, mainly in the North and the West, which were alarmed in the 1960s that such claims would 'empty the museums of Europe,' at that time advanced a principle known as 'the primacy of the object,' according to which they argued that many claimants did not have the resources to ensure an object's long-term survival, and this would lead to alarming cultural losses to the detriment of all humanity. Such arguments are much less powerful today.

States which were formerly colonized and indigenous communities living in countries where they are minorities are renewing many claims and feel that the ethical sensitivity shown in the case of the wartime spoliations should also be applied to them. In response a new argument has been made that there are certain museums which have a 'universal' (perhaps more accurately described as an 'encyclopaedic') vocation to show the widest possible range of cultures in their collections and that their collections should therefore be somehow protected against such claims. This

debate has led to a lively exchange of views and the extracts below are designed to give all points of view.

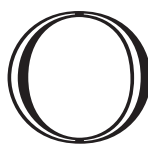
It is of interest to consider that these sorts of issues were already well rehearsed in discussions after the First World War between Austria and Hungary at the breakup of the Dual Monarchy and the provision in the Peace Treaties, mentioned in Part 1, for the return of cultural objects. At that time Austria argued for the ‘intellectual heritage’ of the Habsburg collections, Hungary for the return of artworks, royal regalia and armaments that were essentially linked to its history. After twelve years of negotiation they reached a compromise that ensured that Hungary retrieved the most important items it was seeking, in return for conceding the Austrian claim for preserving the integrity of the rest of its collections.¹

The discussions currently under way are likely to bring forward new ethical stances.

1 H. Tietze ‘L’Accord austro-hongrois sur la répartition des collections de la Maison des Habsbourg’ 23–24 *Museion* (1933) 92.

Museums, Memory and Universality

UNESCO Forum on Memory and Universality, UNESCO Headquarters, Paris, 5 February 2007²

 ON 5 FEBRUARY 2007, UNESCO held a Forum on Memory and Universality at its Headquarters in Paris. It included experts from various disciplines, listed in the Introduction by the Moderator, Françoise Rivière, Assistant Director-General for Culture, UNESCO.

Address by the Director-General of UNESCO, Koïchiro Matsuura

Excellencies, Ladies and Gentlemen,

I am delighted to welcome you this evening to a *MUSEUM International* public debate on the topic of memory and universality. I am particularly glad to welcome to UNESCO Headquarters exceptionally distinguished guests and leading players in cultural heritage safeguarding and promotion policies. The theme of this evening's meeting, it is true, is extremely important. It requires the close attention and imagination of each and every one of us and, even more, open-mindedness and generosity on our part. The two issues implicit in the title – the accessibility of cultural memory through works of art and history and the universal dissemination of cultures – may once have seemed a contradiction in terms. They have for many long years been tainted with the painful history of mass transfers of works during periods of warfare and colonial occupation. The international community was able to put an end to these violent practices, unworthy of humankind, by enacting a legislative framework which, since it has been put in place, has continued to engender positive effects in terms of professional practices, public opinion and awareness.

But this is not enough. We cannot be content with talk of equality, while others talk of legitimacy, while some make appeals for the rebuilding of cultural memories, memories doubly shattered by history and the displacement of heritage. Similarly, it is necessary to guarantee the universal dissemination of the meaning and values related to the works and to provide access to them in the best conditions and with utter conviction. It was with this in mind that, in 1978, UNESCO set up the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of

2 This meeting was organized by I. Vinson, Editor-in-Chief, *MUSEUM International*, UNESCO.

Origin or its Restitution in Case of Illicit Appropriation. This Committee, which was intended to facilitate bilateral negotiations, has had some success. Its capacity for action was recently strengthened by the creation, in 1999, of an International Fund to help countries mount the operations pertaining to the return of works. To date, the International Committee is still the only machinery for international discussion in existence.

It is in this same spirit of fostering opportunities for talks, finding new fora for dialogue in accordance with the intellectual watch function of our Organization that we decided to hold a public debate on the transfer and accessibility of works of art. We all know what a thorny topic this is. No aspect should be neglected. That is precisely why, amongst our guests here this evening, we have representatives of various regions, practices and backgrounds, as well as representatives of the three communities which are essential in representing heritage policies: academics, professionals and politicians. Henceforth, we must all be more serious about listening to our differences and entering into dialogue, in short, about devising new ways to cooperate. I am confident that the debate will broaden everyone's perspectives. Thank you for your attention.

Françoise Rivière, Assistant Director-General for Culture: Introduction

Thank you, Director-General. This is the second public debate we have held in connection with *MUSEUM International*. *MUSEUM International*, as you will be aware, is one of UNESCO's specialized publications. The object of the exercise, drawing on one of UNESCO's essential functions, is to provide a platform where stakeholders, who may have conflicting interests, can come together and voice their opinions with a view to moving matters forward or finding common ground. The aim therefore is not to reach conclusions. The debate should be free-ranging and bring together the representatives of the main communities with a stake in this difficult dilemma where, on the one hand, some so-called 'source' countries and some communities request access to or return of works produced within those communities and, on the other hand, some countries and some institutions like the great museums which claim to be 'universalist,' hold a considerable number of these works and seek to make them available for viewing to as wide a public as possible.

So why hold this debate? Probably because UNESCO believes that there is already a number of achievements to our credit, thanks to action the Organization and some of the people who work with it have taken. In particular, I am thinking of the fact that trafficking is now recognized as bad and to be combatted by all concerned, including governments and major museums. Hence the issue on hand is not one of law, nor one of legality but rather, as the Director-General put it, one of legitimacy. It is no longer a matter of establishing who owns a work but rather who has a right of access to the work which is part of their memory and will enable them to build their identities.

We have attempted to gather together for this round table the representatives of the major communities who have an interest in this debate. Firstly academics and researchers, and to represent them we have called upon a historian many of you will know, Krzysztof Pomian, who is a philosopher and a historian and particularly well placed to talk about museums as he is currently Director of Research at the Museum of Europe in Brussels. He will be called upon doubly as a historian this evening, firstly because issues of memory and history are highly topical amongst historians at the moment – who are taking serious account of public opinion – and, secondly, because he is a historian of heritage and cultural objects, and studies the role of these objects in building collective destinies and from a national perspective.

Besides the academics, we welcome another community, that of the major museums, most of which are located in what is commonly known as the ‘North’ and which style themselves as universalist museums because they display collections which represent cultural universality. We are honoured to have three such representatives this evening; they are: Neil MacGregor, Director of the British Museum; Mikhail Piotrovsky, Director of the Hermitage; and Henri Loyrette, Director of the Louvre.

And then there is a third category of actors, museum professionals who are represented tonight by that great non-governmental museum organization, the International Council of Museums (ICOM), in the person of its president, Alissandra Cummins, and also by the chairperson of the ICOM Ethics Committee, Bernice Murphy, who will be talking to us about the progress made by ICOM on ethics and deontology.

And there is yet a fourth category of actors, namely the representatives of the museums of the so-called ‘source’ countries, in particular, countries of the South, and, for Latin America, we have called upon Antonio Valdés, who is professor of archaeology at San Carlos University in Guatemala and who is also the former director of Guatemala Cultural Heritage; and we have Alain Godonou who is Director of the Porto Novo School of African Heritage in Benin, which trains most of the western African curators. From North America, we have Richard West who is Director of the National Museum of the American Indian, which comes under the Smithsonian Institution in Washington DC.

We were also expecting a participant from Asia, namely the director of the Seoul Fine Arts Museum in Korea, Ms Hongnam Kim who, we were informed at the last minute, is unable to be with us this evening and whom we have been unable to replace.

We have representatives from these four communities who are the main stakeholders in this debate which certainly will be of growing concern to UNESCO and require action upon its part.

I suggest we first hear briefly from a representative of each community; we can allow them 8 to 10 minutes speaking time, and then we can give the others an opportunity to react to what they have heard. Our panelists will thus be able to debate with the keynote speakers who opened the debate. After that, in the remaining time, they can enter into a dialogue with the audience because, and I again stress this, UNESCO is merely the moderator with the job of trying to gradually, after having heard all the points of view, help a position emerge which in the long run may strengthen international solidarity and cooperation.

Let us begin with the historian Krzysztof Pomian.

Krzysztof Pomian

Any work of art, irrespective of its current legal status, is virtually public in nature. For any given work, to be public in nature means that it is likely to arouse interest, curiosity among people, cause a scandal, be at the heart of a controversy, lead to comment, or give rise to displays of enchantment or, on the contrary, to condemnation and so forth.

A work which arouses public interest should belong to the public, the term public being related to a historical and geographically variable content which I shall not enlarge upon here.

Belonging to the public has at least two meanings: to be the property of a legal entity whose immortality will reputedly secure the work in perpetuity, the State or a territorial community for instance; or to be on display to the public in accordance with conservation rules whereby the work shall retain its integrity into the indefinite future. The corollary to this is that the owner of a work which is of interest to the public cannot dispose of it as he sees fit, even where no penal restrictions obtain; he is under strong social pressure, for his reputation is at stake. Only a small fraction of works intended to be public effectively become public, the choice depending in varying degrees on the quality of the works and their history including the personalities and fame of their authors or patrons, the circumstances in which they were created, the way their intended recipients responded to them, their fate over time and space from their inception to today.

Only works which are truly public in nature properly pertain to cultural heritage. The remainder merely aspire to that status and may achieve it, sometimes in the most unexpected circumstances.

Who owns cultural heritage? Can one properly speak of the cultural heritage of a particular people or is there only the one cultural heritage of humanity? Professor Appiah recently made a stunning defence, as is his wont, of the second contention.

He maintains that works are not created by peoples but by individuals, that they are not intended for peoples but for individuals. He draws the conclusion that peoples have no part in this business and that there is no good reason to assign them a cultural heritage which, as Professor Appiah sees it, is purely cosmopolitan in scope.³

These few sentences constitute a simplified version of a more nuanced position; they do serve to contrast the position, I think I rightly ascribe to Professor Appiah, and my own which merely stems from my opening considerations. My position can be summed up as follows: over and beyond the immediate recipients, a work is directed at a virtually unlimited audience; a work cannot be treated properly in isolation from its history and from the significance ascribed to it along the way.

Of the works which can be deemed to be public in nature, some carry meanings which have forged a strong link between these works and the group with which they have been associated. They are, or it is thought that they are – either way it is irrelevant – related to crucial or, at least, important events in the group's past. They illustrate genuine or legendary traditions. They acquire the dignity of emblems, symbols, relics. In a word, they become the visible medium for the identity of the group concerned which is reflected in the care lavished on them, the ceremonies in which they are paraded and, above all, the memory in which they are held when wrested from the group by a foreign power.

Besides such works there are others with which the group has weaker links. In fact, we are looking at a gradation of works ranging from ones that seem like members of the group, seem to truly belong to it and arouse very strong passions, to ones which evoke much more short-lived flurries of interest or even indifference. It is, then, the whole gradated range of works which make up the cultural heritage of religious or ethnic groups and, in particular, the cultural heritage of nations. This in no way implies that such works are alien to other groups, who may be sensitive to the appearance or to the meanings vested in them, not to mention the many works that have passed through the hands of various groups and are hence part of several histories. In this sense, as the preamble to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954 provides, damaging cultural property, irrespective of the group to which it belongs, is tantamount to damaging the cultural heritage of all of humankind since each people makes a contribution to world culture. Professor Appiah also quotes this passage but he construes it differently. I refer you to his paper.

The subject just discussed is far from academic, for many works have come a long way from the place where they originated, legally in the same people's eyes, in breach of the law in the view of others. It is only when the concept of national cultural heritage reflects something real that the protection issue takes on national proportions

3 Extracts from Appiah's book *Cosmopolitanism* are presented later in this Part.

and, hence, that the State becomes involved. Thereon hangs the legitimacy of demands for restitution or return of property to despoiled countries. Currently, in Europe, the restitution issue applies to the Parthenon marbles claimed by Greece and relates to works pillaged during the Second World War and not restored to the public and private collections to which they originally belonged, and also to the aftermath of colonialism.

The latter now exercise us a good deal. The matter is complex and has to be considered from several points of view: from strictly museological, as well as from legal, political and ethical angles.

From the strictly museological standpoint, when considering the future fate of works, one could at the very least set (as a sort of minimum requirement) conservation as an absolute, and absolute is the operative word, priority. There is no point in returning works if they are subsequently likely to irreparably deteriorate or to end up in private collections on another continent. Let me make myself clear; this is not a valid argument for opposing return or restitution. It is merely that this should only happen where one can reasonably expect that the conditions required for the conservation of works in their present condition for a long enough period can be met. I cannot cite examples to illustrate my point for lack of time.

Not being a lawyer, I can only make one remark on legal considerations: the law cannot operate retroactively. In other words, one cannot judge situations of several centuries ago in the light of legal rules introduced at a much later date. That leads us to the conclusion that the solution has to be political and ethical and achieved through bilateral negotiations. Progress does not lie in international conferences. Only direct talks between the interested parties can yield equitable results which everyone finds satisfactory.

In today's world, works of art are generally semiophores, artefacts vested with meanings that are supposedly manifestations of their visible features. This is the case, because of the advent of nationhood in the modern sense of the term, of the democratized access to all cultural property and of the change in the nature of the relationship between the production and the circulation of cultural property and the economy. In other words, cultural activities have taken on a significant economic importance they did not enjoy as little as fifty years ago. We may not necessarily like it, but it is an incontrovertible fact we have to bow to. Works of art which arouse keen interest have become essential in that they bring in revenue through the cultural excitement they generate. Thus far, I have focused on the identity component of cultural heritage. However, it is increasingly exhibiting an economic component.

Although the cultural heritage of each people is purported to belong to all of humanity, some people enjoy closer spiritual and physical contact with works of great value. So no wonder the issue of the distribution of these works among the human race has become more hotly disputed than ever before. Thank you for your attention.

Françoise Rivière

Thank you very much, Mr Pomian. I believe we did well to begin with a historian, for your brief contribution has raised all the issues we will be debating this evening.

First, naturally, there is the issue of ownership: to whom do works of art belong, works of art which are part of a cultural heritage, which can be deemed cultural heritage? Do they belong to individuals, groups or nations? Or do they belong to all of humankind? The issue is out. On the positive side, I note from what you say that, on the one hand, absolute priority must go to conservation requirements. That is not a matter of principle, but simply one of realism in terms of action. Then there are the limitations intrinsic to the legal approach, for this evening we will be debating events that took place before the international law was established. The issue can only be resolved through political and ethical efforts. Then you turned to a matter I feel sure others will want to take up, namely the limitations of intergovernmental action related to cooperation between museum institutions. Since we are on the subject of museum institutions, I should like to call upon a representative of one of these major museums which pride themselves in being universal, someone who has accepted to contribute to this evening and hence to speak on behalf of other universal museums, Neil MacGregor, the Director of the British Museum.

Neil MacGregor

Thank you very much.

I would like to start by putting the debate into perhaps a wider context, because I think one can say that there are two quite different conceptions of culture at work in the world today and that explains the debate that we are having. The first is that culture and cultural objects reveal the essential qualities that make us all human – the characteristics that we all share – and if we look at the objects with that view and that assumption the things that divide us culturally become secondary and temporary. That is the view that lay behind the eighteenth-century enlightenment encyclopaedic idea of collecting objects from all around the world to show essentially that the whole of humanity was the same. That's the view of culture that informed and inspired the encyclopaedic museums like the Louvre, like the Hermitage, like the Berlin collections and the British Museum.

But there is of course another view of culture at work, and that is the view that culture is what distinguishes one group from another group, and that for a group to be confident, secure, to know itself, it has to have a culture where it focuses on what divides and distinguishes it and makes it special. Both views are equally true. Both views are entirely honourable and intellectually defensible. The second view is of course the view that lies behind most of the national museums of the nineteenth-century national view of culture, of nations and of human groups.



Hawaiian God Ku. This statue is believed to be where the god resides and is thought by many Hawaiians to be divine.

© The Trustees of the British Museum

I think the question we are trying to address tonight, thanks to Madame Rivière's invitation, is how these two views of culture – the universalist and the particular – can coexist in the world today. Because I am sure we all want them to coexist. And I want to talk a little bit about how the encyclopaedic museums, the universalist museums, can address this question and to raise some questions about the role that UNESCO might be able to play in such an issue. I am afraid the examples I am going to give are entirely to do with the British Museum but they raise the questions – I know the same points – that affect both the Hermitage and the Louvre.

The first point, I think, is that the debate has changed over the last thirty years. Thirty years ago, broadly, an object had to be in one place or another place. With the advance in techniques of transporting and condition and climate control, objects can travel. All three museums present today make a huge point of letting their collections travel worldwide and the publics that those collections can reach when they travel worldwide are enormous. An exhibition from the British Museum showing the history of the entire world through cultural objects was seen by millions of people in Japan, in Korea and in China – and exactly the same figures could, I know, be given for the exhibitions of the Louvre and the Hermitage that travel.

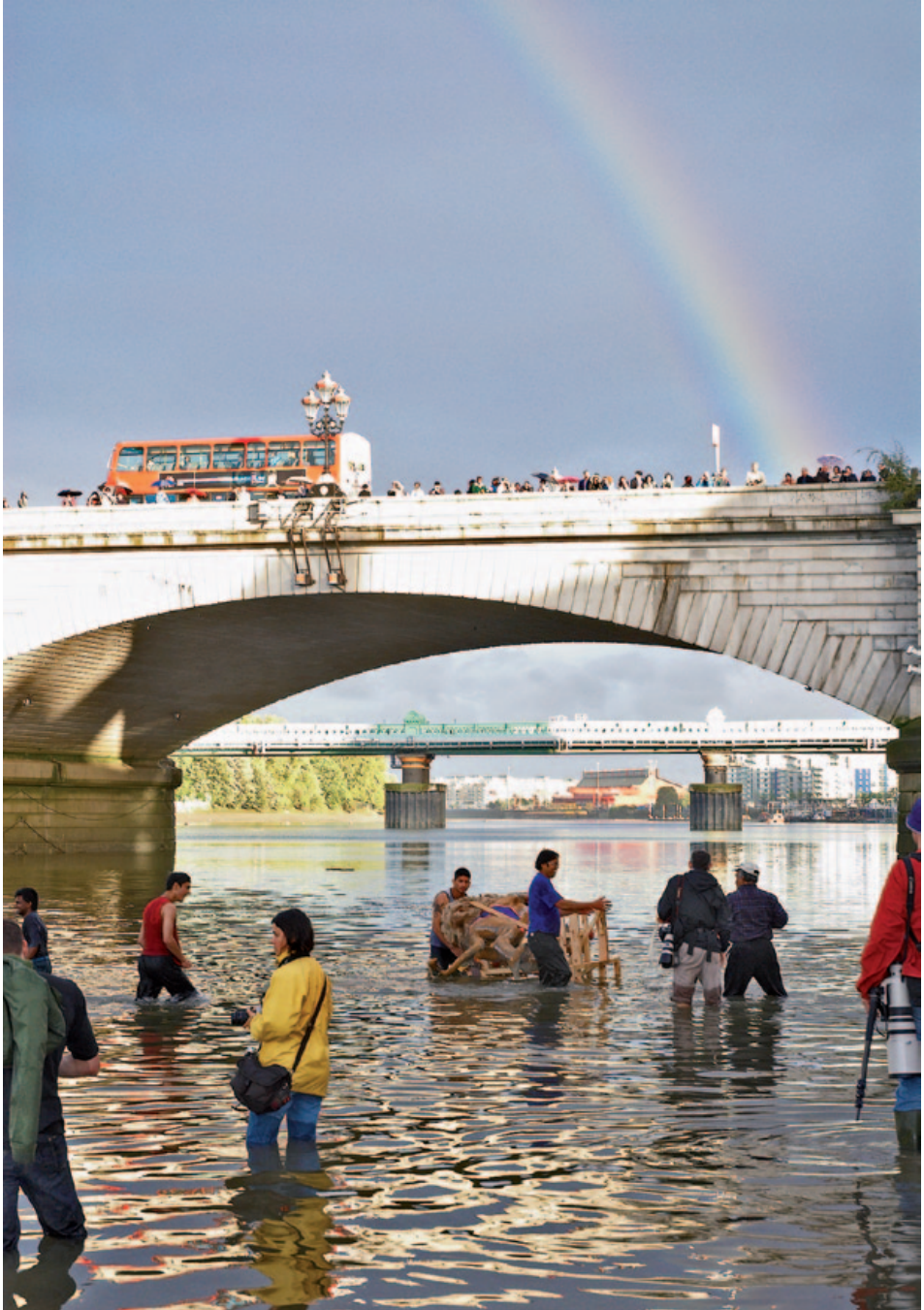
That is, at the very least, our duty – we know that. The aim for all of us at the moment is how you make a universalist museum universally accessible and the first thing is to make the exhibition travel. This will allow all kinds of debates about the different ways in which we all conceive the world and our place in it.

There was a very striking moment in our exhibition in Japan with a statue of the Hawaiian god Ku – not a statue of the god but a statue in which the god sometimes resides, and it is a statue, which, to some Hawaiians, may still be thought divine. It was being looked at by the Emperor of Japan who, as you know, to some Japanese may still be thought divine. Thus you can understand the possibility that these travelling exhibitions allow confrontations between different cultures, and the key point of the encyclopaedic museum is not to look at your own culture but to allow the world to look at the cultures of different people, which must be, I think, our obligation. So the first task is to let the collections travel and to allow huge publics to see them and to confront them and to interrogate them differently.

This raises another question of who chooses what travels – and I think it is a very important one. The British Museum has, in the last couple of years, tried to move to a new position, a new pattern of lending in this way. We have an arrangement with the National Museum of Kenya where colleagues from the National Museum of Kenya have come to the British Museum to spend a year in the collections, choosing the objects they want to borrow to present to the public in Nairobi. They chose very few Kenyan objects because they have of course many more Kenyan objects in their own collections. What they wanted to borrow from the British Museum was the kind of object that places Kenya in a different context, such as a shield from Somalia, a hat made of human hair from Uganda and a copper bracelet from Burundi. What colleagues in Kenya wanted to argue was that there are identities much older than Kenya that link Kenya to many other countries around and about, and indeed to the Indian Ocean, and that this is the narrative they wanted to present from these objects. This, I think, raises a key question: who is entitled to interpret these objects? We must acknowledge that everybody has different interpretations of the same object and the challenge for universalist museums is to allow as many different voices to interpret them and to show them in as many different places as possible – to become, if you like, libraries from which different communities around the world can borrow not only their own cultures but the other cultures that are of interest to them, that speak to them.

The numbers that can be reached are enormous. Just to give you an example – an eighteen-month tour of Egyptian material in North America was seen by one and a half million people. This is crucial. One of the things, I think, we would hope UNESCO might help is to facilitate this travelling of exhibitions, these borrowings from other countries, particularly African countries, to present the stories they want using our collections. Pomian talked about the question: who has the benefit of the collections? Our duty is to widen that circle as far as possible. That is a key question, I think, for us and for UNESCO.

I just want for a second to focus on what is, I think without a question, the greatest problem for the universalist museum patrimony, which is the museums of Iraq and the cultural heritage of Mesopotamia. As you all know, the museum of Baghdad is now completely sealed – nobody can enter, nobody can see the collections. There is no National Museum of Iraq. This is, I think, the greatest problem we all have to face and if there is any place in which one can say the memory of one place is the memory of us all, it must be the memory of Mesopotamia, which is part of all of our stories. What we have all done from that is to conclude we must work with UNESCO in the context of Iraq but, with the British Museum for instance, we have put together an exhibition of some of the great Mesopotamian things from our collection and sent it to Shanghai where it was seen by 300,000 people. There are no Assyrian works, no Mesopotamian works, in Chinese museums. This exhibition



Statue of the goddess Durga made by craftsmen from Bengal for an exhibition at the British Museum, London visited by about 10,000 Bengalis from Britain. At its close the statue was put into the Thames River, declared for this ceremony to be the Ganges. © The Trustees of the British Museum

became the focus of a debate in China about the fate of the museum in Baghdad since it included objects such as an ivory pendant excavated by the British Museum in the 1920s. One such pendant was in the British Museum and another was in the Baghdad Museum but was stolen after the invasion of Iraq. Collections can be used to raise these questions in which UNESCO has a key role to play.

I want finally to mention one other fact, which, I think, has changed the discussion and must change the terms of the discussion. We talk as though there is a separateness between the notions of the universalist and the national museum. We all know that in the great cities of the world there are now populations from all around the world. There is now certainly in London no possibility of distinguishing between home and abroad. Any culture that we present in the British Museum has, in London, people from that culture living there. This changes something very profound. I know it is the same in Paris; it is the same in St Petersburg. It is the same everywhere. We are all now much more a universalist people because of the globalization of the last twenty years than we were two generations ago.

I want, very briefly, to finish on the exhibition in the British Museum of the Bengal collections where in the great court of the British Museum we invited craftsmen from Bengal to come to build the statue of the goddess Durga. Every year in Calcutta, the statue is made out of straw and mud and ceremonies take place around her. This enabled over the weeks somewhere around 10,000 London Bengalis to see, for the first time, their own culture from Bengal. Many Bengalis who had never been in Bengal – second or third generation British Bengalis – were brought by their parents to see their memory in physical form in the Museum.

This is a very important role. It also means that what is being presented in the Museum is being interpreted by the people from the source country, but even the distinction between source and museum has broken down because the source country lives in large measure in London. To finish on a very hopeful note – at the end of this event the goddess Durga is always put into the river Ganges. For this purpose, the Thames was declared to be the Ganges and the statue was put into the river Thames, and as the statue entered the water a rainbow appeared. We take that as an emblem that these are problems that can be solved, that there are many things we can do together however difficult the big questions remain.

Thank you.

Françoise Rivière

Thank you for having reminded us, and I think this is important, that cultural objects can embody multiple meanings and that this plurality of meaning should be taken on board when works travel. You strongly underscored the potential, absent thirty years

ago, for cultural objects to travel and therefore benefit various publics and convey diverse interpretations. You also highlighted the fact that so-called universalist museums need to acknowledge that their responsibilities are also universalist, especially those located in the major metropolises which are themselves increasingly synonymous with universality and cosmopolitanism. So now I shall move on to the museum professionals who are represented by that well-known NGO ICOM and, in this instance, by the ICOM Ethics Committee chair. ICOM has greatly contributed to UNESCO and still does by providing the viewpoint of museum professionals. ICOM has played a particularly prominent role in fighting for ethical concepts. So, Bernice Murphy, you have the floor.

Bernice Murphy

Thank you Ms Rivière and thank you UNESCO.

I thought I would complicate this debate a little this evening. I am not going to speak so much about the ICOM code – our code, recently revised, is a very important normative instrument – but about the way in which ICOM is moving at the moment on the basis of the new code, revised under the chairmanship of Geoffrey Lewis. It is exploring ways in which fundamental principles brought together in that code can lead to possibly different solutions through different kinds of relationships established through museum work. I am also going to speak a bit from my own experience, because I want to actualize for you some of the things I am talking about – a sense of – an ethics of – action in a situation where everything is much more complicated – whether you are in a source country or a source culture, where those categories are much more mixed up. In a country like Australia, where there is such an incisive history of colonization, the moral obligation of our museum work of the last twenty to thirty years – I am speaking of the community in general in Australia – has been driven by an ethical desire to change the relationships between the colonizing culture and the colonized. So that very much influences what I want to say to you.

Memory and universality are terms that have a long and continuing relationship to the work of museums. However, I want to emphasize that they are not static concepts but both of them highly dynamic. Memories are constructed, constitutive activity, not something passively transferred from one group to another. The distinguished director of the Metropolitan Museum of Art in New York, Philippe de Montebello, whom some of you may know, used two very potent images of memory and universality in a lecture last year in his own museum, strongly defining his idea of the universalist museum, and I will give you two quotations from him: ‘In every museum, ladies and gentlemen,’ he said, ‘are the memoirs of mankind.’ His second image was that ‘the universalist museum is the cultural family tree where all people can find their roots.’ I wish to explore and test these metaphors a little, quickly, by

turning for a few moments to the context where I grew up in Melbourne, Australia, where the combined library, museum and art gallery in Victoria in the 1850s in one building was modelled on the idea of the British Museum. In fact, the raised dome there covers the wonderful state library where I started preparing for my exams at age 16, which is an almost facsimile of the reading room in the British Museum. Ours is still going; yours has been turned to other purposes.

Great and important indigenous collections were gathered for the Melbourne Museum and they are still held by the Museum today although it is in a dramatic new site. Although the collections were made with a dutiful, high-minded idea of the universalist museum, when presented in the way they were in 1929 they show only the memory patterns of one culture at work – the collecting culture – and demonstrate the loss and erasure of the memory structures of the cultures collected. Therefore, for me, Philippe de Montebello's metaphor of the universalist museum as the cultural family tree where all people can find their roots cannot possibly express what is happening in this situation. All of these spears and shields and other things that were shown in this exhibition have come from different peoples of different kinship, different traditions, different languages, and the original producers would have been horrified to find their cultural items mixed up with foreign items in this way, destroying all meanings that are important to the producing cultures, or what is here being called the 'source cultures.' The producing cultures – many of them continuing and flourishing today – give meaning to any particular item only through the total ensemble of living relationships and practices that emanate from one particular people, language and tradition.

Our museums and art galleries in Australia have been engaged in a long journey of changing relationships for three decades. In 1982 I commissioned an exhibition in the State Gallery in Sydney, where I worked at that time. These years of renegotiation and learning from our indigenous cultures, inviting them to speak for and represent themselves and to make exhibitions themselves, have produced fundamental shifts in the idea of the universalist museum, and changes in the discourse of universality itself, internally transforming it and moving it onto new ground. These years have affected all of our museums profoundly in the work we do. I curated a cross-cultural exhibition at my own former museum, the Museum of Contemporary Art in Sydney in 1995 entitled 'Localities of Desire.' It included a painting by Edgar Heap of Birds who, incidentally, is a Cheyenne nephew of my distinguished colleague Richard West. Nearby on the floor in the centre of the room was a large grand sculpture made by indigenous women from the central desert of Australia and when that work came first into the Museum, it was brought in and sung in by the women, and that was an important part of the exhibition. It is from the central deserts that this very different kind of wonderful, extraordinary painting by people who had never painted on canvas before, has emerged in the last thirty years.

These showings in just one country of works and their intangible cultural context help us imagine a transformative situation today, a different kind of evolving reflexive museology worldwide. There are so many opportunities today for all museums to build new relationships that can transform their museological practice, relationships that extend and then transform the concept of universality itself, through particularization, through localization and through forging living, knowledge-producing, relationships with source cultures and source countries. Such relationships involve a comprehensive transformation of meaning, memory and discursive practice within the museum. They have the potential to take museums themselves on new journeys as social institutions, to reshape their methods of research and even to connect them directly to new sources of knowledge and to a great range of resources and communities beyond the museum itself.

You will notice perhaps that I have not talked about cultural property, ownership questions, dispute resolution or restitution. These issues, however, are alive, challenging and difficult in all our work as museum people internationally. But it is the wrong place to begin and certainly the wrong place to get stuck in, considering the most important challenges of museums in our time. The most important challenges, I would say, are not about ownership but about forging knowledge-based relationships in which many people's interests come into play, including institutional interests in the integrity and continuity of collections long built, long held. All of these relationships, however, through this relationship-building process can be interconnected and rethought in new ways.

I believe we are challenged today to shift many of the controlling metaphors shaping the past of the universality paradigm for museums. I return again quickly to the notion of the cultural family tree where all people can find their roots. This is really a nineteenth-century biological modelling of a single family tree with a shared root system and it comes out of the scientific theatre, the Darwinian transformation of scientific thought of the nineteenth century. But that metaphor is entirely unsatisfactory as a paradigm for the work that museums do in the cultural sphere.

Culture is shaped by cross-cultural encounter and transfer in many different directions. That metaphor fails to recognize the independent development of cultures historically. Culture is moulded by diasphoric and mutational forms, as well as quite independent developments.

In the many conversations we have about the work of museums we need to think very carefully about the metaphors we use. I return very briefly to memory. Museums, of course, are places of intense arousal of memory but also institutions for the exploration, reconstruction and recovery of memory as much as for its transmission from one generation to the next.

Different societies, of course, have developed complex mnemonic systems that compose social memory in very different ways, even within a continuing tradition

of memory attention and focus change. There is wonderful self-reflexive and reflective work that museums are doing today in reconstructing the past – even their own institutional past – reopening its leading ideas for a later age to encounter.

I celebrate here the fine Enlightenment gallery now presented as a long-term installation in the British Museum seeking to convey to a modern audience how the whole intellectual enterprise of the Enlightenment worked, and doing so through the immediacy of the richness of the British Museum collections.

This brings me to affirm how important the large and complex collections in what I would call ‘encyclopaedic museums’ – but I am sorry not ‘universalist museums’ – are to the world and especially to the whole community of museums. These institutions now face the intense pressures we know, and I want to emphasize, however, that pressure comes not from somewhere else far away. The pressures are coming from within the history of the discourse of universality itself, which has given birth to a legacy of ideas such as the dignity of humankind, fundamental human rights, ideas of distributive justice, liberty for all and the right of diverse societies to their own cultural practices and self-determination. All these tensions come from within the heritage of the universalist discourse or a discourse about universality. That is to say we have today a constellation of new voices and self-interpreting historical actors that raise very difficult challenges for museums with old collections.

However, my most urgent proposition is that museums in their locally grounded and particularized work with living communities today offer an expanded range of experiences of benefit to each other, and international museum collaboration opens up dialogue and case-study knowledge to be shared quite outside a legalistic framework of laws and conventions.

In my last few moments, here are some practical propositions. The potentiality of digital and information communication technologies of today are only beginning to be used by museums in ways that open up the potential of the second stage of internet culture – not the first stage of information out but the second stage of interactivity and the co-creation of meaning. This is a revolution that museums are only starting to take full awareness of. This example was important to me to signal the idea of ‘digital repatriation,’ that is, repatriation of knowledge and information. The repatriation of an object is only the very first stage. Sharing of knowledge about the object, through an interactive internet programme can be one of the most powerful resources to indigenous communities to get knowledge back about what has been taken away, quite apart from the question of objects or, much worse – and more tragically – human remains.

I summarize last my idea of an evolving reflexive museology for us all as follows – just a few quick points:

- Build new relationships with communities through shared museum networks, and not just museum to museum, but as you saw from what I tried to suggest to you, the network in communities that some museums in some cultures in some countries have developed very powerfully. These networks of proximity to those cultures offer resources to museums in metropolitan centres elsewhere. That means that you can learn from the twenty years of painful activity we have had with repatriation, for example, of human remains. There is so much we can transfer.
- Commission new projects, new research, new kinds of curatorship, new exhibitions and new artworks. The work of Australian Aboriginal artists can be seen at the Quai Branly Museum (though we would never present works in darkened spaces but in the light of day, they are contemporary artists to us). These artists won a competitive award against eight other artists in our country. These opportunities for artists stimulate work that was not imagined to be possible before, from tiny-scale works collected by missionaries long ago to this kind of work when artists are invited to produce work themselves
- Facilitate digital repatriation, extend all collections, build new collections, address new audiences, strengthen awareness of museums' precious cultural capital resources through shared heritage worldwide. To be fair, since I was so ungenerous to Philippe de Montebello before, I close finally with a metaphor he gave in another lecture, where he said: 'Museums? Why should we care?' And he answered his question in this way that: 'their main purpose is for the study and understanding of mankind.' I think he got it right that time.

Thank you.

Françoise Rivière

Thank you so very much, Bernice, for having set the stage for our debate on the role of museums: what are museums for, especially when our perception of museums is undergoing such a radical transformation? Thank you for having raised the need to perhaps change paradigms and even the language we use to talk about return, restitution and ownership which may now be obsolete and no longer reflect contemporary reality and perhaps, as you pointed out, we should add to the notion of ownership a second aspect, namely access to knowledge. I also like the term you used, 'digital repatriation,' which we will certainly work on.

We still have one speaker to come and he represents the voice of the famous community of source countries which have been deprived (and who better to speak about this than Mr Godonou) of most of the items which made up their history and their memory. Africa immediately comes to mind. You have the floor, Mr Godonou.

Alain Godonou

Thank you very much, Madam Chairperson. I have heard many interesting things and I realize, like most people, that, in a manner of speaking, the position of some flagship museums has undergone a seismic shift. A few years ago, when studying curatorship in Paris, I applied for a traineeship at the *Musée de l'Homme* and I was assigned to the plaster casts department. There was nothing unusual about it at the time; that was it and you could not gain access to the African collections by that route.

Indeed, the position of the African countries and, in particular, those south of the Sahara, obviously excluding Egypt, is very different. We have sustained massive losses in quantitative and qualitative terms. I think, statistically speaking, on the basis of the inventories of the collections of all African museums, which amount, for the larger collections, to about 3,000 to 5,000 items, it is fair to say that 90 per cent to 95 per cent of the African heritage is to be found outside the continent in the major world museums. Some African museums which get less publicity but which hold fabulous collections (*l'Ecole du Patrimoine africain*, the School of African Heritage, which I have the privilege to head, is one of their number) are all missionary museums like the *Torino Consolata*, and the National Lyons Museum in this country, which also hold extraordinary African collections. Thus, in comparison, the loss is huge. This is not true of Egypt. In Cairo you have 63,000 items on show and almost a further 300,000 reserve objects. This is not true of Greece; there are the Parthenon sculptures, but beyond that, the Greeks know that the great Western culture, in a manner of speaking, has its roots and broad origins in Ancient Greece, and this therefore constitutes a source of some pride.

On the top of this mass haemorrhage, which has led to unimaginable psychological, mental distress, etc., this phenomenon occurred essentially during the period of colonialism, which, as you know, was very violent. It differs from other cultural regions, like the Arab world or Latin America, in that colonialism was compounded by another extremely violent activity, the slave trade. Consequently, we have built against this doubly violent backdrop, and in some African positions, recollections of this violence has led on occasion to what one could term brutal demands. What is certain, if I may further elaborate on my earlier remarks, is that young Africans today know not from whence they hail. They have no consciousness of the fabulous creativity of their source culture. As curator of the Porto Novo royal palaces, fifteen years ago, I had a number of young French from the poor suburban estates visit. At that time, they were part of a scheme. They were purportedly problem boys and girls. That is why they were sent to Africa for a while. They always caused trouble during the summer months and the holidays. They came to the museum and at the end of the visit their leader told us they had never been so well behaved, so attentive. The confrontation with this heritage they had never encountered before because it was not on their curriculum, in a sense, had changed them. This scheme lasted two

or three years longer and then, for budgetary or other reasons, was discontinued. Clearly there was something missing in the lives of those children. A couple of years later, we completed a comprehensive series of surveys on the role of cultural heritage in the education of African children, and we realized that at least 90 per cent or more of them exhibited glaring gaps, for they had never had any exposure to cultural heritage awareness-raising campaigns or to culture, etc. Furthermore, the results showed that there was no museum worthy of the name, no educational programme, no appropriate materials, no teaching support, etc., and that African schools were completely cut off from African cultures. In fact, upon accession to independence, the colonial curricula were rapidly revamped but there were not enough skilled staff, then or now. And yet that would appear to be an ideal situation compared with that described by some education ministers in Africa who shall remain nameless, who said, 'At least you have programmes. Just think, we do not yet have any.' That is a real deficiency.

And when we finished this series of surveys run on African schools we became aware that there was a real problem and that children could hardly show sensitivity, since they had not been taught it. We turned to the community, the so-called African diaspora. We did some work in Torino, some in Paris. We went further afield and worked in Quebec. We then realized something that came as a surprise to us all: in Paris, in Torino and in Quebec, the schoolteachers liked devising a programme. They visited the museums, they got things done. But when you talk about programmes on African cultures, about taking children to museums, the children who are not interested, who refuse to go, are the children of African immigrants who do not want to visit a museum to talk about Africa. We wondered, 'But why?' Simply because the image of Africa, the image their culture throws off is inherently negative and they would rather it were not talked about. It is true that when they do go, they discover something different and feel proud. But most of them – just ask around – say that to begin with there is always a small, hard core that says, 'No, we don't want to go.' These poor suburban estate dwellers are definitely traumatized.

Now, what can we do to speed up the process? Solutions are needed. Very early on, about fifteen years ago, we thought that Africa would have to build its own capacities, solve its own problems. We had to build for the long haul. Every so often the issue of the return of cultural property would crop up because odd items – the Aksum obelisk for example – were returned. The media gets hold of it and there is a bit of a splash when the general public finds out. But if we are to have any chance of restoring the continent's arms, its miraculous arms,⁴ we must begin by framing proper programmes, by building institutions.

4 Phrase used by Aimé Césaire (1913–2008), poet, educator and activist born in Martinique, educated there and in Paris, leader with Léopold Senghor of the 'Négritude' (black consciousness) movement which believed that the shared black heritage of members of the African diaspora was the best tool (*Les Armes miraculeuses* (Gallimard, Paris, 1946)) to fight against colonial political and intellectual domination.

The criticism we level at institutions like UNESCO is twofold: UNESCO's programmes in this field are sometimes of too short duration and sometimes spread too thinly. In short, in Africa, you cannot train curators in week-long seminars. It will not do. We have to acknowledge that some progress has been made, but not enough. Secondly, we believe UNESCO could be a bit more proactive towards other organizations in the United Nations system, because what greatly hampers many African countries are the policies put in place by the World Bank and IMF, it is as simple as that. They do not allow us to recruit staff to a sector already cruelly short of professionals. I would estimate that the number of African professionals working in heritage amounts to 500 at most while we need 100,000 times more as a ratio of the African population which will reach, say, a billion in a few years.

Therefore there is a real need, from this standpoint, to build in Africa, and there is also a need to give African politicians, those who govern us, who hold the key to our destiny, a good shaking. I am saddened; I do not even see African ambassadors in the hall; I see very few. They have to be made aware of the situation because, nowadays in Africa, when this issue is placed in a wider development context, our politicians tend to say we should follow the Asian example: we are to become the African dragons following in the footsteps of the Asian dragons. Beware: while Asia has also been colonized, it has not been subjected to the slave trade nor to the other destructive acts which Africa has experienced. Failure to properly assess the position gives the impression that we are on equal terms. That is wrong.

I would also like to briefly respond to something I heard: you cannot dismiss the legal issues by saying they belong to the past and that laws are not retroactive. That is not the point, not what is in contention, but it is an argument that is not admissible because our subject, the cultural items we are discussing, the punitive colonial expeditions, some of them were contemporaneous with the Second World War. So while we still legislate on the Second World War, while there are ongoing trials relating to Second World War episodes, you cannot tell us that 'the contemporary is obsolete, we cannot legislate on it.' It is not true. Such double standards will not wash. However, we do know that the solution does not lie in legal positions and laws. It lies in cooperation. And today, as just stated by the representative of the British Museum, communities, in particular in large cities where the universal museums are located, have become very cosmopolitan and the debate is being held within these communities, who feel universalist and who are demanding, and will continue to demand, accountability for the justice denied them. I think that, thanks to the strength of this opinion, as has been demonstrated on other continents, and thanks to the strength of civil movements, serious consideration will eventually be given to the sharing of the fruits of this heritage and accessibility.

The internet is very good. We have used it to work on restitution, on what we term documentary restitution: namely, access to the documentation covering these

collections. We will come to an agreement with the Quai Branly Museum to recover all the available documentation, but you should know that, for somebody like me, it is frustrating to be asking for the photographs of a number of objects to which I believed I was the legitimate heir and to be told there are difficulties, that I am charged for this, charged for that. Unfortunately this is still the case today. These are details, however; the dialogue between museum professionals, between curators has, I must say, greatly improved. There is less inflexibility, less resistance than the theoretical position would have us believe. Thank you.

Françoise Rivière

Thank you, Alain Godonou. In asking you to speak on behalf of all the 'source' countries, we were deliberately addressing a specific case, Africa, which is the most destitute for, unlike other continents, it was comprehensively dispossessed of all the objects that constitute its memory. You did say, however, that there has been some movement on the part of the so-called 'universal' or encyclopaedic museums and also on the part of the so-called 'source' countries. I noted with interest that you highlighted the capacity-building priority first and foremost in the form of in-depth country work. I noted the criticisms laid at UNESCO's door. We shall act on them.

We can now open the debate. I think that the four contributions have set the scene for the debate. Before giving the floor to the other panelists, I could perhaps throw a few ideas into the debate. The first, taking into account all the attendant qualifications voiced, is that it is time we shifted our ground a little, namely, instead of thinking in legal terms, of legality, we should to try and speak in terms of legitimacy, a legitimacy that works both ways since it is legitimate for countries who have produced a number of objects to have access to them; it is also legitimate for countries who exhibit those objects in the interests of universality to provide access to them. So, in moving from legality to legitimacy and similarly from ownership rights to knowledge rights, and since knowledge is squarely within UNESCO's remit, there may be opportunities and answers through international cooperation. I have noted the last speaker's call for international cooperation. And then there is a third avenue I would like to explore: I am struck by the concept of a museum as above all a manifestation of pluralism and dialogue whereby, in some cases, alternative, diverse or plural visions of the history of cultural objects and their attendant memory could be developed and whereby museums par excellence would become both in the North and the South, in large cities and elsewhere, a space for the reconstitution of diverse and variously interpreted histories.

I would like us to begin our debate by exploring these avenues. Who would like to begin? Mr Loyrette, you have the floor.

Henri Loyrette

From what the other panelists have also said in response to your questions, I think it is important to introduce a concept not yet mentioned: hybrid objects. We always talk about items produced by a community or a country, which are to be found unadulterated in museums. Yet, we know the Louvre is full of objects which have passed through civilizations and changed not only in appearance but also in function. In fact we conducted an exciting experiment in conjunction with the Quai Branly Museum a year or two ago in which we tracked hybrid objects through the Louvre collections. Serge Gruzinski was in charge of this operation. There were many examples, beginning with the Islamic collections – these secular objects from the Islamic world which were, in a manner of speaking, naturalized and which became ‘Christian objects,’ the most famous of which is the Saint Louis Baptistery where (and it is worth remembering in the current atmosphere) the French kings, from Louis XIII onwards, were christened. Or again, a Mameluke dish vested with new meaning and a new use. We should be mindful of this hybrid concept which is akin to reutilization in connection with universalist museums or at least not leave it out of the equation.

Besides what Neil MacGregor has said and besides the other exciting contributions, there is another issue: how can we universally share the collections we hold? My answer would be to see to it that, as regards the collections we hold, a multiplicity of voices be heard. For a long time the discourse on museum collections was confiscated; admittedly strong language, but it was the exclusive province of the art historian and the archaeologist. We see it is possible to reach and attract other audiences, and attain universality, when we question, when we bring in other people.

The latest example, the finest, the most gripping in a way, was Toni Morrison’s coming to the Louvre. She knew very little about our collections when she first came to work there for three years. Hers was the voice of an outsider on collections with which she was not very familiar and on which she had worked with our teams. Suddenly, we heard a voice that was very different from the ones we are used to: a woman’s voice, a black voice, an American voice, but who on a theme that permeates her work – being an alien in one’s own land – precisely the beautiful theme we are exploring this evening, voiced something entirely new and brought out, as she herself put it, the universality of the Louvre Museum collections.

My third point in a sense answers not only Bernice Murphy but also Philippe de Montebello; it is the universality concept that we take for granted and see as obtaining equally across all museums. Not so. Universality to the Louvre is not universality to the British Museum nor is it universality to the Hermitage Museum. The universality of the Louvre is clearly the fruit of a history, the history of our country. And, goodness knows, a museum like the Louvre, since its creation in 1793, heir to the Enlightenment and intended as universalist by the Revolution is, in a sense, inextricably bound up

with the political history of our country. Now, that universality is in fact political universality associated with our political history, associated with our history of taste. And that universality is artificial, it is a sham, we have to own up to it. How can we claim that a museum is universal when we show disdain, nay indifference, to the absence, for instance, of Slavic art? How can a museum claim to be universalist when it holds so little Scandinavian art, when the Americas (Latin America as well as North America) are hardly represented at all, when for political reasons or political circumstances, until very recently, countries like the Sudan, for instance, were totally absent from our collection? There, I would say that this universality concept we treat as a blanket notion, something to be taken for granted, something that applies to all museums across the board is, in fact, very different from one museum to another.

Also, I would just like to say that that we cannot treat the terms ‘universal’ and ‘encyclopaedic’ as synonymous. They are two very different things. ‘Universal’ applies to collections which are intended or claim to range over all areas of artistic endeavour and all civilizations. ‘Encyclopaedism’ is a presentational method, inherited from the Enlightenment, and which, in a sense, at least as regards the Louvre, but also as regards other museums, shatters and fragments the concept of universality. The encyclopaedism of the Louvre, which is very fine, very interesting and very hard to understand today, in fact balkanized the collections, gave them an interpretation far from the notion of a universal museum, in which collections within departments are supposed to be presented according to schools, to manners, and departed from the very vocation of universality of a museum like the Louvre.

There you are. These are also matters that needed airing as they relate to our debate this evening.

Françoise Rivière

Thank you, Mr. Loyrette. I think you were right to point out an instance of polysemy in connection with the concept of universality. This is clearly a very delicate matter for an organization like UNESCO, but we cannot shirk the issue in our consideration of ‘Memory and Universality’ this evening. I am grateful that you also emphasized the need for a plurality of voices to be heard within museums. That in itself implies that objects possess several meanings which may well all be equally valuable. They belong to those who create them.

I am tempted to turn to Richard West, because I know that you are the Director of the National Museum of the American Indian and I know that, in your museum, you are exploring new ways of forging a dialogue with the communities that are, in a certain way, represented in your museum. Would you say a little bit more on that, on the new roles of museums?

Richard West

Thank you, Madam. I would be happy to.

I must say that I draw very close to the comments which were made earlier by my friend and colleague Bernice, as well as by Neil MacGregor because I too believe in rainbows – I want to extend that metaphor and so do Cheyennes for that matter. And I draw close to Bernice's comments not because she showed you a work by one of my Cheyenne cousins, Edgar Heap of Birds, but it actually represents the same idea.

I want to make three brief points regarding the National Museum of the American Indian and they are as follows. First, the National Museum of the American Indian on a systematic and continuous basis started from the very beginning to invoke the voices of native people from the South in the interpretation of its collections. This is more than simply creating access to collections. What native peoples really want most in the United States is access to the intellectual and psychic that sit in these institutions we call museums – that they become genuine participants in the representation and interpretation that occurs there. That is the first point I would like to make.

The second point that I would make is this: that having done that at the National Museum of the American Indian, what we found very quickly was that we were not simply talking about collections. The National Museum of the American Indian is about collections as they relate to native peoples, and both native peoples and collections relate to the communities in which both sit. And with that realization it became clear that the National Museum of the American Indian, to the consternation of some people, was not simply a palace of collections – it was actually an international institution of living cultures and, in fundamental senses, was more a cultural centre than it was a museum in the classic sense.

My third point is that, having discovered that proposition at the National Museum of the American Indian, it made possible something that I would like to at least offer for consideration here: it made the National Museum of the American Indian a far bigger space. The National Museum of the American Indian ceased to be simply a cultural stop on the tour-bus route of the Smithsonian Institution, and it became instead a very much wide-open, great scope, civic space, not just a cultural destination. And it therefore becomes a different kind of institution. It becomes an institution that transcends the conventional and historic definition of what a museum is – that it is primarily engaged in the presentation of collections. Because, if it is some kind of cultural and community centre, then it becomes a place of dialogue, even for the consideration of controversy. It becomes a safe place for unsafe ideas. It becomes a forum. And if it becomes a forum then it has a far broader connection to the community at large and it simply becomes a large civic and social place rather than simply being a cultural destination.

Now, we have done that in the context of native cultures in the United States. Our collections stretch from one end of the hemisphere – Tierra del Fuego – in South America to the Arctic Circle in North America and everything in between. But native America is not unique. I think that for those museums that choose to do so, this kind of newly considered space can be created in lots of other museums because goodness knows that all countries, not just the United States, need a larger space in which civic social discourse can occur; which becomes a gathering place for ideas and a place that opens to the entire community; which goes far beyond the dimension of simply being a cultural destination; and which is the way I would describe the National Museum of the American Indian.

Françoise Rivière

I shall come back to Mr Valdés because one of the topics discussed has precisely to do with the notion that government action in this area tends to be counter-productive while cooperation between museum institutions works better. When governments interfere, when national legislation is involved, it sometimes makes matters worse. How do you, as museum director and researcher who have seen both sides of the issue, construe the situation?

Juan Antonio Valdés

I believe that we should draw on the experience of many countries and, naturally, realize that the cultural position of Latin America differs from that of the countries of the North. I believe that there are educational and economic differences, and clear-cut ones at that, perhaps rather like the situation in Africa or Asia.

In Guatemala and in the neighbouring countries generally, governments are not in a strong political position and are sometimes economically weak too. Politicians, congressmen and, frequently, the authorities may have good intentions but there is no provision for sustaining current or future programmes. It is difficult to find programmes that run for twenty years. Often, programmes are discontinued because of changes in government, not owing to bad faith but rather for lack of interest on the part of our politicians.

We academics are joining a gigantic battle to gain recognition for institutions like ICOM, ICOMOS and others which can and should be in the vanguard because they command respect and, of course, for UNESCO, which is already held in high esteem.

But esteem is more in evidence in the countries of the North and is perhaps not as widespread and strong in the southern countries. I think our politicians would

appreciate a closer relationship with UNESCO. Also I think UNESCO, at least in my country and in Latin America, could have a more commanding and robust position if its representatives were to deploy greater efforts and better accommodate – not only in terms of UNESCO *per se* – the position of the academy, artists, culture lovers, museums and the like.

I believe that many people want to participate; many would like to help but we often feel like remote islands; I think that UNESCO and the local committees could make this important move and work together with the authorities responsible for looking after the cultural heritage, and museums of course.

I think we have had a variety of experiences of many kinds. The big museums versus small museums controversy will not get far because I think both will always exist. Whether or not we change the name, terminology is not very relevant to us; perhaps we do not really care whether they are universal or not; it makes no difference as our objects are in the big museums. End of story. There is no getting away from it and there is no point in dwelling on it now. Looking to the future, I think we should be exploring how we can cooperate and make this cooperation work between the major museums of the developed countries and the smaller museums in other parts of continents. I believe that along with the demand ‘Give me my objects back,’ we would do better to adopt a stance of ‘Let’s share our objects.’ It is a good thing for the countries that produced the objects to have them and it is also good that developed countries with major museums have objects, as was convincingly argued by the British Museum, for the benefit of people from our continents living in large cities far from their original homes. I think that both approaches can have a positive impact on the community, on peoples, irrespective of the continent under consideration.

Another area where help is needed has to do with travelling exhibitions; the more economically developed countries are also more powerful. The trouble is that the small countries may not have the wherewithal to properly mount objects for display or to curate the objects. Security is vital as is education.

In third world countries, we are not in the habit of visiting museums. The situation is poles apart from what happens in Europe, the United States and Canada. In my country, for instance, students go to museums because they have to, not because they want to. That makes a real difference.

Hence, we still have to educate, teach people why museums are important and how they can find their memory within. That explains why, in Latin America, rather than plump for large museums, we are building many small museums which can be supported by institutions, banks, individuals or organizations. However, I believe that, in this case, culture and entertainment go hand in hand. We will not attract the students by culture alone because they also want entertainment. It is like a hook to catch the fish. We have to find something that will bring them in, make them feel

comfortable, make them take away a good opinion of museums, which is what matters most. It is not important to get them to come, it is the repeat visits that matter, getting them into the habit and getting their children and their families into it too.

Then there was an important initiative we promoted with the Art Institute of Chicago, for instance, which I would like to describe, as it was positive for the whole of Latin America. Back in 1992, in conjunction with the fifth centenary of the discovery of America, the Art Institute of Chicago held a big exhibition ranging from Alaska to the Tierra del Fuego which was ethnic, archaeological and all.

What was really good was that, in agreement with all the countries, a case containing many photographs and posters providing information not on all, but on the most representative items of each civilization was prepared. At the end of this major event, these materials were dispatched to the countries of origin and distributed to the poorest and most remote schools in the countries. It was very useful to have these posters hanging on the corridor and classroom walls. Information was disseminated describing the exhibition and explaining the importance of the diverse cultures of the American continent and their ideological connection with the past and showing why Latin America has remained a fairly culturally integrated continent over time.

In this way we learned what anthropologists and archaeologists like us already knew – that we can trace our roots back not 500 years but 3,000 years, and that is important for the wider population.

We have explored many possible attitudes, in particular with the United States. Economic and political globalization extends worldwide and is very worrying, at least in Latin America, where almost all the countries have been compelled or have willingly signed the free trade agreement which hardly touches upon cultural matters. Lots of economics, lots of development, lots of factories – everything, bar culture. I think culture is worth fighting for, or at least taking seriously. I believe this is not on the agenda today, which is precisely why it is important that countries that have exhibits on loan, and send items or take part in exhibitions, concentrate above all on educational exchanges.

Françoise Rivière

Thank you very much, Mr Valdés, you have touched upon issues within UNESCO's purview, upon how we can expect UNESCO to move the debate forward. I believe we are already doing that this evening – we are bringing together the main actors in this debate to begin to reflect on the issue and, in particular, as you yourself said Mr Godonou, to shift our positions a little. The positions have changed as regards return and restitution, and we are now increasingly talking of sharing objects and sharing the knowledge associated with the objects. These are avenues we must explore. There is

also some very specific action. You stressed the importance of capacity-building and the operational contribution expected from UNESCO on this front. I hear your plea and see it, not in terms of small actions here and there, but rather as facilitating the establishment of institutions like the one you head up, Alain, and whose job it is to build capacities on a continental scale. It remains for me, before opening the floor, to introduce the two remaining panelists, Alissandra Cummins, who is president of ICOM and whom many of you know, and then Mikhail Piotrovsky. So let us make an exception and, for once, not begin with the ladies. We shall begin with Mikhail Piotrovsky, both to recall that we first discussed this debate with him and that it is being held as part of 'Hermitage Day.' He represents one of the museums that claim to be universal, and I am interested in hearing his reactions to the debate so far.

Mikhail Piotrovsky

Thank you very much. I am really very happy that this is taking place at UNESCO. It is one of the results of the big projects called 'Hermitage UNESCO,' which finished with some good results.

Just some remarks: we need more and more definitions. I found one definition yesterday. In the plane I was reading a wonderful article in the *New Yorker* magazine on *verlitteratur* ('junk literature'). The author has a definition of what he considers to be the European ideal: maximum diversity in minimum space. It is exactly what a universal museum is.

Another example of what we are discussing today: early in the morning I went to the Musée Guimet to see the wonderful exhibition from Afghanistan. You see the exhibition downstairs and then you go up and you see the collections of the Musée Guimet coming from Afghanistan, and then you reflect about the history, the Bactrian State discovered by researchers from Europe, studying what is now Afghanistan, collecting what is now in the Musée Guimet. Then they came and made these wonderful excavations – by the way, Russian and French excavations – excavations with objects that are now in the Kabul museum and which have been saved because archaeological sites are not safe nowadays – not in Afghanistan, not in Iraq. It is even more terrible for museums because you do not know what is happening, you only know that the war is going on. So here, museum collections from what we could call a 'source country' and museum collections from the great universal museums come together and tell us the story, and we think about how the story will go on.

We have two terms, which I think we mentioned, which are very important. We have to understand them, we have to understand them fully. One is 'sharing the collections.' The Hermitage has been trying to do this for many years, and we have, as maybe you know, different branches in different parts of the world, where we bring

our collections. Usually we bring things which do not exist in this or that country – such as Britain, the United States, the Netherlands and the Republic of Tatarstan in Russia. But this process must be bilateral, reciprocal, so we share and we work together with our colleagues in these countries and, in the future, in other countries, to share collections which exist, which we bring and put them all together in different ways, which we can develop.

By the way, today, I gave an interview and announced a great project – because projects are very important – which we are planning with the Louvre. Somehow, everybody in Russia knows that the Louvre and the Hermitage are planning to have an exhibition of Islamic art in Kazan, in our branch in Kazan. Everybody is very excited and we are also very excited because two museums with two different kinds of Islamic collections have decided to show their richness, and their approach to the study of Islamic art, in an Islamic country – Tatarstan.

‘Accessibility’ is also a very important thing. It is also what we are doing. It must also be reciprocal, it must be bilateral, because sometimes things can stop being accessible, or accessible in the way we understand. Without wanting to speak of any distant examples, in Russia there is a discussion going on between museums and their religious institutions – the Russian Orthodox Church: Where should the icons be? In the Church or in the museum? It is absolutely clear that when the icon goes to the Church it stops being an object of art, it is a religious object, sacred object and so on. We all understand and have to find ways – we do find solutions – but it is one of the things we must always have in mind. In terms of accessibility, sometimes even moral things will stop the accessibility of certain objects and we have to find a way of choosing where things must be. Must they be for a small number of people or for everybody? Because I am of socialist upbringing, I know that art belongs to the people and that is all. Thank you.

Françoise Rivière

Thank you so much, Mr Piotrovsky and especially to have insisted on this notion of accessibility of the objects. Now, I am pleased to give the floor to Alissandra Cummins.

Alissandra Cummins

Thank you, Madam.

It is both a privilege and a problem coming after so many eloquent speakers. I am deeply grateful to my colleague from Australia, Bernice Murphy, for stating the priority position of ICOM in terms of ethics and in terms of the positioning of institutions and the positioning of knowledge in ethical considerations in an ethical context.

This is tremendously important for us because, wherever we start our work, we do wish to invoke ethical considerations. A number of instances have been mentioned this evening and indeed over decades – they do come back to what is the moral basis for the actions of both individuals and institutions in the conduct of their work.

I would like to say congratulations to our colleagues from the different museums that have been represented here, both the institutions that have designated themselves as universal museums and other museums that have been represented here – the new Museum of the American Indian that is ably represented by Rick West. All of them have demonstrated new ways of approaching issues of access, issues of – let us call it – ‘ownership of memory’ rather than ‘ownership of objects.’ I am not really going to move into the realm of where the ultimate ownership of cultural property lies. I think in fact that we need to move the debate away from terminologies like ownership and property and look in terms of memory – I guess ‘memory’ is a very useful modality of expression in this context. We need to recognize that, for many of the countries that do not host or hold universal museums, what we are talking about is largely in terms of identity, and that the ways in which countries express themselves – people express themselves – have been inspired by their traditional objects and traditional customs to create new work and new forms of expression as a result. This has been somewhat interrupted by historical developments in the museum field where an object has emerged from a particular community, has moved to other territories, but does not necessarily return. I have to thank Bernice for pointing out the value and the importance of digitization as a new way in which knowledge may move and be shared among different communities, different cultures and different people.

Some of the things that occurred to me in listening to the various discussions that we have been privileged to hear tonight – again I speak in terms of the language, the lexicography that has been knocked about in this debate and I think we need to look very carefully at this kind of terminology. The use of the term ‘allow’ means one party is privileged, the other must seek permission. We need to recognize that while the institutions that have these tremendously important, valued, historical, old collections have been generous in sharing them with our new communities, nevertheless there needs to be a change in the curatorial approach to these projects. The change needs to acknowledge that there is a coloniality about the way in which both memory and history have been represented and we need to be able to move away from those tropes of expression and display and invite new tropes of expression and display such as the ones offered by my colleagues Mr Valdés, Mr Godonou and Mr West and indeed the ones mentioned by Neil MacGregor in terms of organizing activities in relation to communities.

But what I am really interested in is hearing from the communities themselves what they wish to be represented by in the institutions, how they wish the story to be told. And that permission is not a matter of being granted. Permission is assumed

because there is inherent ownership of the story that is expressed through the object. If we are prepared to recognize this, there needs to be a paradigm shift in the way in which we present our heritages, our stories. If we are going to move from a coloniality of knowledge to a universality of knowledge, then this is where ICOM, I think, wishes our museums and our institutions to be. Where we do this, we are better able to demonstrate an equality or a balancing of knowledge systems, traditional forms, new systems, new art and new objects. They all come into play, they all have equal value, they all represent something significant, not just to the communities themselves but to the people who are able to encounter them.

Other considerations that have occurred to me – let us look at some examples. You see, the term ‘universal museums’ is problematic in a certain way. The way in which it has been articulated to date is, in some ways, controversial – not so much controversial as confrontational in some instances – because it suggests that there is a hierarchy of museums, which not everyone subscribes to. I appreciate the articulation from my colleague Mr Loyrette – this was very useful, it was definitely a move away from the way in which that term has been presented.

But, nevertheless, let me explain how I would view the term ‘universal.’ The World Heritage Convention has encouraged institutions and countries to recognize that which is unique, that which is of value to the whole of human society and therefore is deserving of a certain designation of world heritage. This is based on immovable objects, it is based on cultural landscapes, it is based on natural and man-made materials – most of which will not have been removed from the country of origin. It becomes problematic if you imagine that, at some point, we may come to a similar form of designation for museums and museum collections. So I think we need to understand the ramifications of what could occur if that were to happen.

By the same token, I am very interested in the work that is being done by the Memory of the World Committee, because here is a register being created of archival heritage. But in this instance the archival heritage need not be designated by – and I would be very specific – the host institution. It can, in fact, be designated by the producing or ‘source’ community. And this is a very different standpoint and a very different approach to the way in which one validates or values culture.

I want to end with another demonstration. I am extremely excited, in my own institution, to be working with colleagues like Jack Lohman from the Museum of London. We are working on an educational programme that recognizes that there is a shared heritage in the terrible past of slavery and the abolition of the slave trade, which we are looking towards commemorating in this year. But the approach has been that there is a shared communication, there are different voices, there are different areas of knowledge, but one cannot tell the story from only one side. The story has to acknowledge and include all of the voices.

Debate

Françoise Rivière

I am tempted to let Alissandra have the last word because she has not so much summed up the current state of play as made clear the need for all of us to redefine the terms of the debate, to change the terminology. It seems many of you insist on that point. She spoke of decolonization, of ‘decolonizing minds.’ New vocabulary is also called for there, I think, and I do believe we have begun decolonizing minds tonight. She also evoked the universality of knowledge which is something I feel that UNESCO has striven for since its inception. Let us now briefly seek comments from the floor.

Contributor 1

I would like to pick up Ms Cummins’ extraordinary idea; she said something wonderful. She said ‘the lexical specificity of museum objects’ and that is new to me and yet I have been in museums for years. She explained that there is a trope for talking about museum objects. May I suggest something in that connection and this is the purpose of my contribution: UNESCO should revert to the idea that emerged twenty years ago on classifying museum objects, it was termed the convention on movable heritage with a universal background. Perhaps, through UNESCO, in order to resolve the memory and universality issue, we could devise a normative text, which need not be a convention, to firmly establish museum objects on a secure basis. Thank you very much.

Contributor 2

I was very interested in all the comments on memory, universality and accessibility. However, I felt a bit short-changed as regards the meaning and scope of accessibility and universality because the contributors concentrated more on the ‘source’ countries than on the countries holding the objects. This means that today we talk about restitution, about getting professionals from ‘source’ countries to work with the countries holding the collections. There is, however, another consideration; if we agree that African objects should rightfully be in the British Museum or in the *Musée de l’Homme* – heritage largely taken over by the Quai Branly Museum – why not have the Mona Lisa or a Rembrandt or some other work spend a few days or a few months in a museum in Porto Novo or Johannesburg or vice versa. I feel justified in saying this as, some thirty years ago, an articulate UNESCO official evoked the idea but it was not followed up. I think that UNESCO should be able to explore that avenue so that universality truly comes into its own and works both ways. Thank you.

Contributor 3

I have a question perhaps for everyone, beyond the museum directors. It will be somewhat provocative. I am picking up on what the previous gentlemen just said. There has been much talk about moving away from the concept of ownership. We evoke knowledge and our educational work on accessibility. Where accessibility is concerned there are clearly limits to what can travel, there are technical difficulties: the Mona Lisa is worth billions: how can we be sure she would not disappear?

A naïve answer perhaps but a logical one: should we not (I know I will have the public up in arms) begin thinking about copies or facsimiles? Because, unless I am mistaken, most people who go to see exhibitions go not to see the original, but to see what the object is like.

You may reply that I am challenging the rationale that has been behind museums for centuries, namely places where a vast variety of means were deployed to keep, to curate originals. But in France we have already done so. The Lascaux caves are an example; we have produced a copy. I must say the first time I went down there I was dubious, but it is superb. It would take a seasoned professional to tell the difference. I think that to glean an idea, to be able to come close, to take away a lasting impression of the prehistoric setting, it gets full marks! It calls into question the very definition of an original, of copies. In Europe we know that this idea of originals has not always prevailed. Baroque and Classic art, among others, took on a whole variety of forms, hence my question. And it is this: is it conceivable that one day the director of a major museum might do that just to make the Mona Lisa or some Rembrandts, etc., accessible? Since we are in Paris, Malraux and his imaginary museum automatically come to mind. As good photography and quality printing became available, all of a sudden, through art books, everybody could create his or her own museum at home, which had been unthinkable before the Second World War and even more so before the First. So why not take the idea further? We were able to produce copies in the shape of two-dimensional photographs, so why not go three-dimensional in the future? Thank you.

Françoise Rivière

Thank you. Let me see if one of the directors of the so-called universal museums who are being challenged is willing to respond on the reproduction or copy controversy especially since it is becoming common in other areas. Well then, Mr Loyrette.

Henri Loyrette

No, I am not going to rise to that because it already exists. We currently have a travelling exhibition of plaster casts taken from the sculpture department's collections doing

the rounds in Europe with two ends in mind: firstly, to publicize the sculpture collection, secondly, to promote what we call the tactile museum. That is a very different experience from the one Louvre museum-goers feel when looking at sculptures because touching is allowed. I would say that there is far less awe shown than with original works, with a well-defined target audience of the visually deficient and the blind. But earlier we mentioned virtual museums (you raised it) and I can tell you that we are giving this eventuality increasing attention. You may rest assured that your idea is not iconoclastic. However, I must say that nothing can replace contact with originals. When all is said and done, it is very basic and what you have been referring to this evening are derivatives. I am not saying they are mediocre only that contact with original works, in my view, is something totally irreplaceable.

Françoise Rivière

Thank you, then, for concluding our debate. Concluding in a manner of speaking, because it is clear that we were not seeking concrete conclusions.⁵ Incidentally, there will not be a report or minutes. The intention was simply to share ideas so as to gradually move towards a common understanding. The time has come for me to thank the panelists. It is true we had an outstanding panel this evening. I am pleased they all, representatives of universal museums and of so-called 'source' countries and communities alike, lent themselves to this exercise. They readily engaged in the question and answer session. The only conclusion I can draw, is that it shows how much (not thanks to UNESCO, but within the framework of UNESCO – UNESCO can never be more than a sounding board) the heritage concept has changed over a very short time in terms of categories, intangible heritage, tangible, natural, cultural heritage, cultural objects and so forth. One senses it, one feels it, listening to the debate on the entirely new function of museums, the new ethical rules which seem to be gaining ground today. In the end, I have to say that I am pleased UNESCO has been at the heart of these changes even though it did not initiate them. One feels then that all these changes will have to be taken into account. They will go into proposals which we will submit to you in our next work programme. But that is another story. Thank you all.

5 There was a follow-up to this debate, a continuance of dialogue in the museum community: See the post-UNESCO debate 'Conversation ...' published in *ICOM News*, 2007 (No. 2) 4, and editorial note in No. 5. http://icom.museum/pdf/E_news2007/p4bis_2007-2.pdf

Making Amends: A New International Morality?

Edited Extracts from *The Guilt of Nations: Restitution and Negotiating Historical Injustices*⁶

E. Barkan

Editor's Note

These extracts are taken from the Introduction and the Conclusion (both substantially condensed). The twelve chapters in between give specific examples, ranging from German, Swiss, United States, Japanese, Russian and Central European efforts to come to terms with their actions in and after the Second World War, to the post-Colonial attitudes to indigenous groups and the results of the slave trade. While this ranges much wider than return of cultural property, it provides this issue with a coherent context of other efforts to change long-lasting resentments.

Introduction

Amending historical injustices in international morality

THE DEMAND THAT NATIONS ACT MORALLY and acknowledge their own gross historical injustices is a novel phenomenon. Traditionally, *Realpolitik*, the belief that realism rather than ideology or ethics should drive politics, was the stronghold of international diplomacy. But beginning at the end of the Second World War, and quickening since the end of the Cold War, questions of morality and justice are receiving growing attention as political questions. As such, the need for restitution to past victims has become a major part of national politics and international diplomacy.

The transition between 1989 and 1999 in the international arena has been dramatic. It includes the horrendous wars in Africa and Yugoslavia, as well as the

⁶ (Johns Hopkins University Press, Baltimore, 2001) xvi–xli, 309–49.

liberation of Eastern Europe and South Africa, and the return to democracy in many Latin American countries. Even these beneficial changes from totalitarian regimes or dictatorships have been painful experiences for many countries. In several of these transitions, instead of revenge against the perpetrators, truth and reconciliation committees have tried to weigh culpability on pragmatic scales. Concurrently, as the so-called realism of the Cold War vanished, the United Nations, NATO, and individual countries struggled to define their places in a world that is paying increased attention to moral values. Previously, the fear of the unknown, the risk of a full confrontation with the Soviet Union, and the memory of Viet Nam determined the West's lack of response to human catastrophes. But the new moral framework of the nineties confused observers/critics and participants/politicians alike. Instead of containment, the rhetoric and motivation underscored high morals.

The new international emphasis on morality has been characterized not only by accusing other countries of human rights abuses but also by self-examination. The leaders of the policies of a new internationalism – Clinton, Blair, Chirac and Schröder – have all apologized and repented for gross historical crimes in their own countries and for policies that ignored human rights. These actions did not wipe the slate clean, nor were they a total novelty or unprecedented. Yet this dramatic shift produced a new climate: moral issues came to dominate public attention and political issues and demonstrated the willingness of nations to embrace their own guilt. This national self-reflexivity is the new guilt of nations.

It is the growth of both identities – the victim and the perpetrator, both as subjective identities – that informs this new space in international and national politics. In contrast with the potential risk and morbidity of autistic self-indulgent victimization, the novelty in the discourse of restitution is that it is a discussion between the perpetrators and their victims. This interaction between perpetrator and victim is a new form of political negotiation that enables the rewriting of memory and historical identity in ways that both can share. Instead of categorizing all cases according to a certain universal guideline, the discourse depends upon the specific interactions in each case. Instead of seeing the increased role of victimization as a risk, the discourse of restitution underscores the opportunities and the ambivalence embedded in this novel form of politics. The political valence of restitution is significant and particularly powerful in the post-Cold War years, but it is neither omnipotence nor panacea.

Having recognized the new phenomenon, we may ask: How does a new insight of guilt change the interaction between two nations or between a government and its minority? How does this impact on the relative power of the protagonists within a national framework and the potential resolution of historical disputes? The book describes the response to the unfolding of guilt around the globe and focuses on those cases in which perpetrators and their descendants have either formally embraced guilt or become candidates for such an admission. This is not to say that the new standard

is implemented worldwide, or that it is consistent, but rather that it provides for a new threshold of morality in international politics.

What, then, is the legacy of the perpetrators? I shall try to describe the specificity of the perpetrators' bequest in the following pages, but we could say at the outset that in those cases in which the victim and the perpetrator are engaged in negotiating a resolution of historical crimes, the relative strength of the victims grows. However, the issue of how this new voice (or strength) is translated into concrete policies remains. Despite a new international moral framework, it is clear that standards vary and also that there is no accepted threshold for moral action or agreement. There is, however, a mechanism of negotiation and an aspiration for justice. While the results are hardly satisfactory to either party in the short term, in addition to improving the lives of the protagonists, resolutions of long-standing international disputes have become a mark of the new international order.

Legal convention defines restitution as only one form of possible methods to amend past injustices; there are others, such as reparations or apologies.

Restitution strictly refers to the return of the specific actual belongings that were confiscated, seized, or stolen, such as land, art, ancestral remains, and the like. Reparations refer to some form of material recompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity. Apology refers not to the transfer of material items or resources at all but to an admission of wrongdoing, a recognition of its effects, and, in some cases, an acceptance of responsibility for those effects and an obligation to its victims. However, these are all different levels of acknowledgment that together create a mosaic of recognition by perpetrators for the need to amend past injustices. Therefore, in the current context I refer to restitution more comprehensively to include the entire spectrum of attempts to rectify historical injustices. Restitution refers to the integrated picture that this mosaic creates and is thus not only a legal category but also a cultural concept.

Restitution forms a large part of the growing attention being paid to human rights and itself testifies to the increased attention being paid to public morality and the augmented efforts to amend past injustices. This phenomenon is most often reported in the news within the context of local or national issues, but rarely does it receive attention as a global trend. Viewed as a trend, however, it provides particular insights into national and international debates during the last generation concerning the extension of Enlightenment principles and human rights to peoples and groups previously excluded from such considerations and into how such extensions potentially alter the very conceptualization of those principles and rights.⁷

7 W. Kymlicka et al. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995).

One fundamental alteration focuses on the realization that victims have rights as members of groups, and calls for a reexamination of our understanding of justice. Our notion of justice is broadly founded on the Enlightenment principle that human rights accrue to individuals. Today an emerging political sense stipulates that such rights may also accrue to groups. This particular view holds that while preserving individual human rights remains crucial, this in itself is no longer sufficient because people cannot enjoy full human rights if their identity as members of a group is violated. The emerging political sense, or neo-Enlightenment morality, which, among other notions, posits the need for a combination of individual and group rights, creates a modern dilemma: How can the Enlightenment principles of individual rights and justice be applied to minorities and to the traditional cultures of indigenous peoples, and what principles can be applied to resolve, or at least to negotiate, the conflicts that arise when individual rights clash with those of a group? For example, governments in general do not recognize the communal legal identity of ethnic groups. To the degree that governmental policies are aimed at a group, implementation is often directed toward the individuals who belong to it.⁸ However, by accepting a policy of restitution, governments implicitly or explicitly accept a mechanism by which group identity receives growing recognition.

Historical identity as a negotiated identity

The impact of the paradox between well-defined, recognized and fixed cultures, on the one hand, and a fluid postcolonial world that recognizes increasing numbers of nations, on the other, is that we have to treat historical identities as negotiated. The recognition that a national identity is intertwined with competing identities is no longer confined to radical historians. The public accepts national identities as both invented and real. Politically, however, there are constraints on what a group can legitimately imagine as its history and culture. These limitations become particularly significant when national images and other identities encroach upon one another. Consequently, competing historical narratives have to negotiate over limited space and resources. The novelty of the urge to amend past injustices is that it addresses history through an effort to build an interpretation of the past that both parties could share. This approach occupies a middle ground that provides both a space to negotiate identities and a mechanism to mediate between national histories.

A historical overview

The Versailles Treaty (1919) postulated harsh terms for the losers. In public memory the war indemnity levied upon Germany in 1919 caused, or at least heavily contributed

8 C. Taylor et al. in A. Gutmann (ed.) *Multiculturalism: Examining the Politics of Multiculturalism* (Princeton University Press, 1994).

to, the Second World War. The wisdom of the Versailles terms was strongly criticized along *Realpolitik* lines and the perceived failure of the policies of vindictiveness.⁹ Having learned from experience, the Allies in 1945 did not impose reparations upon Germany. Instead the United States accepted the burden of rebuilding Europe and Japan and initiated the Marshall Plan. This introduced a novel factor into international relations: rather than hold to a moral right to exploit enemy resources, as had been done previously, the victor underscored future reconciliation and assisted its defeated enemies to reestablish themselves. In hindsight the policy is widely celebrated.¹⁰

Within this context of nonvindictiveness the modern concept of restitution was born, and it is from this point that I examine specific cases. Germany, acting on vaguely comparable motivations of perceived international interests but also on its unique need to reestablish political and moral legitimacy, sought to repent for its sins under Nazism by reaching an agreement with its victims. In 1952 the Germans began to pay compensation, but instead of paying the winners, they paid those they had victimized the worst – primarily the Jews. While the Allies' Marshall Plan and their nonretributive stance toward Germany may have been imaginative politics, the innovative phenomenon in the German-Jewish agreement was that the perpetrator compensated the victims on its own volition in order to facilitate self-rehabilitation. This political arrangement benefited both sides. In forcing an admission of war guilt at Versailles, rather than healing, the victors instigated resentment that contributed to the rise of Fascism. In contrast, Germany's voluntarily admission of responsibility for the Holocaust and consequent restitution to its victims provided a mechanism to enable Germany to move beyond its crimes and facilitate its healing.

This admission of guilt had to be undertaken in concord with the victims. In this case the restitution agreement was formulated between West Germany and Israel, both 'descendant' entities of the perpetrators and the victims. The idea of compensation, the rhetoric of guilt, and limited recognition-forgiveness were translated, through the legal medium of restitution, into new possibilities in international relations. The Holocaust was not undone, but as in mourning, restitution provided a mechanism for dealing with pain and recognizing loss and responsibility, while enabling life to proceed. The agreement between Germany and the Jews turned out to be one of the most significant cornerstones of the newly formed German Federal Republic. Viewing them as a moral obligation as well as a pragmatic policy, Germany provided reparations to victims who were in no political position to enforce such payments or indeed to refuse them. The German-Jewish agreement, which included Jewish recognition of the German attempt to atone for its crimes but not forgiveness of

9 The actual impact of the treaty remains controversial. Here, I highlight only the reversal of public perception. The 'true' harshness of the indemnity is of secondary importance to its perception. M.F. Boemeke, G.D. Feldman and E. Glaser, (eds) *The Treaty of Versailles: A Reassessment after 75 years* (Cambridge University Press, 1998).

10 For example, 'The Marshall Plan and Its Legacy,' special commemorative section, 76 *Foreign Affairs* (May-June 1997) 157. It is clear that in addition to this policy, the impact of the Cold War on moral considerations should not be underestimated.

them, became the foundation for further reconciliation between Germans and Jews, led to the rehabilitation of Germany, and contributed to the economic survival of Israel. This was the moment at which the modern notion of restitution for historical injustices was born.

A generation after Germany had begun to pay restitution to Jewish victims, other victims of the Second World War called for reparations. The first case was concluded when, in the late 1980s, the American government compensated Japanese Americans interned in camps during the war. The agreement was particularly successful because it quantified a historical injustice and translated it into a specific sum acceptable to both the victims as compensation and the government as an expense. The resolution quickly became a model for other groups that demanded justice. African Americans and other victims of the slave trade were quick to cite the agreement as a precedent for their own renewed claims. Among other restitution disputes originating in the Second World War, the debate over art treasures looted from Germany by the Soviet Union at the end of the war is of particular interest. During the course of the war Germany plundered, but mostly destroyed, huge amounts of European and Russian cultural treasures and sites. As the war ended, Russia turned the tables and plundered massive amounts from Germany. The Russian claim is that their 27 million dead and the destruction of Russian patrimony justified Russia's plunder of art from Germany. This is at best a controversial claim. But for many Russians, the museums' looted treasures became a source of national pride – the last vestige after losing the Cold War – and an integral part of Russian identity in the Duma's eyes. Germany's relatively weak contestation of the Russian response to its claim for return of the treasures is indicative. First, it suggests a recognition that certain injustices – in this case, the Russian looting – within a specific context – Germany's destruction and plunder of Russia – may become ethical. Second, it suggests that in contrast with the conventional wisdom that only after a relatively long time can a national tradition be established, that there may not be a 'minimal' time or pace needed for inventing a national tradition. Another facet of Nazi plunder that occupied the international agenda during the mid-nineties was the role banks played, primarily in Switzerland but also in many other countries, in laundering Nazi gold and art loot. Suddenly the morality of neutrality was re-examined as an act of collaboration.

Another sphere of restitution cases resulted from the postcolonial condition. Together with the expansion of civil rights to minorities and women, there evolved a new willingness to recognize the place of indigenous peoples in the modern nation. It is here that the extension of the principle of equality to groups previously denied such treatment has, first, expanded the notion of who deserves individual human rights and, second, reformulated these rights to include group rights. During the 1960s the recognition that such rights must be extended to indigenous peoples grew in English-speaking countries, then spread to Latin America. Indigenous demands for

rights translated into a call for recognizing historical injustices and amending them or, in some cases, into a call for full or semi-sovereignty. In their struggle for legitimacy, indigenous peoples present a major challenge to the contemporary nation-state's self-perception as a just society and a unified sovereign nation, and many of these debates are conducted within the framework of negotiating restitution. For example, legislation regarding Native American rights is influenced by the moral rhetoric of restitution and closely resembles the debate in Australia, New Zealand and Canada.

One new measure of this public morality is the growing political willingness, and at times eagerness, to admit one's historical guilt. As a result of admitting their guilt, the perpetrators may expect to have cleaner consciences and even direct political payoff. Either way, the apology is evidence of the public's distress in carrying the burden of guilt for inflicting suffering and possibly of its empathy with the victims. For example, Queen Elizabeth has lately found herself apologizing around the globe: to the Maoris and the Sikhs. Despite certain mockery, mostly in the conservative London press or postcolonial electronic bulletin boards, there was little downside to her apologies. In general, objections from the recipients come because they believe the apologies do not go far enough, not because they reject the notion of apologies in principle.

In addition to solving a specific dispute, restitution agreements and negotiations around the globe provide possible models for other outstanding conflicts, such as peace negotiations. Bound between the conflicting principles of prosperity (utilitarianism) and morality (rights), and against the context of inequality and oppression, restitution provides a space to negotiate agreements. Neither principle exists in a pure form in restitution; rather, they inform the emerging policies around the world. The different parties that subscribe to restitution benefit from the new rhetoric by having their historical narratives and identities validated, at the cost of admitting that their histories are contaminated by injustices.

Judging historical injustices

In the court of public opinion, historical events are judged out of context and in light of contemporary moral standards. The public suspends a belief in cultural pluralism and ethical relativism and, on the basis of local, provisional and superior moral presentism as well as growing egalitarianism, views the past as a foreign, disdained culture. It may be willing to embrace certain cultural legacies, but in true buffet style, it chooses only the very appetizing dishes. Thus in the United States the Constitution may be viewed as a sacred document, but the Founding Fathers who wrote it are denigrated as DWMs (dead white males) whose world was founded on surplus capital produced by slavery. The evil of Nazism clearly elicited Russian retribution that is, in hindsight, hard to justify and is the subject of current international disputes. In what

way were the millions of German refugees from Central and East Europe (1945–48) victims compared with the rest of the European refugees at the time? Ought they to be recognized as victims and receive restitution, or were they unlucky perpetrators? Also, in the case of the plundered art, if both countries were to reconstitute what plundered treasures remained, because Germany destroyed so much, it would mean that Russia would be deprived of its own material culture while Germany would regain possession of its. Would that constitute a better or just solution? Far from the pandemonium of the war the international public is happy to take the moral high road. The presentist dilemma, of viewing history from the contemporary perspective, is whether or not such actions ought to be judged against the horror of the war or against some other global, abstract, moral standard. Is the public really in a position to legitimate retribution as justice? Democracies seem to prefer limited moral standards to the total abdication of responsibility.

Consider the legacy of archaeological efforts to excavate ancient ruins and anthropological aspirations to ‘salvage’ the culture of disappearing indigenous peoples. The heroic results of those efforts by ‘great (often) men’ exist in museums around the world. Over time, however, these actions have been reevaluated as ‘appropriation’ and ‘domination.’ Similarly, scientific efforts by physical anthropologists to study the remains of indigenous peoples have recently been reclassified¹¹ as grave robbing. If the ethics of possessing certain museum collections is controversial even now, the immorality of slavery is now uncontested.

A principled argument in favor of restitution is that no matter how long ago the injustice occurred, its legitimization only encourages other wrongdoings. The counterargument is that since there is no passage of time without changed circumstances, the perceived injustices may have been over time erased by historical changes. This is not to say that the mere passage of time lends legitimacy to the results of injustices but rather that changed circumstances do.¹² This presentist moral predicament exists in regard to every historical injustice.

Restitution as negotiated justice

Over the last two generations the writing of history has shifted focus from the history of perpetrators to the history of victims. Replacing the stories of elites with the histories of everyday life has necessarily illuminated the ongoing victimization of large segments of humanity along the lines of gender, class and race discrimination. (Even though the stories themselves often underscored the ‘agency’ and relative control the victims had over their own lives, the context was one of oppression.) As victorious

11 K.D.Vitelli (ed.) *Archaeological Ethics* (Altamira Press, Walnut Creek US, 1996).

12 J.Waldron ‘Superseding Historical Injustice’ 103 *Ethics* (1992) 25.

histories of the elite and the rich are replaced by the lives of the conquered, the poor and the victimized other, the public is confronted by history as the territory of injustice. In the democratization of historical memory, the public over time encounters its own identity, one that includes immoral acts, suffering and oppression. Although the political system seems reluctant to take radical steps to heal contemporary injustices, it seems more willing to entertain the possibility of amending historical injustices.

Cultural property turns out to be a particularly appropriate medium for negotiating historical injustices. Cultural property embodies the group's national identity. Specific cultural objects in every society bear the mark of that society's unique identity. Demands for restitution of such objects as the Parthenon Marbles, the Benin Bronzes, Mesoamerican treasures and of indigenous sites of cultural significance, go beyond the economic value of the objects because the group's identity is invested in them. The international community increasingly recognizes these issues and attempts to formulate agreements to address cultural property as inalienable patrimony, the time limitations of historical injustices, and the place of the individual in a communal culture. UNESCO now heads efforts to codify a series of international agreements concerning cultural property.¹³ The significance of cultural property increases not only for reasons of national identity but also because its control carries substantial economic consequences, including the future of tourism and museums. These discussions are particularly befitting to a fuzzy moral logic, beginning from specific cases and generalizing to mediate economic interests, culture, religion, and politics within and among rival societies.

How, then, are we to look at the international order as a moral system? Admittedly a discussion of a moral international system ought to be viewed with skepticism. The public is justifiably disillusioned with the dramatic political movements or major social upheavals of the twentieth century that promised utopian solutions only to lead to terrible wars and human disasters, which contributed to further estrangement from politics and inoculation against any belief in striking solutions. This alienation is reinforced by the inability of international organizations to put a stop to the worst human disasters. Some would go further and argue that there is no international system at all, merely anarchy. This view is too pessimistic. Increasingly, however, the international system combines incremental levels of cooperation, from the most minimal general obligations to a comprehensive set of goals shared by groups of countries. At a profound level, it is a voluntary democratic system, as members determine their own willingness to commit certain resources to achieve a particular aim. The system also includes a moral standard to which countries can choose to subscribe, at times voluntarily and at times with prompting. The Nobel Peace Prize for 1997, which was awarded to the International Campaign to Ban Landmines, was a striking example of the expanded space of ethics in a new post-Cold War international politics. The organization, a coalition of about 1,000 organizations in more than sixty countries, successfully applied

13 E. Barkan 'Collecting Culture: Crimes and Criticism' 10 *American Literary History* (1998) 753.

public moral pressure to governments the world over to sign the international convention. It was praised by the Nobel Committee as an exciting new form of a broad grass roots coalition of citizens' groups that, by applying moral political pressure and working outside existing international organizations, led to world change.¹⁴

The rush to restitution since the 1980s has been informed in part by the delegitimation of armed conflict as the Cold War waned, often transferring the desire for recognition into diplomacy. Whereas, in the 1970s, radical activists within these groups resorted to violence, in the 1990s their activism has shifted to diplomacy and demands for restitution. This shift is most visible among indigenous peoples, including Native Americans, Aborigines and Maoris.

Against this notion of increased morality, we are faced with the weak political response to human disasters and the sense of a bankrupt international system that seems to contradict the increased integration of the world economy and the necessarily high degree of cooperation. Critics view this presumed cooperation as a neocolonial system in which the rich nations are able to exploit the rest of the world (as well as the domestic poor) more efficiently. What are the existing alternatives to the ills of the market economy as a global ideology? We find alternatives in the form of national ideologies and religious fundamentalism that reject Enlightenment values and liberalism. While people in the West object to these ideologies, they find it hard to articulate a counterideology to which they can subscribe or even to reject these ideologies from a coherent perspective.

Short of conservative efforts to invent a cohesive past, political philosophers are very ambivalent in their attempts to point toward 'positive' alternatives. Since the political situation is too complex and distressing, denial replaces involvement.

The challenge of restitution

Against the background of a moral malaise, does restitution provide a moral opportunity? The political calculus of restitution aims to privilege a moral rhetoric, to address the needs of past victims, and to legitimate a discussion about redistribution of resources around the globe. A strong case for restitution would underscore a moral economy that would calculate and quantify evil and place a price on amending injustices. Such a theory of justice would obviously suffer from all the shortcomings of utilitarianism that have been exposed over the last 200 years. After all, who could quantify genocide? Yet the moral high ground has its own disadvantages. One virtue the moral economy of restitution may present would be that it does not propose a universal solution but strives to evaluate conflicts in light of a vague standard and would be pragmatically mediated by the protagonists themselves. Would an atmosphere of

14 F. Sejersted 'Foes of Land Mines Win Nobel Peace Prize' *New York Times* 11 October 1997.

restitution and apologies create motivation for the perpetrators to submit to the judgment of the victims and facilitate an economy in which distributive justice is shaped by the reciprocal contribution of the protagonists to each other's identity?

Does restitution signal a new relationship between powerful and weak nations? Does it change the relationship between the rich and the poor? In a world fraught with 'civil' wars, ethnic cleansing, separatism and human rights abuses, it is only too easy to reject the very notion of a moral stand. Yet victims around the world refuse this easy option.¹⁵ Instead they often prefer to receive even token reparations as symbolic of recognition; they are eager for the perpetrators to acknowledge the past and to provide a shared escape route for a new beginning. In this case victims and perpetrators collaborate in searching for an exit from the bonds of history. This morality may have a particular cachet in our postcolonial world, in which peoples' identities include their histories and sufferings. Descendants and survivors of peoples who were conquered, colonized, dominated, decimated or enslaved may come to recognize that a new international standard enables them to establish new relations with the descendants of the perpetrators. Each new relationship is dependent not only on moral considerations but also on political and social power relations.

Beyond the moral framework, groups have to pursue their claims politically and persuade different constituencies of their just claims.

Under such new circumstances restitution may demonstrate that acting morally carries tangible and intangible political and cultural benefits. Its attractiveness results from presenting local moral solutions in a deeply immoral and unjust world. Restitution argues for a morality that recognizes an ensemble of rights beyond individual rights, and it privileges the right of peoples to reject external impositions and decide for themselves. A theory of conflict resolution based on restitution may illuminate the efforts by many nations and minorities to gain partial recognition and overcome conflicting historical identities through the construction of a shared past. Contemporary international discourse underscores the growing role of guilt, mourning, and atonement in national revival and in recognizing the identity of a historically victimized group.

Towards a theory of restitution

The perpetrator's growing willingness to recognize the legitimacy of the victim's claims becomes the victim's political power. Victimization empowers. Building on a willingness to turn the guilt into political recognition and on the perpetrator's need for the victim's approbation, the discourse of restitution turns this acceptance of guilt

15 Y.K. Tyagi 'The Concept of Humanitarian Intervention Revisited' 16 *Michigan Journal of International Law* (1995) 883.

into a political tool. The politics of group guilt is enacted in the twilight zone between international and national politics. At times the case involves two sovereign countries. But often the recognition takes place within a specific country whose citizens include the victims and the perpetrators alike. Either way, international morality plays a major role in determining the spectrum and scenarios available for the protagonists.

Restitution: a growing moral trend

Restitution as a new system is distinct from past practices in that both sides enter voluntarily into negotiations and agreements; they are not imposed by the winner upon the loser or by a third party. While claims of injustice are not new, the centre-piece of restitution as a new international system is the willingness of governments to admit to unjust and discriminatory past policies and to negotiate terms for restitution or reparation with their victims based more on moral considerations than on power politics. The worldwide perspective and the similar rhetoric currently employed in very distinct conflicts suggest that this new wave may be evidence of an appeal to a novel international standard that privileges ethical along with traditional *Realpolitik* considerations. The moral economy of restitution enjoys a growing popularity in the private and public sectors alike. It ranges from private reparation in criminal and civil cases to a framework for resolving historical injustices in the intra- and international arenas. In the post-Cold War world the language of reconciliation and amending historical crimes becomes an increasingly useful mechanism in international relations, especially where NGOs are involved. It presents a vague moral standard that redefines the relationships among groups and in the process rewrites group identities and rights. Its popularity is growing as a legal remedy in the present capitalist society since it privileges concrete economic incentives and compensation over punishment.

The new trend is still in its formative stages in international relations. It derives its notions of justice from an empirical examination of the gained benefits and professed motivations of groups that subscribe to restitution. But such a standard is of a very provisional nature, and if history teaches us anything, future circumstances will most likely shift notions of morality. Linear moral progression is unlikely, and therefore, it is feasible that the current first steps of restitution agreements may be judged as unsatisfactory and possibly even as further exploitation of the victims. Yet at present restitution serves as an attempt to allow for atonement for historical injustice.

In exploring a framework for a theory of restitution, we should recognize, among other things, the role of individual and group rights in international morality, the predicament of presentism in judging historical injustices, the tension and conflict between national heritage and economic prosperity, the dilemma of the inalienability of culture, and the way historical injustices are transformed into a discourse of restitution, as well as answer objections to and provide possible models for restitution.

Through a dialogue that focuses on mutual recognition of the identities and perceived histories of the protagonists, it transcends exclusionary identities and provides a prudent way to affirm both the principles of individual human rights and new group rights. As restitution agreements proliferate, should we anticipate a new component in international and intranational relations that validates dialogue and the desire for justice and recognition?

A theory of restitution as a mechanism for international justice assumes (i) that there is no global consensus on specific morality, but (ii) that community standards and traditions should not conflict with the vague global principles held by international public opinion.

Restitution builds on the moral common denominator among diverging standards and communities. It is based on the recognition that justice depends, foremost, on negotiation and mutual acknowledgment by the protagonists. By accepting the principled failure to formulate a homogeneous moral theory, a theory of restitution recognizes the very forging of a reconciliation agreement as itself a moral achievement.

The attempt to bridge vague global morality and local conditions is done through an international system of 'public shame.' The combined force of public opinion and the international media is often substantial to the point that even mild international shame could be meaningful. This obviously does not succeed in all circumstances. Indeed the expectation that one could shame Saddam Hussein into behaving morally sounds pathetic rather than utopian. This, however, leaves many other cases in which shame does work, such as that of the Swiss, who were shamed and pressured into action by the disclosure of hidden treasures from the 1930s. Public shame is proving effective in pressuring politicians to apologize and repent.

The success of restitution as a moral political theory will be measured by its ability over time to imagine a cultural diversity that eschews a universal notion of the good but subscribes to vague shared values that provide models for conflict resolutions otherwise unavailable. By recognizing the merit in both individual and group rights as they exist in an unjust world, restitution aims to provide a mechanism for negotiating rivalries and recognizing identities rather than ignoring them.

Restitution as a theory of international relations proposes a process, not a specific solution or standard.

The restitution of indigenous rights leads to recognition of the group, which legitimizes the group's claims and leads to further discussion of new rights and to a growing inclusion of the indigenous story in the culture of the mainstream. If the acceptance of restitution around the world represents the globalization of Western Enlightenment and modernity, it also represents the inclusion of 'other' histories and

spaces, which in the process transforms this ideology. The craving for recognition must therefore validate dialogue and the participation of distinct cultures as a precondition for resolution of conflicts: not the domination of one ideology over another, but the recognition by both winner and loser of their intertwined histories and equal worth as humans.

Restitution as a dialogue between protagonists provides an alternative to growing millenarist narratives that see the victory of the West over the rest, or at least the need for such a victory, as a necessity for survival. In the restitution narrative the West is not under attack but is rather in a dialogue with the rest of the world. For better and for worse, the Western culture, like its economy, becomes multinational and is shaped by the encounter with other cultures.

The process of restitution negotiation leads to a reconfiguration of both sides. While the perpetrators hope to purge their own history of guilt and legitimize their current position, the victims hope to benefit from a new recognition of their suffering and to enjoy certain material gains.

As particular cases unfold, they further the shared international moral standard and exemplify how plural historical narratives emerge and become a vague global moral 'good.' A string of agreements around the world, motivated and initiated by local indigenous activism, creates a global standard of morality based upon restitution that becomes the foundation for new group rights.

Restitution is voluntary, and it accepts a vague global morality yet anchors its principles in local social and cultural reality. The common denominator of these cases is that they involve no explicit external coercion, neither by a victorious nor by a third party. Agreements are reached voluntarily, if under pressure, and as part of a democratic process.

The dynamics of restitution

Frequently discussions of restitution begin with a polarized, unbridgeable disagreement about the past. Were the disputed actions at the time legal, moral or criminal? What were the causes of what, at times perhaps only in hindsight, is viewed as crime? As the conversation of restitution proceeds, perpetrators are motivated to reach agreement by a desire that their current position be recognized globally as legitimate and justified, or at least tenable, and at times by the hope that the cost of healing historical wounds will be economically beneficial, and an improvement over the economic costs of the current animosity.

In a growing number of cases involving indigenous groups, historical injustices have been recognized, substantial economic resources have been restituted, and even

a measure of sovereignty has been recognized. Australian Aborigines, New Zealand Maoris, Native Canadians and Native Americans all are in the midst of prolonged restitution processes wherein the rewriting of their identities and places in society is occurring, together with a certain redistribution of economic resources. Restitution has become essential to the politics and identities of indigenous groups.

While policies often resist the coherence of general moral principles, political action can point to a contemporary moral *modus operandi* that is beginning to be manifested in, among other things, restitution agreements. The legitimacy of a local choice, however, is measured against the 'universal' yardstick of the notion of good. This is not an uncontroversial statement and could not have been made just a few years ago. It was exemplified during the 1980s by the controversies over UNESCO's policies surrounding the issues of whether or not pluralism warrants the acceptance of oppression and authoritarianism, over issues of freedom of expression, and whether political and cultural tolerance is specifically Western or is a global human value. Although it may still be empirically true that 'most of the globe's inhabitants simply do not believe in human equality [and think] that such a belief is a Western eccentricity,'¹⁶ the political potency of this critique has diminished greatly in the post-Cold War world.

Conclusion

The novelty of restitution presents a dilemma. Are we to celebrate the proliferation of restitution as a modest beginning of a new international morality, or is it merely the latest twist in contemporary escapism from moral responsibility? Successful cases of restitution as understood here are celebrated by the protagonists and the media. In these cases restitution is viewed as the final stage of amending historical injustice and as reconciliation between two warring parties. This type of resolution of a long conflict – the burying of the hatchet – should indeed be a cause for optimism. It has become a truism that trade and economic prosperity are enhanced by the absence of conflict. While consent does not mean equality, it does imply a dialogue and a reciprocal recognition. Moreover, while the redistribution of resources around the globe as a result of restitution is likely to be minimal, the rhetoric of restitution profoundly changes the relationship between rich and poor, between powerful and weak nations, and between states and minorities.

Restitution could be seen as an inexpensive way for powerful nations and governments to regain the appearance of just societies while maintaining their position of hegemony and control. From this position, under the oratory of equal and democratic

16 See, for example, the exchange between C. Geertz 'The Uses of Diversity' and R. Rorty 'On Essentialism: a Reply to Clifford Geertz' 25 *Michigan Quarterly* (1986) 531.

ideals, restitution may be viewed as lip service in a hegemonic ideology and as facilitating further exploitation of resources by the multinationals and the all-powerful West.

As an economic critique this is often true. However, the meaning of restitution goes further in facilitating a shift in power relations. Does the evolving international norm of group and individual rights and a shared belief in basic human equality force the rich to consent to a greater distribution of resources beyond political verbosity and to barter recognition and resources beyond the previous necessities of naked political power? The economic limitation should not minimize the recognition that restitution has significant impact on the victims, who are often the poor and the oppressed, by enabling them to gain better standards of living and enhancing their political and cultural claims on public spaces. Even though the discourse of restitution is often economic, the identity of the victims is validated and given a political boost, which changes the substance of hegemonic control.

From the perpetrators' perspective, a powerful critique of the morality of restitution is based on the notion that the current generation should not have to pay for the previous generations' crimes (guilt is not inherited). However, the generational question is anything but straightforward. Our identity – who we are – is a result of our history, for better and for worse. We enjoy the riches of our past and therefore supposedly should pay our historical debts. Nor do we know where to draw the line that demarcates which historical crimes call for amends and which should fall under the category of 'let bygones be bygones.'

Successful restitution cases underscore the growing role of guilt, mourning, and atonement in national revival and reconciliation and the demand for new rights by historically victimized groups. These cases transform a traumatic national experience into a constructive political situation. By bringing a conflict to closure and opening new opportunities while creating new rights, they facilitate changes in national identities and are becoming a force in resolving international conflicts.

Mindful of wrongs that cannot be resolved, a theory of restitution addresses a segment of historical injustices and is an ongoing process. It transforms into a moral standard when groups and governments try to emulate successful agreements. It can be a long road to the point where a vague moral standard is established, and even then it will shift and change as new events occur and new agreements are reached. However, examples of successfully enacted restitution can provide models for governments, NGOs and the public, attesting to its practicality.

From within the pluralist perspective the moral dilemmas of 'hard cases' are replaced by negotiations among the parties, all of whom subscribe to a similar set of vague principles but interpret these from their own particularly subjective perspectives. Because these cases are resolved locally, they produce only the most general precedent, more cultural than legal – not a universal principle but a specific conflict resolution.

A theory of restitution does not claim to offer a solution for every conflict. It redirects public attention and political energy to international and quasi-international cases in which potential solutions can be imagined, and it provides models for such negotiations. It is not a comprehensive theory; rather it is a mechanism with widespread application. Restitution makes conflict resolution an attractively plausible proposition.

The theory of restitution takes the pragmatic road of building upon agreements, first, in places where such changes are welcomed. These principles are then sought out and embraced in other cases. It is an approach that is only meaningful in a specific historical period when despite rhetorical and cultural differences, a certain vague, minimal, common moral denominator exists. It is of little use in places where violence overwhelms reason. In contrast, it is most alluring to those parts of the world affluent enough to be concerned with moral justice.

Instead of searching for a metamoral principle to adjudicate conflicts, restitution theory reaches for agreement and for reconciliation of the subjective perceptions of victimization. This seems at present a worthy principle for international morality.

I believe the significance of restitution stems from its impact on the victim, who is often (but not exclusively) the poor and oppressed. The emphasis here is on consent and inclusion, not on equality. The assumption is that the moral economy of restitution succeeds as a mechanism if it enables the victims to claim a share of the economic pie in addition to legitimizing their histories, their stories and their identities.

But it also gives certain latitude for partial solutions. Restitution may not need to postulate a comprehensive solution in order to provide a meaningful improvement in international morality. As restitution becomes the norm, it establishes a new reality and presents new winners and losers, as well as new predicaments. But before being able to deal with these new dilemmas, besides recognizing the novelty of the phenomenon, we also have to see its limitations. A theory of restitution cannot put an end to inequality; rather its more limited aim is to improve on existing social injustice.

In a world that privileges economic transactions, the moral economy of restitution is a viable option for conflict resolution, even if its ramifications on the identities of the protagonists leave many aspects of historical injustices unaddressed. The discourse of restitution aims at the morally possible, not at the politically utopian.

Cosmopolitan Ethics

Extracts from *Cosmopolitanism: Ethics in a World of Strangers*¹⁷

A.K. Appiah

Editor's Note

This book also sets the return of cultural objects against a wider moral picture, giving examples of a 'cosmopolitan ethics' and coming to a very different conclusion. However, while Barkan feels he is reporting on an existing development of morality, Appiah is arguing for the adoption of one.

Making conversation

OUR ANCESTORS have been human for a very long time. For most of human history, we were born into small societies of a few score people, bands of hunters and gatherers, and would see, on a typical day, only people we had known most of our lives. Everything our long-ago ancestors ate or wore, every tool they used, every shrine at which they worshipped, was made within that group. Their knowledge came from their ancestors or from their own experiences. That is the world that shaped us, the world in which our nature was formed.

Now, if I walk down New York's Fifth Avenue on an ordinary day, I will have within sight more human beings than most of those prehistoric hunter-gatherers saw in a lifetime. Between then and now some of our forebears settled down and learned agriculture; created villages, towns, and, in the end, cities; and discovered the power of writing. But it was a slow process. When, in the first century, the population of Rome reached a million, it was the first city of its size. To keep it fed, the Romans had had to build an empire that brought home grain from Africa. By then, they had already worked out how to live cheek by jowl in societies where most of those who spoke your language and shared your laws and grew the food on your table were people you would never know. It is, I think, little short of miraculous that brains shaped by our long history could have been turned to this new way of life.

¹⁷ (Norton, New York, 2006). These extracts are taken from the Introduction and Chapter 8 'Whose culture is it anyway?' xi-xviii, 115-35.

Even once we started to build these larger societies, most people knew little about the ways of other tribes, and could affect just a few local lives. Only in the past couple of centuries, as every human community has gradually been drawn into a single web of trade and a global network of information, have we come to a point where each of us can realistically imagine contacting any other of our 6 billion con-specifics and sending that person something worth having: a radio, an antibiotic, a good idea. Unfortunately, we could also send, through negligence as easily as malice, things that will cause harm: a virus, an airborne pollutant, a bad idea. And the possibilities of good and of ill are multiplied beyond all measure when it comes to policies carried out by governments in our name. Together, we can ruin poor farmers by dumping our subsidized grain into their markets, cripple industries by punitive tariffs, and deliver weapons that will kill thousands upon thousands. Together, we can raise standards of living by adopting new policies on trade and aid, prevent or treat diseases with vaccines and pharmaceuticals, take measures against global climate change, encourage resistance to tyranny and express concern for the worth of each human life.

And, of course, the worldwide web of information – radio, television, telephones, the internet – means that we can not only affect lives everywhere but can learn about life anywhere, too. Each person you know about and can affect is someone to whom you have responsibilities: to say this is just to affirm the very idea of morality. The challenge, then, is to take minds and hearts formed over the long millennia of living in local troops and equip them with ideas and institutions that will allow us to live together as the global tribe we have become.

Under what rubric to proceed? Not ‘globalization’ – a term that once referred to a marketing strategy, and then came to designate a macroeconomic thesis, and now can seem to encompass everything, and nothing. Not ‘multiculturalism,’ another shape shifter, which so often designates the disease it purports to cure. With some ambivalence, I have settled on ‘cosmopolitanism.’ Its meaning is equally disputed, and celebrations of the ‘cosmopolitan’ can suggest an unpleasant posture of superiority toward the putative provincial. You imagine a *Comme des Garçons*-clad sophisticate with a platinum frequent-flyer card regarding, with kindly condescension, a ruddy-faced farmer in workman’s overalls. And you wince.

Maybe, though, the term can be rescued. It has certainly proved a survivor. Cosmopolitanism dates at least to the Cynics of the fourth century BC, who first coined the expression cosmopolitan, ‘citizen of the cosmos.’ The formulation was meant to be paradoxical, and reflected the general Cynic scepticism toward custom and tradition. A citizen – a *polites* – belonged to a particular *polis*, a city to which he or she owed loyalty. The cosmos referred to the world, not in the sense of the Earth, but in the sense of the universe. Talk of cosmopolitanism originally signaled, then, a rejection of the conventional view that every civilized person belonged to a community among communities.

The creed was taken up and elaborated by the Stoics, beginning in the third century BC, and that fact proved of critical importance in its subsequent intellectual history. For the Stoicism of the Romans – Cicero, Seneca, Epictetus and the emperor Marcus Aurelius – proved congenial to many Christian intellectuals, once Christianity became the religion of the Roman Empire. It is profoundly ironic that, though Marcus Aurelius sought to suppress the new Christian sect, his extraordinarily personal *Meditations*, a philosophical diary written in the second century AD as he battled to save the Roman Empire from barbarian invaders, has attracted Christian readers for nearly two millennia. Part of its appeal, I think, has always been the way the Stoic emperor's cosmopolitan conviction of the oneness of humanity echoes Saint Paul's insistence that 'there is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus.'¹⁸

Cosmopolitanism's later career wasn't without distinction. It underwrote some of the great moral achievements of the Enlightenment, including the 1789 'Declaration of the Rights of Man' and Immanuel Kant's work proposing a 'league of nations.' In a 1788 essay in his journal *Teutscher Merkur*, Christoph Martin Wieland wrote, in a characteristic expression of the ideal, 'Cosmopolitans ... regard all the peoples of the earth as so many branches of a single family, and the universe as a state, of which they, with innumerable other rational beings, are citizens, promoting together under the general laws of nature the perfection of the whole, while each in his own fashion is busy about his own well-being.'¹⁹ And Voltaire spoke eloquently of the obligation to understand those with whom we share the planet, linking that need explicitly with our global economic interdependence. 'Fed by the products of their soil, dressed in their fabrics, amused by games they invented, instructed even by their ancient moral fables, why would we neglect to understand the mind of these nations, among whom our European traders have travelled ever since they could find a way to get to them?'²⁰

So there are two strands that intertwine in the notion of cosmopolitanism. One is the idea that we have obligations to others, obligations that stretch beyond those to whom we are related by the ties of kith and kind, or even the more formal ties of a shared citizenship. The other is that we take seriously the value not just of human life but of particular human lives, which means taking an interest in the practices and beliefs that lend them significance. People are different, the cosmopolitan knows, and there is much to learn from our differences. Because there are so many human possibilities worth exploring, we neither expect nor desire that every person or every society should converge on a single mode of life. Whatever our obligations are to others (or theirs to us) they often have the right to go their own way. As we'll

18 Letter to the Galatians, *Bible*, 3:28.

19 'Das Geheimnis des Kosmopolitenordens' *Teutscher Merku*, August, 1788, 107 (where the author gives a reference only to a source that is not in English, the translation is his).

20 *Essai sur les moeurs et l'esprit des nations*, Vol. 16 of *Oeuvres complètes de Voltaire (L'Imprimerie de la Société Littéraire-Typographique, Paris, 1784)* 241. Voltaire is speaking specifically here of 'the Orient.'

see, there will be times when these two ideals – universal concern and respect for legitimate difference – clash. There's a sense in which cosmopolitanism is the name not of the solution but of the challenge.

A citizen of the world: how far can we take that idea? Are you really supposed to abjure all local allegiances and partialities in the name of this vast abstraction, humanity? Some proponents of cosmopolitanism were pleased to think so; and they often made easy targets of ridicule. 'A lover of his kind, but a hater of his kindred,' Edmund Burke said of Jean-Jacques Rousseau, who handed each of the five children he fathered to an orphanage.

But if there are friends of cosmopolitanism who make me nervous, I am happy to be opposed to cosmopolitanism's noisiest foes. Both Hitler and Stalin – who agreed about little else, save that murder was the first instrument of politics – launched regular invectives against 'rootless cosmopolitans'; and while, for both, anti-cosmopolitanism was often just a euphemism for anti-Semitism, they were right to see cosmopolitanism as their enemy. For they both required a kind of loyalty to one portion of humanity: a nation, a class – that ruled out loyalty to all of humanity. And the one thought that cosmopolitans share is that no local loyalty can ever justify forgetting that each human being has responsibilities to every other. Fortunately, we need take sides neither with the nationalist who abandons all foreigners nor with the hardcore cosmopolitan who regards her friends and fellow citizens with icy impartiality. The position worth defending might be called (in both senses) a partial cosmopolitanism.

Loyalties and local allegiances determine more than what we want; they determine who we are. A creed that disdains the partialities of kinfolk and community may have a past, but it has no future.

Whose culture is it, anyway?

The Spoils of War

In the nineteenth century, the kings of Asante – like kings everywhere – enhanced their glory by gathering objects from all around their kingdom and around the world. When the British general Sir Garnet Wolseley destroyed Kumasi in a 'punitive expedition' in 1874, he authorized the looting of the palace of the Asante king Kofi Karikari. At the treaty of Fomena, a few months later, Asante was required to pay an 'indemnity' of 50,000 ounces (nearly one and a half tons) of gold, much of which was delivered in the form of jewelry and other regalia. A couple of decades later, a Major Robert Stephenson Smyth Baden-Powell (yes, you know him as the founder of the Boy Scouts) was dispatched once more to Kumasi, this time to demand that the new king, Prempeh, submit to British rule. Baden-Powell described this mission in his book *The Downfall of Prempeh: A Diary of Life with the Native Levy in Ashanti, 1895–96*.

Once the king and his Queen Mother had made their submission, the British troops entered the palace, and, as Baden-Powell put it, ‘the work of collecting valuables and property was proceeded with.’ He continued,

There could be no more interesting, no more tempting work than this. To poke about in a barbarian king’s palace, whose wealth has been reported very great, was enough to make it so. Perhaps one of the most striking features about it was that the work of collecting the treasures was entrusted to a company of British soldiers, and that it was done most honestly and well, without a single case of looting. Here was a man with an armful of gold-hilted swords, there one with a box full of gold trinkets and rings, another with a spirit-case full of bottles of brandy, yet in no instance was there any attempt at looting.

This boast will strike us as almost comical, but Baden-Powell clearly believed that the inventorying and removal of these treasures under the orders of a British officer was a legitimate transfer of property. It wasn’t looting; it was *collecting*. In short order, Nana Prempeh was arrested and taken into exile at Cape Coast. More indemnities were paid.²¹

There are similar stories to be told around the world. The Belgian *Musée Royal de l’Afrique Centrale*, at Tervueren, explored the dark side of the origins of its own collections in the brutal history of the Belgian Congo, in a 2001 show called ‘ExIt-CongoMuseum.’ The Berlin Museum of Ethnology bought most of its extraordinary Yoruba art from Leo Freebies, whose methods of ‘collection’ were not exactly limited to free-market exchange.

The modern market in African art, indeed in art from much of the global south, is often a dispiriting sequel to these earlier imperial expropriations. Many of the poorest countries in the world simply do not have the resources to enforce the regulations they make. Mali can declare illegal the excavation and export of the wonderful sculpture of Djenné-Jeno, but it can’t enforce the law. And it certainly can’t afford to fund thousands of archaeological digs. The result is that many fine Djenné-Jeno terracottas were dug up anyway in the 1980s, after the publication of the discoveries of the archaeologists Roderick and Susan McIntosh and their team. They were sold to collectors in Europe and North America who rightly admired them. Because they were removed from archaeological sites illegally, much of what we would most

21 I. Wilks *Asante in the Nineteenth Century: The Structure and Evolution of a Political Order* (Cambridge University Press, Cambridge, 1975). The history of Asante in the nineteenth century has a great deal to do with its wars and treaties with Britain. Sir Garnet Wolseley’s sack of Kumasi was intended to establish British dominance in the region; though the fact is that he entered Kumasi unopposed on February 4, 1874, and had to retreat two days later because he needed to take his sick and wounded back to the safety of the Gold Coast colony. The expedition of 1895–96, in which Baden-Powell took part, was intended in part to enforce the settlement of 1874 and to establish British sovereignty over Asante by the forced submission of the king. The British eventually exiled a number of political leaders, like the Asantehene, to the Seychelles, remote islands in the middle of the Indian Ocean, in order to make it hard for them to communicate with their peoples. Prempeh I returned to the Gold Coast colony as a private citizen in 1924, and was allowed to resume his title as *umashene* – the chief of Kumasi – a couple of years later. Only in 1935 was his successor, Osei Agyeman Prempeh II (my great-uncle by marriage), allowed to resume the title of Asantehene, king of Asante.

like to know about this culture – much that we could have found out by careful archaeology – may now never be known.

Once the governments of the United States and Mali, guided by archaeologists, created laws specifically aimed at stopping the smuggling of the stolen art, the open market for Djenne-Jeno sculpture largely ceased. But people have estimated that, in the meantime, perhaps a thousand pieces – some of them now valued at hundreds of thousands of dollars – left Mali illegally. Given these enormous prices, you can see why so many Malians were willing to help export their ‘national heritage.’

Modern thefts have not, of course, been limited to the pillaging of archaeological sites. Hundreds of millions of dollars worth of art has been stolen from the museums of Nigeria alone, almost always with the complicity of insiders. And Ekpo Eyo, who once headed the National Museum of Nigeria, has rightly pointed out that dealers in New York and London – including Sotheby’s – have been less than eager to assist in their retrieval. Since many of these collections were well known to experts on Nigerian art, it shouldn’t have taken the dealers long to recognize what was going on. Nor is such art theft limited to the Third World. Ask the government of Italy.

Given these circumstances – and this history – it has been natural to protest against the pillaging of ‘cultural patrimony.’²² Through a number of declarations from UNESCO and other international bodies, a doctrine has evolved concerning the ownership of many forms of cultural property. It is that, in simplest terms, cultural property be regarded as the property of its culture. If you belong to that culture, such work is, in the suggestive shorthand, your cultural patrimony. If you do not, then it is not.

The patrimony perplex

Part of what makes this grand phrase so powerful, I suspect, is that it conflates, in confusing ways, the two primary uses of that confusing word ‘culture.’ On the one hand, cultural patrimony refers to cultural artefacts: works of art, religious relics, manuscripts, crafts, musical instruments, and the like. Here ‘culture’ is whatever people make and invest with significance through the exercise of their human creativity. Since significance is something produced through conventions, which are never individual and rarely universal, interpreting culture in this sense requires some knowledge of its social and historical context. On the other hand, ‘cultural patrimony’ refers to the products of a culture: the group from whose conventions the object derives its significance. Here the objects are understood to belong to a particular group, heirs to a trans-historical identity, whose patrimony they are. The cultural patrimony of Norway, then, is not just Norway’s contribution to human culture – its voices in our

22 I owe a great deal to the cogent (and cosmopolitan!) outline of the development of the relevant international law in John Henry Merryman’s classic paper ‘Two Ways of Thinking about Cultural Property’ 80 *American Journal of International Law* (1986) 831.

noisy human chorus, its contribution, as the French might say, to the civilization of the universal. Rather, it is all the artefacts produced by Norwegians, conceived of as a historically persisting people: and while the rest of us may admire Norway's patrimony, it belongs, in the end, to them.

But what does it mean, exactly, for something to belong to a people? Much of Norway's cultural patrimony was produced before the modern Norwegian state existed. (Norway achieved its modern independent existence in 1905, having been conjoined with either Denmark or Sweden – with the exception of a few chaotic months in 1814 – since the early-fourteenth century.) The Vikings who made the wonderful gold and iron work in the National Museum Building in Oslo didn't think of themselves as the inhabitants of a single country that ran a thousand miles north from the Oslo fjord to the lands of the Sami reindeer herders. Their identities were tied up, as we learn from the sagas, with lineage and locality. And they would certainly have been astonished to be told that Olaf's gold cup or Thorfinn's sword belonged not to Olaf and Thorfinn and their descendants but to a nation. The Greeks claim the Elgin marbles, which were made not by Greece – it wasn't a state when they were made – but by Athens, when it was a city-state of a few thousand people. When Nigerians claim a Nok sculpture as part of their patrimony, they are claiming for a nation whose boundaries are less than a century old, the works of a civilization more than two millennia ago, created by a people that no longer exists, and whose descendants we know nothing about. We don't know whether Nok sculptures were commissioned by kings or commoners; we don't know whether the people who made them and the people who paid for them thought of them as belonging to the kingdom, to a man, to a lineage or to the gods. One thing we know for sure, however, is that they didn't make them for Nigeria.

Indeed, a great deal of what people wish to protect as 'cultural patrimony' was made before the modern system of nations came into being, by members of societies that no longer exist. People die when their bodies die. Cultures, by contrast, can die without physical extinction. So there's no reason to think that the Nok have no descendants. But if Nok civilization came to an end and its people became something else, why should those descendants have a special claim on those objects, buried in the forest and forgotten for so long? And, even if they do have a special claim, what has that got to do with Nigeria, where, let us suppose, a majority of those descendants now live?

Perhaps the matter of biological descent is a distraction: proponents of the patrimony argument would surely be undeterred if it turned out that the Nok sculptures were made by eunuchs. They could reply that the Nok sculptures were found on the territory of Nigeria. And it is, indeed, a perfectly reasonable property rule that where something of value is dug up and nobody can establish an existing claim on it, the government gets to decide what to do with it. It's an equally sensible idea that the object's being of cultural value places on the government a special obligation to

preserve it. Given that it is the Nigerian Government, it will naturally focus on preserving it for Nigerians (most of whom, not thinking of themselves as heirs to Nok civilization, will probably think it about as interesting as art from anywhere else). But if it is of cultural value – as the Nok sculptures undoubtedly are – it strikes me that it would be better for them to think of themselves as trustees for humanity. While the Government of Nigeria reasonably exercises trusteeship, the Nok sculptures belong in the deepest sense to all of us. ‘Belong’ here is a metaphor, of course: I just mean that the Nok sculptures are of potential value to all human beings.

That idea is expressed in the preamble of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* of May 14, 1954, which came out of a conference called by UNESCO. ‘Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world ...’

Framing the problem this way – as an issue for all mankind should make it plain that it is the value of the cultural property to people and not to peoples that matters. It isn’t peoples who experience and value art; it’s men and women. Once you see that, then there’s no reason why a Spanish museum couldn’t or shouldn’t preserve a Norse goblet, legally acquired, let us suppose at a Dublin auction, after the salvage of a Viking shipwreck off Ireland. It’s a contribution to the cultural heritage of the world. But at any particular time it has to be in one place. Don’t Spaniards have a case for being able to experience Viking craftsmanship? After all, there’s already an awful lot of Viking stuff in Norway. The logic of ‘cultural patrimony’ would call for it to be shipped back to Norway (or, at any rate, to Scandinavia): that’s whose cultural patrimony it is.

And, in various ways, we’ve inched closer to that position in the years since the Hague Convention. The *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, adopted by the UNESCO General Conference in Paris in 1970, stipulated that ‘cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting’; that ‘it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage.’ And a state’s cultural heritage, it further decreed, included both work ‘created by the individual or collective genius of nationals of the State’ and ‘cultural property found within the national territory.’ The Convention emphasized, accordingly, the importance of ‘prohibiting and preventing the illicit import, export and transfer of ownership of cultural property.’ A number of countries now declare all antiquities that originate within their borders to be state property, which cannot be freely exported. In Italy, private citizens are free to own ‘cultural property,’ but not to send it abroad.²³

23 J. Cuno ‘US Art Museums and Cultural Property’ 16 *Connecticut Journal of International Law* (2001) 189.

Precious bane

Plainly, special problems are posed by objects, such as Viking treasure and Nok art, where there is, as the lawyers might say, no continuity of title. If we don't know who last owned a thing, we need a rule as to what should happen to it now. Where objects have this special status as a valuable 'contribution to the culture of the world,' the rule should be one that protects that object and makes it available to people who will benefit from experiencing it. So the rule of 'finders, keepers,' which may make sense for objects of less significance, will not do. Still, a sensible regime will reward those who find such objects, and give them an incentive to report not only what they have found, but where and how they found it.

For an object from an archaeological site, after all, value comes often as much from the knowledge to be gleaned by knowing where it came out of the ground, what else was around it, and how it lay in the earth. Since these articles usually don't have current owners, someone needs to regulate the process of removing them from the ground and deciding where they should go. As I have said, it seems to me reasonable that the decision should be made by the government in whose soil they are found. But the right conclusion for them is not obviously that they should always stay exactly where they lay. Many Egyptians – overwhelmingly Muslims who regard the religion of the pharaohs as idolatrous – nevertheless insist that all the antiquities ever exported from its borders are really theirs. You do not need to endorse Napoleon's depredations of North Africa to think that there is something to be said for allowing people in other countries the chance to see close up the arts of one of the world's great civilizations. And it's a painful irony that one reason we've lost information about cultural antiquities is the very regulation intended to preserve it. If, for example, I sell you a figure from Djenne-Jeno with evidence that it came out of the ground in a certain place after the regulations came into force, then I am giving the authorities in the United States, who are committed to the restitution of objects taken illegally out of Mali, the very evidence they need.

Suppose that, from the beginning, Mali had been encouraged and helped by UNESCO to exercise its trusteeship of these Djenne-Jeno terracottas by licensing digs and training people to recognize that objects removed carefully from the earth with accurate records of location are worth more, even to collectors, than objects without this essential element of provenance. Suppose they had required that objects be recorded and registered before leaving, and stipulated that if the national museum wished to keep an object, it would have to pay a market price for it, the acquisition fund being supported by a tax on the price of the exported objects. The digs encouraged by this regime would have been worse than proper, professionally conducted digs by accredited archaeologists. Some people would still have avoided the rules. But mightn't all this have been better than what actually happened? Suppose, further, that the Malians had decided that, in order to maintain and build their collections, they should auction off some works they own. The cultural-patrimony crowd, instead of

praising them for committing needed resources to protecting the national collection, would have excoriated them for betraying their heritage.

The problem for Mali is not that it doesn't have enough Malian art. The problem is that it doesn't have enough money. In the short run, allowing Mali to stop the export of a good deal of the art in its territory does have the positive effect of making sure that there is some world-class art in Mali for Malians to experience. (This doesn't work well everywhere, since another feature of poor countries is that it's hard to stop valuable materials from disappearing from national collections and reappearing in international auction houses. That's especially true if the objects are poorly catalogued and worth many times the total annual salaries of the museum staff; which explains what has happened in Nigeria.) But an experience limited to Malian art – or, anyway, art made on territory that's now part of Mali – makes no more sense for a Malian than for anyone else. New technologies mean that Malians can now see, in however imperfectly reproduced a form, great art from around the planet. If UNESCO had spent as much effort to make it possible for great art to get into Mali as it has done to stop great art from getting out, it would have been serving better the interests that Malians, like all people, have in a cosmopolitan aesthetic experience.

Living with art

How would the concept of cultural patrimony apply to cultural objects whose current owners acquired them legally in the normal way? You live in Norway. You buy a painting from a young, unknown artist named Edvard Munch. Your friends think it rather strange, but they get used to seeing it in your living room. Eventually, you leave it to your daughter. Time passes. Tastes change. The painting is now recognized as being the work of a major Norwegian artist, part of Norway's cultural patrimony. If that means that it literally belongs to Norway, then presumably the Norwegian government, on behalf of the people of Norway, should take it from her. After all, on this way of thinking, *it's theirs*. You live in Ibadan, in the heart of Yorubaland in Nigeria. It's the early sixties. You buy a painted carving from a guy – an actor, painter, sculptor, all-around artist—who calls himself Twin Seven Seven. Your family thinks it's a strange way to spend money. But once more time passes, and he comes to be seen as one of Nigeria's most important modern artists. More cultural patrimony for Nigeria, right? And if it's Nigeria's, it's not yours. So why can't the Nigerian government just take it, as the natural trustees of the Nigerian people, whose property it is?

Neither the Norwegians nor the Nigerians would in fact exercise their power in this way. (When antiquities are involved, though, a number of states will do so.) They are also committed, after all, to the idea of private property. Of course, if you were interested in selling, they might provide the resources for a public museum to buy it from you (though the Government of Nigeria, at least, probably thinks it has

more pressing calls on its treasury). So far, cultural property is just like any other property. Suppose, though, the governments didn't want to pay. There's something else they could do. If you sold your artwork, and the buyer, whatever his nationality, wanted to take the painting out of Norway or Nigeria, they could refuse permission to export it. The effect of such international regulations is to ensure that Norwegian cultural patrimony is kept in Norway, Nigerian in Nigeria. An Italian law (passed, by the way, under Mussolini) permits the Italian government to deny export to any artwork over fifty years old currently owned by an Italian, even, presumably, if it's a Jasper Johns painting of the American flag. But, then, most countries require export licences for significant cultural property (generally excepting the work of living artists). So much for being the cultural patrimony of humankind.

These cases are particularly troublesome, because neither Munch nor Twin Seven Seven would have been the creator that he was if he'd been unaware of and unaffected by the work of artists in other places. If the argument for cultural patrimony is that the art belongs to the culture that gives it its significance, most art doesn't belong to a national culture at all. Much of the greatest art is flamboyantly international; much ignores nationality altogether. Early modern European art was court art, or it was church art. It was made not for nations or peoples but for princes or popes or *ad majorem gloriam dei*. And the artists who made it came from all over Europe. More importantly, in the quote often ascribed to Picasso, good artists copy, great ones steal; and they steal from everywhere. Does Picasso himself – a Spaniard – get to be part of the cultural patrimony of the Republic of the Congo, home of the Vili, one of whose carvings the Frenchman Matisse showed him at the home of the American Gertrude Stein?

The problem was already there in the preamble to the 1954 Hague Convention that I quoted a little while back: '*each people* makes its contribution to the culture of the world.' That sounds like whenever someone makes a contribution, his or her 'people' makes a contribution, too. And there's something odd, to my mind, about thinking of Hindu temple sculpture or Michelangelo's and Raphael's frescos in the Vatican as the contribution of a people, rather than the contribution of the individuals who made (and, if you like, paid for) them. I know that Michelangelo made a contribution to the culture of the world. I've gazed in wonder at the ceiling of the Sistine Chapel. I will grant that Their Holinesses Popes Julius II, Leo X, Clement VIII and Paul III, who paid him, made a contribution, too. But which people exactly made that contribution? The people of the Papal States? The people of Michelangelo's native Caprese? The Italians?

This is clearly the wrong way to think about the matter. The right way is to take not a national but a cosmopolitan perspective: to ask what system of international rules about objects of this sort will respect the many legitimate human interests at stake. The point of many sculptures and paintings, the reason they were made and bought, was that they should be looked at and lived with. Each of us has an interest

in being able, should we choose, to live with art; and that interest is not limited to the art of our own 'people.' Now, if an object acquires a wider significance, as part, say, of the oeuvre of a major artist, then other people will have a more substantial interest in being able to experience it and to the knowledge derived from its study. The object's aesthetic value is not fully captured by its value as private property. So you might think there was a case for giving people an incentive to share it. In America such incentives abound. You can get a tax deduction by giving a painting to a museum. You get social kudos for lending your artworks to shows, where they can be labeled 'from the collection of ...' And, finally, where an object is a masterpiece, you can earn a good sum by selling it at auction, while both allowing the curious a temporary window of access and providing for a new owner the pleasures you have already known. If it is good to share art in these ways with others, the cosmopolitan asks, why should the sharing cease at national borders?

In the spirit of cosmopolitanism, you might wonder whether all the greatest art should be held in trusteeship by nations, made widely available, shared across borders through travelling exhibitions, and in books and on websites. Well, there's something to be said for the exhibitions and the books and the websites. There is no good reason, however, to think that public ownership is the ideal fate of every important art object. Much contemporary art – not just paintings, but conceptual artworks, sound sculptures, and a great deal more – was made for museums and designed for public display. But paintings, photographs and sculptures, wherever they were created and whoever imagined them into being, have become one of the fundamental presences in the lives of millions of people. Is it really a sensible definition of great art that it is art that is too important to allow anybody to live with?

Human interest

When we're trying to interpret the concept of cultural property, we ignore at our peril what lawyers, at least, know: property is an institution, created largely by laws which are best designed by thinking about how they can serve the human interests of those whose behaviour they govern. If the laws are international laws, then they govern everyone. And the human interests in question are the interests of all of humankind. However self-serving it may seem, the British Museum's claim to be a repository of the heritage not of Britain but of the world seems to me exactly right. Part of the obligation, though, will be to make those collections ever more widely available not just in London but elsewhere, through travelling collections, through publications, and through the World Wide Web.

It has been too easy to lose sight of the global constituency. The legal scholar John Henry Merryman has offered a litany of examples of how laws and treaties relating to cultural property have betrayed a properly cosmopolitan (he uses the word

‘internationalist’) perspective. ‘Any cultural internationalist would oppose the removal of monumental sculptures from Mayan sites where physical damage or the loss of artistic integrity or cultural information would probably result, whether the removal was illegally or legally, but incompetently, done,’ he writes. ‘The same cultural internationalist, however, might wish that Mexico would sell or trade or lend some of its reputedly large hoard of unused *Chac-Mols*, pots and other objects to foreign collectors or museums.’ And though we readily deplore the theft of paintings from Italian churches, if a painting is rotting in a church from lack of resources to care for it, and the priest sells it for money to repair the roof and in the hope that the purchaser will give the painting the care it needs, then the problem begins to look somewhat different.²⁴

So when I lament the modern thefts from Nigerian museums or Malian archaeological sites or the imperial ones from Asante, it’s because the property rights that were trampled upon in these cases flow from laws that I think are reasonable. I am not for sending every object ‘home.’ Much Asante art now in Europe, America and Japan was sold or given by people who had the right to alienate them under the laws that then prevailed, laws that, as I say, were perfectly reasonable. The mere fact that something you own is important to the descendants of people who gave it away does not generally give them an entitlement to it. (Even less should you return it to people who don’t want it because a committee in Paris has declared it their patrimony.) This is a revolution that museums are only starting to take full awareness of. This example was important to me in signalling the idea of ‘digital repatriation,’ that is, repatriation of knowledge and information. The repatriation of an object is only the very first stage. Sharing of knowledge about the object, through an interactive internet platform can be one of the most powerful resources to indigenous communities to get knowledge back about what has been taken away, aside from the question of objects. It is a fine gesture to return things to the descendants of their makers – or to offer it to them for sale – but it certainly isn’t a duty. You might also show your respect for the culture it came from by holding on to it because you value it yourself. Furthermore, because cultural property has a value for all of us, it can be reasonable to insist that those to whom it is returned are in a position to take trusteeship; repatriation of some objects to poor countries whose priorities cannot be with their museum budgets might just lead to their decay. Were I advising a poor community pressing for the return of many ritual objects, I might urge it to consider whether leaving some of them to be respectfully displayed in other countries might not be part of its contribution to the cosmopolitan enterprise of cross-cultural understanding as well as a way to ensure their survival for later generations.

To be sure, there are various cases where repatriation makes sense. We won’t, however, need the concept of cultural patrimony to understand them. Consider, for example, objects whose meaning would be deeply enriched by being returned to the context

24 Merryman, n. 24 852.

from which they were taken: site-specific art of one kind and another. Here, there is an aesthetic argument for return. Or take objects of contemporary ritual significance that were acquired legally from people around the world in the course of European colonial expansion. If an object is central to the cultural or religious life of the members of a community, there is a human reason for it to find its place back with them. The communities in question are almost never national communities; still, the states within which they lie may be their natural representatives in negotiating their return. Such cases are bound to be messy: it will often be unclear if a work is site-specific or how an outsider should judge whether something is central to a community's religious life. Law, whether national or international, may well not be the best way to settle these questions.

But the clearest cases for repatriation are those where objects were stolen from people whose names we often know – people whose heirs, like the king of Asante, would like them back. As someone who grew up in Kumasi, I confess I was pleased when some of this stolen art was returned, thus enriching the new palace museum for locals and for tourists. Still, I don't think we should demand everything back, even everything that was stolen – not least because we haven't the remotest chance of getting it. Don't waste your time insisting on getting what you can't get.

There is, however, a more important reason: I actually want museums in Europe to be able to show the riches of the society they plundered in the years when my grandfather was a young man. I'd rather that we negotiated as restitution not just the major objects of significance for our history, things that make the best sense in the palace museum at Manhyia, but a decent collection of art from around the world. Because perhaps the greatest of the many ironies of the sacking of Kumasi in 1874 is that it deprived my hometown of a collection that was, in fact, splendidly cosmopolitan. As Sir Garnet Wolseley prepared to loot and then blow up the Aban, the large stone building in the city's centre, European and American journalists were allowed to wander through it. The British *Daily Telegraph* described it as 'the museum, for museum it should be called, where the art treasures of the monarchy were stored.' The London *Times*'s Winwood Reade wrote that each of its rooms 'was a perfect Old Curiosity Shop.' 'Books in many languages,' he continued, 'Bohemian glass, clocks, silver plate, old furniture, Persian rugs, Kidderminster carpets, pictures and engravings, numberless chests and coffers. ... With these were many specimens of Moorish and Ashantee handicraft.' The *New York Herald* augmented the list: 'yataghans and scimitars of Arabic make, Damask bed-curtains and counterpanes, English engravings, an oil painting of a gentleman, an old uniform of a West Indian soldier, brass blunderbusses, prints from illustrated newspapers, and, among much else, copies of the London *Times* ... for 17 October 1843.'

We shouldn't become overly sentimental about these matters. Many of the treasures in the Aban were no doubt war booty as well. Still, it will be a long time before Kumasi has a collection as rich both in our own material culture and in works from other places as those destroyed by Sir Garnet Wolseley and the founder of the

Boy Scouts. The Aban had been completed in 1822. It was a prize project of the Asantehene Osei Bonsu, who had apparently been impressed by what he'd heard about the British Museum.²⁵

Imaginary connections

Cosmopolitanism, as we've been conceiving it, starts with what is human in humanity. So we understand the urge to bring these objects 'home.' We, too, feel what Walter Benjamin called the 'aura' of the work of art, which has to do with its uniqueness, its singularity. In this age of mechanical reproduction, Benjamin noticed, where we can make good facsimiles of anything, the original has only increased in value. It is relatively easy nowadays to make a copy of the Mona Lisa so good that by merely looking at it – as you would look at the original in the Louvre – you could not tell the copy from the original. But only the original has the aura: only it has the connection with the hand of Leonardo. That is why millions of people, who could have spent their plane fare on buying a great reproduction, have been to the Louvre. They want the aura. It is a kind of magic; and it is the same kind of magic that nations feel toward their history. A Norwegian thinks of the Norsemen as her ancestors. She wants not just to know what their swords look like but to stand close to an actual sword, wielded in actual battles, forged by a particular smith. Some of the heirs to the kingdom of Benin, the people of Southwest Nigeria, want the bronze their ancestors cast, shaped, handled and wondered at. They would like to wonder at – if we will not let them touch – that very thing. The connection people feel to cultural objects that are symbolically theirs because they were produced from within a world of meaning created by their ancestors – the connection to art through identity – is powerful. It should be acknowledged. The cosmopolitan, though, wants to remind us of other connections.

One connection – the one neglected in talk of cultural patrimony – is the connection not *through* identity but *despite* difference. We can respond to art that is not ours; indeed, we can fully respond to 'our' art only if we move beyond thinking of it as ours and start to respond to it as art. But equally important is the human connection. My people – human beings – made the Great Wall of China, the Chrysler Building and the Sistine Chapel: these things were made by creatures like me, through the exercise of skill and imagination. I do not have those skills, and my imagination spins different dreams. Nevertheless, that potential is also in me. The connection through a local identity is as imaginary as the connection through humanity. The Nigerian's link to the Benin bronze, like mine, is a connection made in the imagination; but to say this isn't to pronounce either of them unreal. They are among the realest connections that we have.

25 The quotations from the *Daily Telegraph*, the *Times*, and the *New York Herald*, as well as the information about Osei Bonsu, are all from Wilks cited above n. 21 200.

National and Common Cultural Heritage

Cultural Property as National Heritage and Common Human Heritage: The Problem of Reconciling Common and Individual Interests²⁶

S. Turner

THE DEVELOPMENT of specific international laws governing cultural property has been marked by two basic ideas which are problematic with regard to their interrelationship and have dominated scholarly debate and the practice of States in the area of cultural property law from the beginning of its development in the early-nineteenth century up to this day. One perspective views cultural property as the heritage of individual nations, the other as the common heritage of all humanity.

The term 'heritage' seems to be bound by the notion of attribution, whereby certain goods are attributed to certain subjects; on the one side, the 'nation,' on the other, 'humanity.' Notwithstanding the question of the legal personality of the categories 'nation' and 'humanity,' the question arises as to the relationship between these two categories, that is, the relation between their legal positions in regard to cultural property. Technically, the legal formulation of this question in categories of certain traditional or modern legal institutions poses serious difficulties, as is made clear by the discussions on this issue. First of all, on an internal basis, cultural property can be classified as either public or private property. But then, national sovereignty or a special rule of international law seeks to define cultural property as national cultural heritage and finally, it is assigned to all of humanity. One speaks of cultural property belonging to States as held for the benefit of humanity as a whole and of restrictions on national freedom of action in order to safeguard legal rights of humanity in respect of that heritage.

This technical aspect of models of attribution is not to be pursued further here, although the academic discussion is by no means exhausted. The discussion is at any rate a clear expression of the conflict of interests which are at the root of the varying arguments and which must be balanced in a legally tenable form.

The following discourse concentrates on the question of conflicting interests.

²⁶ *The Penal Protection of Works of Art* (International Institute of Higher Studies in Criminal Sciences, Siracusa, 1994) 227.

Interests Articulated in the Community of States as the Basis for Legal and Non-Legal Rules

The term 'interest' has been marked by its ambiguity and lack of precision as well as its popularity in political theory since the beginning of the early modern era; these two characteristics are closely related to one another.

'Interest' can be understood as a psychic phenomenon, namely as a value judgment process. This process becomes legally relevant when it relates to circumstances that can be influenced by human action. If this understanding of interest is taken as a basis, then only individuals can have interests, but not States. However, individuals do have interests which can be projected onto their associations.

One fact to be distinguished from this issue is that certain procedures for associations exist in order to determine which claims can be articulated by associations as lying in their own interest. In this respect one can speak of interests of States as well as interests of the worldwide association of humanity, which articulate themselves in the community of nations.

The interests of any single individual are contradictory and must be weighed against one another in order to be brought into balance. This also holds true for the reconciliation of diverse interests between individuals. This reconciliation is factually reached by sacrificing one interest for another. This can take place in very diverse ways, but an interest finally emerges that the reconciliation occur in the most just way possible. Preferably, rules of different kinds will be applied to the situation. These rules can be either of a moral or legal nature and legal rules have either a concrete-individual or a general-abstract nature.

An interest in the reconciliation of interests by means of general-abstract rules emerges when certain preconditions are present.

Such an interest arises within the international law order when every single State is sensitively affected by internal events in other States and between other States. Furthermore, it is necessary that the States agree to be bound by a general abstract rule, even when in a concrete case this rule proves itself disadvantageous to one or the other party. Generally, States have little interest in binding general-abstract rules as they try to invoke legal rules that can support their case and assert their interests in a particular situation. Their legal stance then changes when their interests change with the situation. This situation serves the interests of the economically and politically more powerful States. On the other hand, a general reconciliation of interests demands a classification of situations and an assessment of the classified situations according to standards of justice. The interest in regulation by means of general-abstract rules in international law has been only slowly developed and extended to cover wider areas.

At first, only the preservation of peace and the law of war created an interest in general-abstract rules; later on questions of environment, natural resources and cooperation were added. Cultural property is an additional area in which such an interest is developing.

Interests in International Cultural Property Law

One of the most important aspects of the concept of interests in political theory was the differentiation between common and individual interests. Literature on political theory initially perceived these interests as being totally incompatible with one another (Hobbes);²⁷ but they were soon brought into harmonious agreement (A. Smith).²⁸ It was the task of law to reconcile interests not only horizontally, that is individual interests competing with one another on the same level, but also vertically, that is the relation between individual interests and claims asserted and determined by the internal community process in formulating the common interest. In analysing every concrete rule, these two aspects, the reconciliation of individual interests, and the reconciliation of these with common interests, must be kept distinct. Two contending claims can therefore be seen under the aspect of the reconciliation of divergent individual interests and in a certain sense this is done out of a common interest; on the other hand, they can be viewed under the aspect of particular 'common interests.' It is unjust to judge one claim only under the first aspect and at the same time to judge the other contending claim under the second aspect. If this is done, one claim is then handled under the assumption that it serves the common interest and therefore has a higher value, whereas the other is seen as being only in an individual's interest.²⁹ This can be illustrated by the question of the movement of cultural property in international art trade.

Interests in relation to cultural property, which have been articulated in the international community by States and other subjects involved in the international law-making process (e.g. UNESCO) and which must be justly reconciled with one another, are extremely varied and contradictory.

Individuals have immediate interests in cultural property as part of their own personal property and particular interests as members of specific professional or interest groups such as art dealers, archaeologists, collectors and enthusiasts. Individuals also have interests which are specifically related to their national State such as State symbols, or which are related to a certain culture which has produced cultural art, whereby this culture can be one of a national people or a specific minority in a

27 Thomas Hobbes 1588–1679, best known for *Leviathan*, 1651.

28 Adam Smith (1723–90), best known for *The Wealth of Nations*, 1776.

29 R. Pound *Jurisprudence* III (West Publishing Co., St. Paul, Minn. 1959) 328.

multinational State. Finally they also have interests relating to certain cultural property as members of the universal community of humanity.

Which of these interests are taken up by individual States or international organizations and presented as their own depends on which group of individuals predominantly influences the decision-making process in the nation or organization.

The following discussion is limited to the question of international movement of cultural property. This is however closely connected with the issue of the protection and use of cultural property. It is disputed as to whether or not States should have the right to prohibit the export of cultural property within certain limits and with binding effect on other States and the corresponding obligation of other States to hamper import and to restore cultural property exported in violation of export regulations of another State. The converse question as to whether a State should have the right to export cultural property at its own discretion with the corresponding obligation of other States to allow the cultural property into their country has hardly been discussed at all.

The question of the movement of cultural property is related to interests of individual states as well as to the universal interests of humanity. States have an interest in preserving their existing possessions, in protecting them from destruction and removal; but also there exists a State interest in increasing national possessions by acquiring the cultural objects of other peoples. This interest is directed against retention of cultural objects and towards the most liberal policy of acquisition possible. Thus there is a conflict in internal interests themselves: there exist contradictory interests in cultural property, between which a reconciliation must be found.

As world citizens, everyone has an interest in the preservation of the cultural heritage of all peoples, in other words, cultural objects should be preserved from destruction and integrated works of art should nor be dismembered, and cultural art should be generally accessible and put to use. However, the universal interest in a mutual understanding between cultures, the interest in cooperation between States, and finally the preservation of peace, also serve the interest of cultural exchange and this is aimed against the retention of cultural objects by the possessing States. Thus here, too, there exist differing interests that demand reconciliation.

It is thus apparent that the determination of a certain legal position of States in regard to the movement of cultural property always occurs not only from the point of view of the national but also from the perspective of universal interests, and must be understood from both viewpoints. Furthermore, even considerations from only one point of view can lead to quite different rules. For instance, the universal interest might sometimes be best served by a lively exchange or its cessation and the national interest might be best promoted by exchange or restrictions on exchange. It is therefore not possible to maintain that exchange lies in universal interests, and

restraint in national interests, or that exchange lies in national interests and restraint in universal interests. Both exchange and restraint are motivated by universal as well as national interests.

To allege otherwise is a propagandist assertion which is understandable when one takes the factual divergence of interests into consideration. Above, only abstract interests were illustrated and general-abstract solutions taken into consideration. The factual situation of our world community of States is such that a certain group of States almost exclusively acquires and another group almost exclusively exports cultural property and each group claims for itself a universal interest in support of its attitude towards cultural property while accusing the other of only egoistical motives underlying its position on this issue. Such a factual inequality hampers the reconciliation of interests by means of general abstract rules since the allocation of roles can not be changed by such rules: the one group remains in the role of exporter, the other in the role of acquirer.

A just reconciliation requires taking both perspectives and their underlying interests into account as being basically reasonable and justified. A prejudiced point of view with the aim of reaching a certain result by denying the other interest any significance is fruitless. The lawyer must be clearly aware that the question of cultural property is tied to considerable political and economic interests. This awareness has consequences for the assessment of the discourse which is often characterized by extremely one-sided and unscrupulous demagoguery, not only on the political-institutional level, but also in scholarly literature.

The orientation on a certain result determines the assessment of the facts. The States from which cultural objects are procured maintain that the restraint on removal serves universal interests in the preservation of these objects, either because their export causes a dismembering of integral works of art or because the danger of these objects being destroyed is increased. This objective of restraint of course lies also in the national interest of these States. The contention that removal and destruction always go hand-in-hand must be contested. These same States accuse States importing cultural objects and who argue for an extensive freedom of movement of cultural property of being motivated solely by their national interests, whereas in reality, a lively exchange of cultural objects certainly serves universal interests.

A prominent example in the literature on this subject, which vindicates certain interests in order to denounce the others, can be found in Merryman's writings. Merryman justifiably criticizes the stance of Third World countries in possession of cultural property that promote extremely extensive restraint and regulation on international art trade and label their position as 'cultural nationalism.' On the other hand, he refers to the position of the States importing cultural property and who defend extensive freedom of trade in cultural objects as 'cultural universalism,' as though this

posture serves solely universal interests and not just as much national interests, just as restraint also accommodates universal interests.

Apart from this prejudiced view with propagandist tendencies, Merryman to a large degree makes use of the same demagogic distortions which he so bitterly decries in his criticism of the opposite point of view. An impressive example can be found in Merryman's contribution to the *UC Davis Law Review* 21 (1988) 477–513, pp. 490 ff. 'The Retention of Cultural Property.' Merryman discredits the national interest in the law on cultural property by bringing this interest into connection with National Socialism. The connection drawn from Byron and Romanticism via Rudolf Hess ('a logical consequence of romantic premisses,' p. 491) to the current discussion on cultural property ('the application of these attitudes of nationalism to cultural objects.' p. 493) can only be described as breathtaking.

In comparison, a whole other perspective is expressed by certain authors as well as in the practice of States: the idea that common interests cannot be realized without tending to the welfare of the individual predominates, as well as, *vice versa*, the welfare of the individual can only be secured by assuring the public welfare. Quatremère de Quincy who laid down these principles in his famous *Lettres au Général Miranda* is to be noted in this context. A further example is the Hague Convention of 1954, which is incorrectly claimed by Merryman as an example of so-called 'cultural universalism.' As is evidenced by its Preamble and the materials on the Convention, it solves the relation between common and individual interests in the sense of congruence and harmony.

Thus without a brusque contraposition of individual and common interests, this view allocates to international law the task of working out a just reconciliation of conflicting individual interests by taking into consideration common concerns.

‘Universal’ Museums

Editor’s Note

A particularly vibrant discussion in the museum community resulted from the 2002 Declaration of eighteen major museums that their particular mission as ‘universal’ museums makes the retention of objects acquired long ago important for the interests of all peoples.³⁰ The statements of position that follow this Declaration reject this approach.

Declaration on the Importance and Value of Universal Museums 2002

10 December 2002

THE INTERNATIONAL MUSEUM COMMUNITY shares the conviction that illegal traffic in archaeological, artistic and ethnic objects must be firmly discouraged. We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones.

Over time, objects so acquired – whether by purchase, gift, or partage – have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them. Today we are especially sensitive to the subject of a work’s original context, but we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source. The universal admiration for ancient civilizations would not be so deeply established today were it not for the influence exercised by the artefacts of these cultures, widely available to an international public in major museums. Indeed, the sculpture of classical Greece, to take but one example, is an excellent illustration of this point and of the importance of public collecting. The centuries-long history of appreciation of Greek art began in Antiquity, was renewed in Renaissance Italy, and subsequently spread through the rest of Europe and to the Americas. Its accession into the collections of public museums throughout the world marked the significance of Greek sculpture for humanity as a whole and its enduring value for the contemporary world. Moreover, the distinctly Greek aesthetic of these

30 See also in support of this position J. Cuno *Who Owns Antiquity? Museums and the Battle Over Our Ancient Heritage* (Princeton University Press, 2008).

works appears all the more strongly as the result of their being seen and studied in direct proximity to products of other great civilizations.

Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation, but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.

Signed by the Directors of:

The Art Institute of Chicago

Bavarian State Museum, Munich (Alte Pinakothek, Neue Pinakothek)

State Museums, Berlin

Cleveland Museum of Art

J. Paul Getty Museum, Los Angeles

Solomon R. Guggenheim Museum, New York

Los Angeles County Museum of Art

Louvre Museum, Paris

The Metropolitan Museum of Art, New York

The Museum of Fine Arts, Boston

The Museum of Modern Art, New York

Opificio delle Pietre Dure, Florence

Philadelphia Museum of Art

Prado Museum, Madrid

Rijksmuseum, Amsterdam

State Hermitage Museum, St. Petersburg

Thyssen-Bornemisza Museum, Madrid

Whitney Museum of American Art, New York

The British Museum Press Office

The Universal Museum

Eighteen of the world's great museums and galleries have signed a statement supporting the idea of the universal museum. The statement was drafted at their last meeting in Munich last October, and presented to the British Museum for publication.

Their directors are all members of an informal group of museums worldwide which meets regularly to discuss issues of common interest.

One of the most pressing of these is the threat to the integrity of universal collections posed by demands for the restitution of objects to their countries of origin.

Museums and galleries such as these are cultural achievements in their own right. They bring together the different cultural traditions of humanity under one roof. Through their special exhibitions and their permanent displays they endow the great individual pieces in their collections with a worldwide context within which their full significance is graspable as nowhere else.

Neil MacGregor, Director of the British Museum, said 'This declaration is an unprecedented statement of common value and purpose issued by the directors of some of the world's leading museums and galleries. The diminishing of collections such as these would be a great loss to the world's cultural heritage.'

Chinese Experts Demand Return of Cultural Relics³¹

ON 10 DECEMBER, 2002, eighteen major museums and research institutes of Europe and America, including the British Museum and the Louvre Museum, jointly signed a Declaration on the Importance and Value of Universal Museums (hereinafter referred to as the 'Declaration'), which opposes returning art works, especially ancient ones, to their original owners.

'Over time, objects acquired – whether by purchase, or exchange of gifts – have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them,' the Declaration stated.

European and American museums house numerous Chinese treasures

Although there are no ready statistics showing how many Chinese relics are scattered in these eighteen museums, it is certain, experts said, that they are not small in number.

According to statistics released by the Chinese Society of Cultural Relics, China's cultural relics have been lost in amazing figures calculated by in millions of pieces, including hundreds of thousands of works of superb quality, scattered over forty-seven countries, some of them taken away in wartime. In terms of Chinese paintings alone, the Metropolitan Museum of Art in New York claims the largest quantity, while the British Museum boasts the best quality paintings. As for porcelain, the Musée Guimet of France is famed for its collection of Asian art works. In America, over a thousand large bronze wares of ancient China can be found, including at least 1,000 extraordinary pieces.

Among European countries, Britain has the richest collection of Chinese cultural objects; next comes France – in its Musée Guimet over half of the works collected are of Chinese origin, more than 30,000 pieces in number.

The 'Declaration' goes against international conventions

In 1954 the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on Stolen and Illegally Exported Cultural Objects, stipulating that any cultural object looted or lost due to reasons of war

31 *Peoples' Daily* online, Monday, January 27, 2003 (*People's Daily* Online Staff Li Heng).

should be returned without any limitation of time span. The Declaration signed by these eighteen museums runs counter to the spirit of this international Convention.

On 7 March 1997, the Chinese government acceded to the UNESCO sponsored *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995, which laid down rules that (1) stolen or illegally excavated cultural objects shall be returned to the owners (nation, natural or legal persons), and (2) cultural objects exported illicitly shall be restituted upon request by the country of origin if it can prove that the illegal export would have an essential impact on scientific or cultural interests or that the object is of essential cultural significance for the country of origin. According to the Convention, the Chinese Government has the right, within seventy-five years from then on, to demand the return of cultural objects taken out of Chinese land through illegal means. This provides legal support for China's demand for the return of cultural objects. At the same time the Chinese Government declared that China still reserved the right for the return of objects stolen or illegally exported before the Convention came into effect.

Chinese experts fight for return of treasures

On 18 October, 2002, a special fund was established by the Chinese Social and Cultural Development Foundation in an effort to rescue lost cultural relics from overseas.

A group of experts gathered together today to protest the 'Declaration' and discuss means to get cultural relics back. Currently, aside from diplomatic channels, China chiefly buys back its treasures in auctions.

The protests of experts will be made public and the Association will call for more entrepreneurs and non-governmental organizations to join the ranks of those fighting for the return of Chinese relics.

The Declaration: A Contested Issue³²

G. Abungu

THERE ARE SEVERAL ISSUES raised by the Declaration on the Importance and Value of Universal Museums. Firstly, many museum collections worldwide, particularly in the West, house collections with a suspect history, particularly as regards how objects were acquired. Many were acquired through conquest, others were stolen – while still others were brought to museums for study and never returned to their original owners. But if large-scale repatriation were to take place, then of course many museums would be left with hardly any collections at all. The Declaration responds to the fear of many museum directors that they would be left with empty museums or with hardly any collections worth talking about. This seems to me to be an unnecessary fear.

Secondly, I strongly contest the idea that some museums may call themselves Universal Museums. Surely all museums share a common mission and a shared vision. Do Universal Museums claim to be universal on the grounds of their size, their collections, how rich they are? Moreover, each museum should have something special that makes it of universal value for humanity. For example, the National Museums of Kenya, of which I was Director until 2002, is universally known for its work on human origins. It hosts the largest Hominid collection under one roof in the world; it hosts the Centre for Biodiversity for Kenya, which is the largest in East and Central Africa; the East African Herbarium (for Uganda, Kenya and Tanzania); and in its invertebrate zoology department, it has over 2 million insect specimens – probably the largest in sub-Saharan Africa. The Institute for Primate Research of the National Museums of Kenya carries out research in all areas of biomedical research including research on HIV/AIDS vaccines. These are just a few of the Museum's major activities that have universal implications. Yet the National Museums of Kenya was not asked to join the group of Universal Museums. So what is the basis of their universal value? Are Universal Museums based solely in Europe and North America?

It seems to me that the Declaration on the Importance and Value of Universal Museums is signed principally by a group of large museums who want to create a different pedigree of museum, largely due to fears that materials held in their collections of which the ownership is contested, will face claims for repatriation. It is a way of refusing to engage in dialogue around the issue of repatriation. If the signatories of the Declaration are trying to create the idea that their collections are held in trust for

32 *ICOM News* 1994 No. 1, 5.

all of humanity, then why do they still call themselves by their original names? Why not 'Universal Museum in Britain' rather than 'British Museum'?

I personally do not believe in mass repatriation, except for human remains and materials of great emotional and spiritual value to a group. I do believe, however, that there should always be dialogue between museums, and between museums and communities affected by issues of repatriation, in order to reach amicable solutions. Solutions may even include acceptance by the community concerned of the present ownership situation, and the museum may be provided with a permanent loan. However, to declare that museums are universal, solely in order to avoid such discussions, is the wrong way to go about such issues. This is why I do not support the Declaration, nor the notion of the Universal Museum.

I have a lot of admiration for many of the Directors of these museums. Apart from being very respected scholars and leaders in the field of museums, they have contributed immensely to getting the role of museums in society recognized. I do, however, want to ask them to stick together with other museums in the same spirit rather than create a separate class of museum.

Universal Museums: The View from Below³³

K. Singh

A FEW YEARS AGO, I received a grant from the Getty Foundation for a project on museums in South Asia. I was just about to send twelve researchers to about a hundred museums all over the country, to get a sense of the place museums occupy in the social landscape of India today. I took an appointment with the Secretary of the Department of Culture – the topmost bureaucrat in the Government of India responsible for cultural matters. I knew her a little; she had even started a PhD in art history under the same professor as myself. But when I met her and asked her for a letter of support for my researchers to use while travelling, I got an earful. She said, you are going to send people all over the country, to museums in remote places that have valuable artefacts and very poor security; you will submit your reports to the Getty, and then all our things will begin to disappear.

I felt personally insulted of course at this vision of myself as some kind of a cog in an international art smuggling ring, but I held my tongue. I could have dismissed this bureaucrat's remarks as an aberration, ill-advised notions coming from someone who really should have known better. But some months ago the same sorts of anxieties surfaced in Bangladesh, as the Bangladesh National Museum made preparations for a loan exhibition to the *Musée Guimet* in Paris. The Guimet was borrowing 189 objects dating from the fourth to the tenth century from Bangladeshi museums. In this case, the whole process was dogged by controversy. Journalists, artists, archaeologists and retired museum officials were all expressing concerns and anger in newspapers, on blogsites and on protests in the street. They felt the objects were too precious to travel; or that Bangladesh was not getting anything out of this, except twenty copies of the catalogue, whereas when India had lent similar objects to the Guimet, they had at least received a show of Picasso prints in return. The Bangladeshi protestors were deeply suspicious of the French and criticized many aspects of the contract between France and Bangladesh. Even technical documents such as condition reports were leaked to the press, published and scrutinized for lapses in protocol.

At one point, the French authorities even yielded to the protestors; the Guimet clearly had tried to insure the artefacts at less than the current market value, and public pressure forced them to reappraise the objects and increase the insured value by some 30 per cent.

33 Speech given at the Salzburg Global Seminar 'Achieving the Freer Circulation of Cultural Artefacts.' A condensed version entitled 'National patrimony in a global environment' was published in *The Art Newspaper*, No. 192, June 2008.

But along with the scrutiny of the contract and procedures, rumours began circulating in Bangladesh of an astonishing sort. For instance, when it was found that the Guimet had undervalued the objects, what was said was not that the Musée Guimet was cutting costs, but that these objects had been deliberately under-insured because the Guimet planned from the start to 'lose' the consignment and pay the small insured sum, then make a tidy profit by selling the goods on the market. Another set of rumours surrounded the conservation protocols that the objects were going to undergo before being put on display. It was said that the conservators planned to make perfect copies of the ancient artefacts, send back the fakes, and keep the originals.

A citizen went to court to block the show, delaying the exhibition's opening. When the court struck down his plea, the objects started shipping out. To avoid the public gaze the museum sent its first consignment under cover of darkness in vans marked 'Flood Relief.' This subterfuge aroused greater passions and citizen groups organized a vigil outside the museum and tried to block the trucks taking the second consignment to the airport. From this second consignment, one packing case went missing from the tarmac in Dhaka airport. It contained two sixth-century terracottas.

The next morning the French Embassy made a statement that was not diplomatic: 'France feels the disappearance of this crate is highly suspicious and could also be the result of a conspiracy by a very small nexus of persons to embarrass France and Bangladesh.' In short, the French authorities were accusing Bangladeshi patriots of stealing Bangladeshi objects to make France look bad.

What emerged was worse: cargo handlers who were arrested 'confessed' – under torture – to stealing and destroying the statues. These unlettered men had heard that the cargo contained priceless treasures. They were able to steal one carton, but when the sculptures it contained turned out to be made of clay, the thieves smashed them because they thought the sculptures must be full of gems. Bangladeshi policemen and archaeologists had to spend days picking over Dhaka's largest garbage dump to retrieve as much as possible of the sculptures. Bangladesh cancelled the show, the Minister for Culture resigned, and another rumour spread through the city: that the French were now going to keep the artefacts that already had been shipped out as a penalty because Bangladesh had 'broken its contract.' A few days later, the young, and by all accounts very likeable, Bangladeshi Ambassador in France emerged from a meeting at the Guimet – where they were discussing the return of the objects, and fixing the liability for shipping and insurance. Moments later, he collapsed in his car and after a few days on life support, he died.

As one can see, an event that commenced as farce in Bangladesh descended swiftly into tragedy. In my discussion of these events, if I have dwelt not just on the facts but also the wild rumours that eddied around the facts, it is because they were a

vital part of events, building fear, shaping people's responses, even attracting the attention and creating the pressures that led to the loss of both artefacts and men.

What do we make of these wild rumours that imagined Bangladesh lying helpless as the Guimet deflowered it? There is no point in reasoning with these rumours; no point in even explaining that if one wanted to steal artefacts, there are far better, and easier, ways to do it. We do not have to examine whether these rumours have any basis in fact, but what is worth examining here, I think, is what these kinds of rumours and anxieties tell us, about how Western museums are being seen outside the West.

I believe that they are being seen as terrifying places with insatiable appetites. In the view from below, the Western museum, I believe, appears as a place with an inexplicable and insatiable desire for artefacts. And this kind of museum is also seen not just as a cultural institution, but as the arm of a more powerful State, whether an erstwhile colonizing State or a new neo-colonial State; it is able to manipulate the archive, hire clever lawyers to work out one-sided deals, and it is able to produce perfect fakes; all because it has infinite funds, and the magical power of technology at its command.

Now I can see some of my friends who work in Western museums shaking their heads at this and saying 'I wish,' and I know of the constraints under which many museums work, the professional norms that they try to follow and the good intentions that underwrite most of their plans. And yet, despite the good intentions and high integrity of most museums and museum professionals, the Western museum, the Western universal museum, is often seen with resentment and suspicion in the non-West. In Bangladesh, to tell that public that universal museums 'promote tolerance and mutual respect,' would provoke anger or derision.

These two divergent views, of museums as guardians and of museums as gobblers really represent the two rocks on which all debates about whether artefacts should move freely, or whether art should stay rooted to its own soil, tend to founder: the rock of nationalism on the one hand, and the rock of universalism on the other.

For the last 100 years, as the nation State has emerged on the world map, the idea of the nation has been under active construction and revision. The need of new nations to show themselves not as modern constructs, but as the fulfilment of a historic destiny has led to all manner of cultural and identitarian politics. The development of the idea of national heritage has been fundamentally important in shoring up national feeling, and this has led to the setting up of national museums and national cultural policies.

Today, because we understand how nationhood is produced, we imagine that the idea should lose its hold upon us. It doesn't. The United Nations, which began with fifty-one member nations, now has 192, as countries have divided and broken up, but this fact doesn't just show the artificiality of the 'nation' as an idea – it shows

peoples' abiding belief in it, as they fight for the 'right kind of nation,' one where they think they will finally feel at home. Needless to say, in the face of resurgent nationalism, this use of culture to give legitimacy and weight to the kind of history one wishes one had had remains centrally important.

Museums like the British Museum or the Louvre on the other hand, describe themselves as 'Universal' museums; since their holdings include objects from all over the globe, they cover a terrain much broader than that of any national museum. However, we are all now very aware that these great collections were mostly made possible by historically traumatic events such as conquest or colonialism. Universal museums could be made only at a particular juncture in history when there was a convergence of wealth, power, physical contact with far-off lands, and an intellectual interest in encyclopaedism. It is extremely rare to see an encyclopaedic museum being made today – the Miho Museum in Japan comes to mind as one of the few recent museums that tries to encompass world culture – but the future spread of universal museums is more likely to come through the Abu Dhabi model, which basically franchises an existing universal museum.

In this age of resurgent nationalism, 'universal' museums have faced criticism and calls for repatriation of objects. In response, these museums have articulated a new role for themselves as places that preserve diversity and foster mutual respect among civilizations and peoples. Because these museums urge us to rise above national boundaries, to affirm an essential unity of humankind, because universalism speaks about eternal principles and transcendent truths, it is easy to see the universal museum as also representing an eternal principle and a transcendent truth. Of course it does not; the museum's 'universalism' is an ideological position that has its own history and its own politics, and the universal museum is fighting to protect its own heritage, not the world's.

Despite that, and despite the fact that I come from a formerly colonized country, I feel the universal museum is worth preserving. This is so not because this kind of museum is essential for us to get to know one another. Books can do this, and university courses can do this, the internet can do this, physical travel can do this, and the global economy will make us do this. The universal museum is worth preserving because it is a significant cultural phenomenon; the historical conditions that allowed it to be made will probably never be repeated and that is why therefore the universal museum is not likely to proliferate. I would say we should preserve the British Museum, in the way it is usual to say we should preserve the Pitt Rivers Museum because through it we time-travel to another era in history when it was possible to make museums of this sort.

As they continue to exist, of course, the 'Universal Museums' will mean many things to many people. To some, they will be places that affirm the essential unity of

humankind. To others, they will be a place to consume culture, one of the benefits of a cosmopolitan life. To yet others, they will be a reminder of colonialism in the past and of continuing inequalities in the world of the present. This range of meanings itself is part of the richness and the value of the universal museum.

To say the 'Universal Museum' should be preserved for these reasons, however, is different from saying that it should be preserved because it represents the best and the noblest use to which artefacts can be put. Instead, I am suggesting that the 'Universal Museum' learns to see that its universalism is one particular way of thinking about art, culture and civilization. If it wants other people to believe in what it believes, it must 'sell' this idea; and it must learn to be genuinely respectful to other people, not just their artistic masterpieces.

The most difficult lesson for the universal museum to learn, however, is the knowledge that its very principles can be offensive, hurtful or sacrilegious to others. Let us just look at the core functions of the universal museums, which are committed to preserving, displaying and making accessible the objects that they hold. It is possible to imagine situations in which these very functions would be deeply disturbing to some of the people that the museum sets out to serve. Imagine for instance, the physical preservation and display of an object that goes against the grain of a community who believes that the object is impious and should be destroyed – iconoclasts, in a word. Or imagine the revulsion felt by a community that sees grave goods, provided for the comfort of their ancestors in the afterlife, being put on display in a museum. Think of the sorrow felt by believers who see the relics of their saints in museums and demand that they be moved to churches or temples where they will be worshipped. Imagine the frustration felt by other worshippers when an object that is intended to be temporary, and whose meaning comes from being part of a ritual in which it is made to be ritually dissolved, is preserved and kept indefinitely in a museum.

To all these responses the museum will offer the preservationist counter argument, which privileges the physical object over religious sentiment. I am in broad sympathy with that argument, primarily because I am suspicious of revivalism of most kinds. But what our age has made possible, even when it has not been able to redistribute real power or money, is to make an increasing number of people audible and visible. They are able to raise their voices in public domains as was never possible before; authorities are forced to acknowledge them and their views; and to realize that what they took to be an inherently good action can look very different from a different cultural point of view. In some instances the museum has accepted the arguments of the other side. We see this in the repatriation of human remains and grave goods effected for Native Americans and Australian Aborigines, where objects leave the museum sometimes to enter ritual use or to be buried – where there is no guarantee that they will remain visible or even physically preserved.

Now while these are significant events that mark a paradigm shift in the museum's self-understanding, I think it is not entirely lost on the increasingly vocal global community that when the museum's preservationist policies have yielded to ritual or religious sentiment, this has been out of respect for the views of indigenous peoples who also happen to be citizens of the US, Canada or Australia. I believe we are likely to see pressures mounting on the museum to give things back to other communities who will relate to them as other than art, or as more than art, and I do feel that in fifty years' time we will no longer see the museum as the final resting place of objects or the ultimate arbiter of their meaning, but rather as a way-station on a continuing journey that they make.

What is at stake here, when things start going 'back' to their communities to re-enter or enter renewed ritual lives? It's not just the universal museum that is being challenged here – your right to represent my ancestors – but it is the museum mode. And it is the museum mode whether this lives in the British Museum, or in the Bangladesh National Museum, or in a tiny site museum in the wilderness of Central India. And by the museum mode I mean the lifting out of the object from its particular context of use – domestic use, ritual use, courtly use, which made the object accessible and useful to a small group – and the transformation of the object into 'art' – desacralized, secularized, rationalized; turned into heritage; fitted into an intellectual structure in which it can become meaningful or interesting to a larger group; to the public. Although the proponents of the 'Universal Museums' see nationalism as their adversary because these national regulations will not allow them to keep acquiring more and more things, from Italy or from China, I would alert us to the fact that national museums function by the same principles as universal museums, really, when they try to forge a relationship between say a twenty-first-century Indian from north India and a ninth-century sculpture from the south of India. Both Universalism and Nationalism are projects of modernity. Their real adversary is cultural relativism, where we imagine we can turn back the clock; we can return things to original owners and these things will make their shattered worlds complete again; when a museum in Vancouver returns a mask to a tribe the tribe will be healed. We are not, we are never returning things to the past – that moment is gone – we are assisting contemporary revivalisms. And coming from India where we have a history of current day Hindus avenging themselves on current day Muslims for 800 years of Islamic rule; current day low castes waiting to get into a position to avenge themselves against 5,000 years of oppression by the upper castes, I have to say that even the well-intentioned acts of respecting other cultures which then lead to revivalism terrify me.

And that to me is the second reason and possibly the more important reason we should preserve universal museums. Because once we start imagining that we can set past wrongs right by dismantling something we may well set ourselves on the path of dismantling those very things that make it possible for us to survive.

And this takes me from the museum to the broader issue: What is the proper place for art in the world? That is the big question. Should objects go to those who most devoutly believe in them in a religious sense? Should they go to those who would be the best physical caretakers, or the most engaged or sophisticated interpretive community? Should they go to those national or local formations that most urgently need them for their sense of identity, or should they go to the highest bidder?

And this last category is opening wider than ever before, as billionaires are being added to the world by China, India and Russia; it will be interesting to see how this plays out in the field of art. We have already crossed the point where a van Gogh has been bought by a Japanese millionaire who pays so much for it that he needs to keep it in a vault; the inheritance tax on it will be so high, he jokes, that he might as well have it cremated with his body when he dies.³⁴ Newly wealthy collectors in the Middle East have made astounding collections of Islamic art over the last thirty years, buying Persian, Indian or Turkish art to shore up a sense of their (Muslim) identity; and now they have begun collecting not world art but universal museums. Abu Dhabi's agreement with the Louvre,³⁵ incidentally, has sparked anxieties in France not dissimilar to those voiced in Bangladesh. French protestors say that their objects are too precious to travel; that the government has no right to play with the national patrimony; that cultural diplomacy is guided by political and economic goals. Only on one count do the French differ from the Bangladeshis. The Bangladeshis were upset because their country was not getting enough from the deal; the French are upset because their government is accepting money at all. Our museums are not for sale, prominent French museum directors and art historians say, although the Louvre is reportedly getting 1.3 billion euros for this 'selling of its soul.' What they are expressing is a fear of what happens to something that was meant to be priceless, when the logic of the market begins to apply to it.

As the French express their revulsion at being 'bought' by the Arabs, we have to ask: Are we ready for a unified world of art? Principles worth espousing are the ones we will stand by even when they no longer favour us.

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- 34 In 1990 Ryoei Saito, a Japanese millionaire collector, purchased for the sum of US\$ 82.5 million a van Gogh painting, the *Portrait of Doctor Gachet*, the most expensive painting in the world up to that time. Then seventy-five years old, he created an uproar when he said that he would have the painting cremated and buried with him when he died, in order to avoid inheritance taxes. Subsequently he said that this was a joke. He died in 1996 and it is believed that the painting has been sold. Its present whereabouts (March 2009) are not known and it has not been publicly seen since the 1990 auction. *Daily Telegraph* 5 May 1991, 7; *The Art Newspaper* May 1996, 1; *The New York Times* 19 August, 1999.
- 35 Agreement signed in Abu Dhabi 6 March 2007 by the French Minister for Culture, Renaud Donnedieu de Vabres, and the President of Abu Dhabi's tourism authority, Sheik Sultan bin Tahnoon al-Nahayan, French text available at <http://www.assemblee-nationale.fr/13/projets/pl0180.asp> The Louvre Abu Dhabi, expected to cost around US\$ 108 million, is planned as a 'universal museum' exhibiting art from all eras and regions, including Islamic art. Under the thirty-year agreement, Abu Dhabi will pay US\$ 525 million for the Louvre brand name and for loans of hundreds of artworks for periods of between six months to two years. On the controversy see A. Ridging 'A "desert Louvre" for Abu Dhabi' *International Herald Tribune*, 12 January, 2007.

Excerpts from ‘Restitution and Repatriation: Guidelines for Good Practice’ 2000

Museums and Galleries Commission (United Kingdom)

Part 2: Context for Responding to a Request for Return

Museums in the United Kingdom belong to a professional community which, nationally and internationally, is facing constant social, economic, political and cultural change. Museums are also accountable to a diverse range of stakeholders, past, present and future. Museums therefore need to give careful thought to decisions that can affect the communities to which they are accountable, and the individuals and communities whose heritage they hold.

2.1 Considering the Interests of All Parties

Whatever the final decision in response to a request for return, there will be consequences for your museum and its professional reputation, the requesting party and the wider museum community in the United Kingdom and internationally. The best outcome for all concerned will be more likely to be achieved if the request has been seriously considered and the decision based on:

- All available evidence;
- Respect for the concerns of the requesting party;
- Ethical considerations;
- Current professional practice;
- Legislative constraints;
- Consideration of opportunities and options.

Your museum’s response has implications within the wider museum community and your decision may be seen as setting a precedent. It is important that museums do not act in isolation and your museum is strongly encouraged to work with other museums and kindred institutions when preparing your responses. (See Appendix 5 for contact addresses within the museum community and potential sources of advice).

Those involved in responding to requests for return may identify both opportunities and threats during the process. The opportunity to forge new relationships can offer long-term benefits to all parties.

2.2 Debate – Retention vs Return

Museums now recognize the fundamental importance of the changing relationships and attitudes between museums and the communities who value material they hold, but the issues are often still subject to debate. Similarly, objects can acquire new meanings in environments quite remote from their point of origin. These acquired meanings can have equally powerful and legitimate significance and value for quite different communities.

2.2.1 Arguments that Favour Retention

Arguments in favour of retention are generally based on cultural and Western scientific views and philosophies. These include:

- Value to science, especially medicine, physical anthropology, epidemiology and palaeopathology, whose cultural value to the international community overrides other considerations;
- Importance for better cross-cultural understanding in the United Kingdom and internationally of past and present cultures;
- Possibilities of even more significant research potential as new research techniques and methodologies become available;
- Integrity of collections;
- Better care and access potential than if returned to requestor;
- Potential for material to become familiar to much wider audiences by being located in a museum in the United Kingdom;
- Global significance of cultural and natural heritage, which belongs to us all;
- Opportunities for fixed-term loan to requesting party or an appropriate third-party such as a museum;
- Survival of the material substantially due to its care in the museum;
- Opportunities for comparative research at one central point;
- Access still available to the requesting party if retained by the museum;
- Opportunities for data repatriation, collaborative surveys and collaborative agreements;
- Opportunities for requesting party to determine culturally appropriate care within the museum and to share in the management and use of the material, including restricting access;

- Opportunities for participation in the interpretation of the material within the museum;
- Risk of the material being put on the art market and lost to the public domain;
- Risk of total loss through complete destruction;
- Extended history of the material's presence in the museum makes it now part of the scientific or cultural heritage of the United Kingdom;
- Cultural value to particular ethnic groups in the United Kingdom;
- Local landmark status and sense of community ownership gained through its presence in the museum;
- Legal issues where trusts are bound to act in the interests of their charitable status;
- Obligations arising from bequests and conditions associated with early acquisitions;
- Need to move forward while acknowledging past history.

2.2.2 Arguments that Favour Return

Arguments in favour of return generally acknowledge prior rights, derived from customary and/or Western property rights, and the changing significance of objects. These include:

- New approaches to professional practice in scientific research, archaeological excavation and museum activities which recognize others' rights to control cultural material and knowledge;
- Consideration for the spiritual beliefs and cultural imperatives of relatives and descendants;
- Acknowledgement of rights of indigenous people to regain control of their cultural heritage;
- Acknowledgement of past wrongful taking and/or misunderstandings of complex customary ownership concepts, and attempt to redress;
- Establishment of constructive relationships with previously under-acknowledged stakeholders;
- Recognition that it is easier for Westerners to travel to consult with requesting parties than for culturally affiliated indigenous peoples to travel to the United Kingdom;

- Recognition that a particular object would benefit from being in a different context;
- Information technology enabling easier access to research information;
- Continuing ability to carry out research while objects are in the care of the requesting party;
- Opportunity to build new relationships important to the museum and potential to add new, more accurate information, and even new accessions, to museum collections.

Part 3: Considering a Request

Ensure the requesting party is confident at all times that your museum is taking the request seriously and is approaching the decision-making process in a professional and respectful manner.

- Formally acknowledge all correspondence in writing.
- Where possible, invite the requesting party's participation in undertaking the research.
- Try to create an atmosphere of trust and mutual respect and understanding, particularly where highly personal or strongly emotional issues are involved.
- Notify the requesting party as soon as any potential major delays become apparent.
- Keep a record of all contacts with the requestor and seek clarification in writing to ensure that both parties have the same understandings of any agreements or points at issue.
- While the burden is on the requesting party to provide the necessary background to their request, the museum should also gather all the information it can find access to.

It is easy to underestimate the complexity of the process. Requests for return challenge many basic notions of a museum's purpose and functions. Recognize that it is likely to take time to gather all the relevant information and to follow the appropriate decision-making and ratification process required by your governing body in accordance with your museum's policies.

There is an obligation to proceed promptly when the requesting party is elderly.

3.1 Steps to Consider

Please note that not all of these steps will apply in every case.

3.1.1 Acknowledge the Request

Acknowledge the request in writing. Make clear that the process will take time and indicate what is involved in the process. Send a copy of the museum's policy on responding to requests for return, if it has one.

3.1.2 Delegate the Preparation of the Response

Allocate the coordination of the preparation for the response to one person. This person should consult with the requesting party, as well as within the museum and general museum community. Also identify who will be the main point of contact for all future communications about this matter – in a small museum this is likely to be the same person.

3.1.3 Inform the Governing Body of the Request

The final decision to retain or return the requested material is the responsibility of the governing body. It is good practice to inform the governing body that a request for return has been received, and to keep members informed of progress in responding to the request.

3.1.4 Clarify the Status of those making the Request

Ensure that the person making contact with your museum is in fact acting on behalf of the appropriate requesting party, particularly if they are from abroad.

It is not your museum's role to settle disputes between rival parties, but it is important to be confident that the person you are dealing with has the full mandate of any group he or she purports to represent. After establishing contact by letter, it is recommended that you also make contact with the individual, group or organization by telephone or in person to ensure they are aware of, and give their approval for, the request being made on their behalf.

If approached by an individual seek evidence of:

- Right to request. This may include the results of genealogical and kinship records, official government records, anthropological research, traditional and oral history, photographic evidence;

- If the requesting party is a politician or journalist, ask to deal directly with the party that they represent and check their credentials;
- Mandate of the group – traditional elders or council of the cultural group that he or she claims to represent;
- Lineal right – that they are the legitimate heirs of property stolen or confiscated, for example in time of war;

If approached by a cultural group seek evidence of;

- Formal recognition by its national government, its cultural ministry or its registration or equivalent with a professional museum organization;
- Lineal right – that they are the legitimate heirs of property stolen or confiscated, for example in time of war;
- Legal status of the group. In most countries, indigenous groups are formally recognized by their nation state. This may take the form of a registered tribal authority, tribal trust, corporate body or similar legal entity with a specific mandate;
- Formal recognition by the appropriate national or state government. Seek confirmation through that government’s Embassy or High Commission in the United Kingdom;
- Museums in the region of the requesting party. They may be able to tell you how to confirm who the proper authority is.

If approached by a museum or similar institution seek evidence of:

- Formal recognition by its national government, its cultural ministry or its registration or equivalent with a professional museum organization.

If approached by a foreign government department check evidence of:

- Mandate through your museum’s contact with that government’s Embassy or High Commission in the United Kingdom.

Museums should also be aware that other museums in the United Kingdom might be receiving requests from the same source at the same time, particularly if the approach is from a national government, national museum or a tribal organization. In this case there will be benefits from working together and sharing information.

3.1.5 Contact Other Museums and Kindred Institutions

Museum colleagues with similar collections may have received similar requests at present or in the recent past. They may be able to share useful contacts, networks and

sources of information, and, if currently preparing a response themselves to the same requesting party, are likely to be very happy to work with you and to share research resources, policy and procedures. Also inform the Museums and Galleries Commission (MGC), the Museums Association and your Area Museum Council.

Appendix 5 lists a number of useful sources. University departments and collections, botanical gardens, research institutes, archives, specialist libraries and other related institutions may also be able to assist you.

3.1.6 Understand the Reasons behind the Request

Understanding the reasons behind the request will help when working with the requesting party towards a satisfactory outcome. Examples might be:

- Part of a proactive programme of cultural renewal for a particular cultural or kin group;
- Respectful completion of burial and death rites that have been disturbed;
- Redress for past injustices, possibly as part of a formal claim for restitution of rights and resources within a national government;
- Concern for the spiritual and physical welfare of ancestral human remains or sacred artefacts;
- Retrieval of private or public cultural property wrongfully taken, possibly in line with provisions of international legislation or conventions;
- Restoration of misappropriated inheritance;
- Desire or need to fill key gaps in a national or regional museum collection;
- Part of an indigenous research programme;
- Political advantage making full use of potential for media coverage in the United Kingdom and/or abroad;
- Commercial advantage following promotional activity such as a high-profile auction sale or media coverage of other high value material.

3.1.7 Try to Gauge Cultural and Religious Importance of the Material

Where a request relates to religious or sacred objects and communally owned cultural patrimony, attempt to assess the continuing links between the original community in which the material was made, used and valued, and the contemporary community on whose behalf the request is made. Again the burden is on the requesting party to provide the necessary background information, but the museum should also undertake whatever information gathering it can. This might include contacting one

of the museum specialist groups, other museums or university departments. You will need to try to assess to what extent the material features in the cultural, spiritual and religious life of the community claiming this material. Attempt to ascertain whether the:

- Material is central to maintaining the identity and cohesiveness of the community and/or the revival or survival of traditional practices;
- Return of these items will contribute to the confidence and self-esteem of the community;
- Material plays a key role in the continuing practice of traditional religion;
- Material is of outstanding symbolic significance in the history of the community, i.e. whether it is a cultural icon.

3.1.8 Check Status and Condition of the Material

Assuming the material requested is held by your museum, check:

- Actual location within the museum;
- Status in the collection, for example permanent, on loan, teaching or handling material, research or other;
- If on loan to the museum, contact the lender and pass on the request details. The decision is now the lender's responsibility, but your museum will need to formalize its procedures for the termination of the loan if this material is to be withdrawn from your collections. You should be prepared to share, with the lender and the requesting party, any information about the history, significance and conservation treatment of the material;
- Relationship to other material in your collection, for example whether it duplicates other material or forms part of a cohesive group of items;
- Provenance of the material;
- Authenticity of the material;
- How common this type of material is within the British collections. There may be similar or equivalent material held by other museums in your region or the rest of the country;
- Nature and condition of the material and whether it is sufficiently robust for extended travel;
- Use, conservation treatment and interpretation of the material by the museum in the past;

- Present use and interpretation of the material;
- The importance of the material for further museum use, including research and display;
- Its potential to provide ‘important’ as opposed to ‘interesting’ research information.

3.1.9 Check Acquisition History of the Material

While it may be assumed that the material was acquired in good faith and accessioned into the permanent collections of the museum, it is important to check information available about its acquisition. This includes:

- Acquisition status of the object, such as donation, bequest, purchase, exchange, field collection, deposit, and any conditions which may have been accepted at the time of acquisition;
- Museum documentation of the object such as formal evidence of a transfer of title;
- History prior to its acquisition by the museum;
- Details about the original collector, donor or vendor or their descendants and whether additional information is available from these sources. Note that the museum must observe the requirements of the Data Protection Act, by protecting the identity of living informants who do not wish to be contacted by the requesting party.

It may be difficult to come to a definitive conclusion on these points with material that has been in the care of the museum for many years, and it is important to be open about this situation. Be aware that legal costs may be incurred in verifying documentation. For material for which the data is minimal or non-existent, the museum should consider the balance of probability when making any decisions.

3.1.10 Refer to Current Museum Policies

It is also important to look at the material from the museum’s point of view. For example, is this material consistent with current collection management policies, enabling your museum to fulfil its mission and mandate? Registered museums in the United Kingdom are required to review their acquisition policies regularly. The MGC and the Museums Association also expect museums to observe the 1970 UNESCO and 1995 UNIDROIT Conventions.

Recognize that the requested material may have been in your museum for many years. Over this time, your community may have developed a special relationship with the material, endowing it with meanings quite different from those of its originators, but of particular significance in its present context. It may have acquired additional status as part of the local heritage of your museum’s community. It may also have become a focus of identity for culturally affiliated minority ethnic groups in the United Kingdom.

Consider whether the museum is able to:

- Demonstrate that the material is consistent with your museum’s current collection policy;
- Demonstrate its importance to the collections;
- Store and care for the material adequately and appropriately, including providing religious and cultural care requested by the traditional owners;
- Maximize the exhibition, education and research potential of the material;
- Provide adequate and safe public access to this material and its associated research information.

Also consider the issues around deaccessioning. While museums registered with the Museums and Galleries Commission are required to have an approved deaccessioning policy and procedure, not all museums are constitutionally allowed to undertake deaccessioning. This may depend on specific acts of parliament and how your museum was established as a legal entity. The decision to return an object in response to a request requires many of the same processes as deaccessioning. It is good practice for the highest level of the museum governing body to grant approval for returns.

Check:

- The legal status of the material being requested;
- The rules and governance of your museum;
- The legal ability to deaccession material from its permanent collections;
- Compliance with deaccessioning criteria, should a decision be made to return the material.

3.1.11 Consider Ethical Concerns (see also paragraphs 3.1.12 – 3.2.14)

Professional ethics encourage museums and their employees to be responsible and accountable to their stakeholder communities. These communities will include those local and national taxpayers who fund the museum directly or indirectly, local residents and regular supporters and visitors, local and international researchers, students

and educational institutions, past and present donors and the international scientific community. They also include communities whose history, culture and worldview are interpreted through the collections and museum activities. Consider:

- Any impact on responsibilities and accountabilities to stakeholders resulting from return of this material;
- Obligations to the museum profession nationally and internationally;
- Circumstances of acquisition, where these may have breached national or international legislation or traditional or customary law;
- The potential contribution that the material could make to the spiritual and cultural well-being and educational and economic development of the requesting community;
- Ability of those requesting return to safeguard material in the long term;
- Advice from the Museums Association's Ethics Committee.

3.1.12 Refer to International Legislation and Conventions

National legislation in other sovereign nations does not cover material held in British museums. However, you should take account of relevant international conventions and principles, some of which are legally binding under United Kingdom law and some of which guide international ethical practice.

3.1.13 Consider Proposed Future of the Material, if Retained

Where the material will be retained in the museum's collections, there are opportunities to allay any concerns that unsuccessful requestors may have about the future of the material in your museum.

There are also a number of ways in which the requesting party can maintain contact with this material and your museum. This understanding, which comes from developing a positive relationship, can provide compensating benefits to both parties.

These might include:

- Seeking advice from the requesting party on culturally acceptable care or storage that is also consistent with established museum practice. This might include:
 - removal from, or restricting, display;
 - isolation and storage of human remains separately;
 - ensuring only male or female museum workers handle or view sacred or secret material, in accordance with religious or other cultural prohibition;

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- access restricted to bona fide individuals;
 - enabling occasional access for culturally affiliated visitors to conduct non-destructive prayers or rituals, possibly in a separate area;
 - consultation on conservation treatments, where practical, including use of traditional methods, exhibition methods and potential loans to other institutions;
 - Shared management agreement, including potential for loans to requesting party or appointed museum or similar institution. Note: It is considered inappropriate to place human remains on long-term loan;
 - Seeking advice and input on interpretation of the material in exhibitions, publications and other museum activities;
 - Collaboration on exhibition, research, outreach and publication projects, including exchange programmes;
 - Sharing information on other related material held in both parties’ collections, including advice on conservation;
 - Respect for any restrictions on access to secret and sacred information which is traditionally held only by initiated members of a cultural group;
 - Consultation and cooperation on research design and implementation, with joint ownership of intellectual property rights, where applicable, and acknowledgement of results. Many indigenous groups are supportive of research projects where the knowledge gained will be beneficial not only to them but also to the world scientific community;
 - Training exchanges – opportunities to learn about different conservation and analysis techniques;
 - Exchange of other less contested material;
 - Opportunities to commission related craftspeople, artists or field collectors to provide additional contemporary material for the museum’s collections, subject to current national and international legislation.

Note that you may have to seek advice on the care of human remains.

3.1.14 Consider Proposed Future of the Material, if Returned

The requesting party should be able to provide details of the proposed future for material passed to its custody. Determine the:

- Individual or body that will be responsible for the material;
- Individual or body that will be responsible for the costs and means of return;

- Arrangements that will be in place for its future care and storage, if returned to a museum or local keeping place;
- Arrangements for its future access to members of the immediate family or community, scholars and researchers, visitors;
- Information that will be made available about this material (and how) to members of the immediate family or community, scholars and researchers and visitors.

Requests for the return of human remains, funerary material and sacred cultural objects may lead to the material being permanently removed from the public domain. This could involve the burial or ritual destruction of such remains or material. Museums need to take account of the cultural imperatives of other cultural traditions. If the material is to be returned for the fulfilment of traditional funerary or other sacred cultural practices, determine the records that will be made about the proceedings, access to this information and whether copies will be available for your museum.

Part 4: The Decision

All the available information gathered on the request should now be assembled to enable the decision-makers within the museum to prepare the response. A decision to return an object from the collection needs to be made at the highest level of authority and members of the governing body should take an active part in reaching the decision. The decision-making procedure will vary between institutions, depending on their constitution and whether they form part of a larger organization such as a local authority or a university.

There is a presumption that once an item enters a museum's permanent collections, it will be held in perpetuity. The process of considering requests for return challenges this assumption. The museum's governing body must therefore consider carefully the implications of their decision and whose interests are best served by retaining or returning the object.

4.1 Steps to Consider

Please note that not all of these steps will apply in every case.

4.1.1 Prepare the Report

The staff member who has been delegated responsibility for dealing with the request should prepare a report for the museum's chief officer. This should include:

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- A summary of the background to the request, the requesting party's credentials and their reasons for making the request;
 - A brief account of the museum's acquisition of the material, any provenance or other background history, its history while in the museum's control including exhibition use, conservation treatment, loans, research and teaching use, any future plans for the material to which the museum is already committed;
 - An assessment of its significance to the requesting party and in a wider context;
 - A statement relating to the museum's powers to alienate material from its collection, if these exist;
 - How, if at all, the return of this material would fit the criteria of the deaccessioning policy or any established policy on repatriation;
 - The case for retaining/returning the material;
 - Implications for the museum whether the material is retained/returned;
 - Implications for the museum's parent body if it has one (e.g. local authority, university, society);
 - An assessment of the attitudes of the local community to a request for return.

4.1.2 Follow the Museum's Formal Decision-making Process

Different procedures will apply in each institution but some or all of the following elements are likely to be necessary.

After due consideration of the staff member's report and discussion with the museum's management team, the Director may make an appropriate recommendation to the museum's governing body. In all cases, he or she will follow the normal procedures for bringing matters to the attention of the governing body of the museum. These could include, but are not limited to:

- Provision of full background papers;
- Presentation from the delegated staff member;
- Presentation from requesting party;
- An agenda meeting with the chairperson of the governing body;
- A meeting of the collections sub-committee;
- A meeting of the full governing body of the museum.

The museum's governing body will give due consideration to the Director's recommendation and associated information, actively discussing the issues and weighing up the factors involved. It may seek further advice if required, before making an informed decision, taking into account all relevant facts and potential implications. The governing body may accept the recommendation and authorize the museum's chief officer to act accordingly.

Alternatively, in view of the wider implications of some decisions, the governing body may ask the chief officer to seek additional advice from the professional museum community, the museum's legal advisors or other communities of interest.

If the museum is part of a larger organization, the governing body of the parent institution may also be required to endorse the decision of the museum's board or committee. This could be the full metropolitan, county or district council or a university council.

4.1.3 Ratify the Decision

The decision will need to be ratified by relevant levels of authority within your museum, in line with your collection policies and procedures. The decision should be formally minuted by your museum and its governing body.

4.1.4 Record Decision-making Process

The process of decision-making should be fully recorded. This is part of the accountability to the museum governing body and to the supporters of the museum and is also now an aspect of the history of the object. It is important to be alert to any sensitivities surrounding the case. Consider the following steps:

- Put all correspondence, notes of meetings, research into the provenance and significance of the material, photographs, the internal reports and the formal minuted decision in the object's history file;
- Include copies of any media coverage in the file. Ask the requesting party to provide you with copies of any articles from their local media, and agree to forward copies of your local coverage;
- Take a special set of record photographs if appropriate, particularly if the material is to be returned. If the material is culturally sensitive or is still in copyright, seek permission of the requesting party as appropriate;
- Bear in mind that copyright in an artwork does not necessarily belong to the requesting party or to your museum.

4.1.5 Inform All Parties

You may already have established a good working relationship, even at some distance. Consider the following:

- Inform the requesting party and other interested parties by letter, enclosing a copy of the formal minute or equivalent evidence of high level authorization of the decision;
- Work with the requesting party to determine whether the decision will be communicated publicly, and, if so, what level of publicity will be acceptable to both parties;
- Notify any other museums who have taken part in the process or who are responding to requests from the same requesting party of the decision reached;
- Notify the outcome to the United Kingdom museums community (through the Museum Ethnographers’ Group where ethnographic material is concerned), and advertise the decisions if appropriate.

If a decision has been made to return an object

- Work with the requesting party on the logistics of return, including any ceremonial that will be performed;
- If you have been working with the requesting party in conjunction with other museums, it may be appropriate to work collaboratively on the logistics of return.

4.1.6 Prepare Public Response

It is important that the interests of all stakeholders are considered in communicating the decision. If the decision is to retain the material, the requesting party may be reluctant to accept the decision. If there is a decision to return and the material to be returned has been on frequent display and has become a popular exhibit, your regular visitors may have formed an attachment to it that will now be broken.

- Respect any wish for anonymity on the part of the requesting party.
- If you have established that the requesting party is also negotiating with other museums, it may be appropriate to work collaboratively on publicity.
- If appropriate, publish articles about this process in your own museum publications or other professional media, first determining the requesting party’s views on reproducing images and whether such publicity would be welcome.

If the material is to be returned:

- It may be appropriate to make it a focus for special activities and displays, or arrange a farewell. This will depend on the cultural meanings and sensitivities that it holds for the recipients, who may require some private ritual or ceremony;
- Be aware that the exchange of gifts is a significant part of the rituals of encounter in many other cultures, and your museum may be offered other material for its collections. This exchange can symbolize the establishment or continuation of an important relationship.

If the material is to be retained:

- It may become the subject of further requests at some later date. Your museum may also become the focus of attention from the media, stimulated by the disappointed requesting party.

4.1.7 Manage the Media

Each museum should formulate a clear outline policy on restitution before calls from the media become an issue. Your museum's Press Officer or spokesperson should never be in a position of creating policy on the hoof. For example, the party line may be that a museum is bound to protect the integrity of its collections for each new generation, yet it is prepared to consider each request for restitution in a sympathetic manner. Using this policy as a starting point, the spokesperson can avoid falling at the first hurdle.

Consider the following steps:

- Identify who should be your museum's spokesperson and ensure that they are fully briefed, with appropriate supporting information. All media enquiries should be addressed to them and other museum staff and trustees should be dissuaded from talking to the press;
- Try to work in consultation with the requesting party;
- Identify whether the former owners, collectors or donors (or their heirs) would welcome acknowledgement, being mindful of the Data Protection Act. Ensure that requests for anonymity are respected at all times;
- Identify the key messages which the museum and the requesting party would like to promote;
- Provide a full media release that accurately spells out unfamiliar names and titles and acknowledges the help from both sides (as appropriate), and especially any government or other sponsorship that has helped in reaching the resolution;
- Anticipate questions and answers for any follow up interviews;

- Coordinate press comments from relevant individuals and organizations as appropriate e.g. Chair of Board of Trustees, Chair of Local Authority, Museums Association, requesting party, other museums involved;
- Send a personal letter from your museum’s Director to key organizations informing them of the decision, its progress and rationale;
- Keep key players informed of any developments. It is important that your museum is the first source of any information – they should hear from you first;
- Only provide photographs, with approved captions and acknowledgement of source and any copyright, if this is culturally acceptable to the requesting party.

If the decision is made to return the material:

- Only invite the media to celebrations, farewell activities or ceremonial with the approval of the requesting party, and ensure that media representatives are clear about protocols, especially concerning photography and filming.

If the decision is made to refuse the request:

- Make available a full account of the arguments that led to the decision;
- If the decision is likely to be contentious it would be advisable to talk to other museums who have been in a similar situation.

4.1.8 Act on the Decision

If the material is to be retained:

- It may be appropriate to review practices associated with the management of this material within the museum. Openness, responsiveness and a willingness to learn from the requesting party can help both parties to address specific cultural or other concerns;
- The material will now be more fully documented. Additional information from the requesting party may provide guidance on culturally preferred options for care, display, interpretation, handling, storage, conservation and access, which could be implemented within your museum. You may instigate additional requirements, such as involving discussions with the requesting party, when research or exhibition proposals are considered;
- You may have reached an agreement with the requesting party regarding special practices for the care and management of the material within the museum, or regarding access to the material and associated information for research and

other purposes. Ensure that these joint requirements are confirmed in writing and that both sides share the same understanding.

If the material is to be returned:

- Determine and prepare appropriate documentation for the formal transfer of the material when it leaves the museum, and obtain signatures of authorities representing the museum's governing body and the requesting party. If the requesting party is a museum, its own acquisition documentation will be available. Otherwise some formal contract may be required, with subsequent costs associated;
- Where ritual and ceremony surrounds the return, request material recording these events, if culturally acceptable;
- There may be budget constraints on both parties. However, if possible, request that a member of your museum team be invited to take part in the return of the material;
- Your museum may be expected to host the requesting party during the transfer formalities at your museum. This is an opportunity to exchange ideas and information on other aspects of the museum's work and collections and to learn from the requesting party;
- The logistics of returning the material may be complex. In addition to packing and crating to conservation standards, there will be transport, insurance and even courier costs. Normally these costs should be the responsibility of the receiving party. Your Area Museum Council is likely to be able to provide advice on packing, local carriers and customs. Send appropriate copies of relevant museum documentation, object history, photographs and other information;
- If going overseas, special permits are likely to be required. Contact the relevant Embassy or High Commission for details. Do not commit to the dates of transport until all the relevant licences have been granted. There are different requirements for export to countries within the European Union and for those beyond. The following may apply:
 - Certain cultural goods over specific market values need an export licence from the Reviewing Committee on the Export of Works of Art applied for through the Department for Culture, Media and Sport
 - A CITES licence may be required for both the export and import of natural history specimens and ethnographic or decorative arts objects made from, or incorporating, parts of endangered species on the world endangered species list

- Import licences may be required for natural history material from species on the national lists of endangered species of the importing country. The authority is usually the government department for the environment, agriculture, fisheries or conservation
- Human remains may also require special permits from the importing country. The authority is usually the government department of internal affairs or health.

4.1.9 Determine Policy on Future Requests

The experience of processing a request for return, repatriation or restitution will have tested your museum record systems, de-accessioning procedures, the decision-making process and your policy on returns, if there is one in place. By reflecting on the process and outcomes, your museum will be in a better position to establish an effective way of dealing with future requests.

Your museum or governing body may see the value in establishing a separate policy for managing such requests, or revising any current policies and procedures. The experience may also provide insights helpful in strengthening your museum’s acquisitions procedures. If a museum has a sound acquisition policy, effective acquisition procedures (including verification of good title), comprehensive knowledge of the museum’s collections and responsible record-keeping, responding to requests for return will be more straightforward for today’s staff and governing body and for their successors.

4.1.10 Build on the Experience

Both your museum team and the requesting party will have gained new knowledge from this experience of request and response, and you may wish to build on this through future activities or research projects. If other museums in the United Kingdom have been similarly involved, you may be able to continue to work collaboratively. How these relationships continue will depend on the circumstances of the case. There may be representatives of the originating cultural group living in your museum’s catchment area who may wish to take an active interest in the interpretation or spiritual care of the requested object and other related materials in your collection or of new acquisitions. Descendants or relatives of wronged owners may be grateful for the care given over the years by your museum and wish to become involved with the Friends of the Museum. A national or other museum may wish to collaborate on an exhibition or research project. Other opportunities may arise.

Part 3

Repatriation in Different Contexts

Editor's Preliminary Note

MANY OF THE CLAIMS made for the return of cultural property have unique features. It is therefore quite difficult to formulate rules, legal or otherwise, that would apply generally to such claims. Indeed, the diversity of cultural items themselves, and of the ways in which they came to be lost and acquired, warns against generalization.

While it has been pointed out that placing cultural objects in categories does not reflect the way in which many peoples see their heritage, it is nonetheless true that the different legal regimes and museum classifications applying to them make it convenient to group certain of them together. For this reason I have arranged them in categories, though it will be immediately obvious that many of the examples given could equally well have been classified in another group, or perhaps differently described altogether.

The categories used (cultural objects displaced during war, hostilities or occupation; colonial cases; dismembered objects; sacred objects; human remains; objects needed for the revival of intangible heritage and, not least, archives) bring together cases that share certain similar features, although others differ. Nevertheless, each of the categories used elucidates particular factors that cannot be ignored in dealing with sensitive issues, and as we will see in Parts 4 and 5, such factors often dictate the manner in which the claim is made and pursued.

Cultural Objects Displaced during War, Hostilities or Occupation

Editor's Note

THERE HAVE BEEN SEVERAL EFFORTS to formulate principles which would guide States or communities or individuals in efforts to resolve claims for cultural objects misappropriated, looted or otherwise displaced during the Second World War or its immediate aftermath,¹ some by scholars, some by interested communities or national governments,² and some by international organizations.³

The Washington Conference Principles on Nazi-Confiscated Art, 1998⁴

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

- I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
- II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
- III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

1 A draft declaration of principles is currently under discussion by an intergovernmental committee of experts convened by UNESCO. So far, no consensus has been achieved on a complete set of principles. For a first attempt at such a project, see L.V. Prott 'Principles for the Resolution of Disputes concerning Cultural Heritage Displaced during the Second World War' in E. Simpson (ed.) *The Spoils of War* (Abrams and Bard Graduate Centre, New York, 1997). Originally presented to a Symposium 'The Spoils of War – World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property' in New York in 1995, it sought to show the Principles' basis in existing and accepted legal rules and practice and how they might be implemented. This article expressed the personal views of the author, which are not necessarily those of UNESCO.

2 Washington Principles 1999 and Vilnius Declaration 2001 (texts given below).

3 Council of Europe 1999 (see text below).

4 Principles released 30 November, adopted 3 December 2008 at Washington Conference on Holocaust-Era Assets, 30 November – 3 December, 1998. Text available at: http://www.claimscon.org/index.asp?url=artworks/wash_princ. These are discussed in the article immediately below, but there is little available information to date on their application.

- IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
- V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
- VI. Efforts should be made to establish a central registry of such information.
- VII. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
- VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
- IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.
- X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
- XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Council of Europe: Resolution 1205 on Looted Jewish Cultural Property, 5 November 1999⁵

1. One essential part of the Nazi plan to eradicate the Jews was the destruction of the Jewish cultural heritage of movable and immovable property, created, collected or owned by Jews in Europe.
2. This involved the systematic identification, seizure and dispersal of the most significant private and communal Jewish property.

5 *Official Gazette of the Council of Europe* – November 1999. The Assembly represented forty-one nations and Resolution 1205, calling for the restitution of looted Jewish cultural property in Europe, was adopted by the Standing Committee, acting on behalf of the Assembly, on 4 November 1999. See Doc. 8563, report of the Committee on Culture and Education, Rapporteur: Emmanuel Zingeris. Text available at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/%2FDocuments%2FAadoptedText%2Fta99%2FERES1205.htm>

3. Subsequent expropriation and nationalization of Jewish cultural property, whether looted or not, by communist regimes was illegal, as was similar action in countries occupied by the Soviet Union.
4. Though early moves were made following the end of the Second World War to find and return this looted property, a very considerable amount has not been recovered and has remained in private and public hands.
5. A new attempt is now being made, characterized inter alia by major conferences held in London and in Washington, to complete this process and advance the recovery of looted Jewish cultural property before the last of those persons from which it was taken has died.
6. The Assembly has long recognized the Jewish contribution to European culture (Resolution 885 (1987)) and recently underlined the significance of Yiddish culture (Recommendation 1291 (1996)). From local community to national and European levels, Jewish culture is a part of the heritage.
7. Moreover, Europe, as represented in the Council of Europe, now includes the wider Europe, including Russia, throughout which looted Jewish cultural property remains dispersed.
8. The Assembly believes that restitution of such looted cultural property to its original owners or their heirs (individuals, institutions or communities) or countries is a significant way of enabling the reconstitution of the place of Jewish culture in Europe itself.
9. A number of European countries have already made moves in this direction, notably Austria and France.
10. The Assembly invites the parliaments of all member States to give immediate consideration to ways in which they may be able to facilitate the return of looted Jewish cultural property.
11. Attention should be paid to the removal of all impediments to identification such as laws, regulations or policies which prevent access to relevant information in government or public archives, and to records of sales and purchases, customs and other import and export records. Russia in particular should keep open its files on Jewish heritage.
12. Bodies in receipt of government funds which find themselves holding looted Jewish cultural property should return it. Where such works have been destroyed, damaged or are untraceable, or in other cases where restitution may not be possible, such bodies should be assisted to pay compensation at the full market value.

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13. It may be necessary to facilitate restitution by providing for legislative change with particular regard being paid to:
 - a. extending or removing statutory limitation periods;
 - b. removing restrictions on alienability;
 - c. providing immunity from actions for breach of duty on the part of those responsible for collections;
 - d. waiving export controls.
 14. Such legislative change may require modification and clarification of human rights laws in relation to security and enjoyment of property.
 15. Consideration should also be given to:
 - a. providing guarantees for those returning looted Jewish cultural property against subsequent claims;
 - b. relaxing or reversing anti-seizure statutes which currently protect from court action works of art on loan;
 - c. annulling later acquired titles, that is, subsequent to the divestment.
 16. The Assembly encourages cooperation in this question of non-governmental organizations, and in particular the European Jewish communities, at both national and European levels. Such encouragement extends to the exploration and evolution of out of court forms of dispute resolution such as mediation and expert determination.
 17. Due diligence should be imposed on purchasers and the art world by the implementation of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.
 18. In circumstances where dealers, agents or intermediaries know or suspect a work they have in their possession to be looted, provision should be made in law requiring them to hold on to it and alert the relevant authorities, and every effort should be made to locate and alert the dispossessed owner or his or her heirs.
 19. The Assembly calls for the organization of a European conference, further to that held in Washington on the Holocaust era assets, with special reference to the return of cultural property and the relevant legislative reform.

Vilnius Forum Declaration, 5 October 2000⁶

The Vilnius Forum,

Recognizing the massive and unprecedented looting and confiscations of art and other cultural property owned by Jewish individuals, communities and others, and the need to reach just and fair solutions to the return of such art and cultural property,

Referring to Resolution 1205 of the Parliamentary Assembly of the Council of Europe and the Washington Conference Principles on Nazi-Confiscated Art,

Noting in particular their emphasis on reaching just and fair solutions to issues involving restitution of cultural assets looted during the Holocaust era and the fact that such solutions may vary according to the differing legal systems among countries and the circumstances surrounding a specific case,

Makes the following declaration:

1. *The Vilnius Forum asks* all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs. To this end, it encourages all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe.
2. In order to achieve this, the *Vilnius Forum asks* governments, museums, the art trade and other relevant agencies to provide all information necessary to such restitution. This will include the identification of looted assets; the identification and provision of access to archives, public and commercial; and the provision of all data on claims from the Holocaust era until today. Governments and other bodies as mentioned above are asked to make such information available on publicly accessible websites and further to cooperate in establishing hyperlinks to a centralized website in association with the Council of Europe. The Forum further encourages governments, museums, the art trade and other relevant agencies to cooperate and share information to ensure that archives remain open and accessible and operate in as transparent a manner as possible.
3. In order further to facilitate the just and fair resolution of the above mentioned issues, the *Vilnius Forum asks* each government to maintain or establish a central reference and point of inquiry to provide information and help on any query regarding looted cultural assets, archives and claims in each country.

6 Agreed by participating governments present at the Vilnius International Forum which took place under the auspices of the Council of Europe 3–5 October 2000 in Lithuania as a follow-up to the Washington Conference on Holocaust-Era Assets 1998. Text available at <http://www.lootedart.com/MFV7EE39608> accessed 10 April 2009.

4. Recognizing the Nazi effort to exterminate the Jewish people, including the effort to eradicate the Jewish cultural heritage, the *Vilnius Forum* recognizes the urgent need to work on ways to achieve a just and fair solution to the issue of Nazi-looted art and cultural property where owners, or heirs of former Jewish owners, individuals or legal persons, cannot be identified; recognizes that there is no universal model for this issue; and recognizes the previous Jewish ownership of such cultural assets,
5. *The Vilnius Forum* proposes to governments that periodical international expert meetings are held to exchange views and experiences on the implementation of the Washington Principles, the Resolution 1205 of the Parliamentary Assembly of the Council of Europe and the Vilnius Declaration. These meetings should also serve to address outstanding issues and problems and develop, for governments to consider, possible remedies within the framework of existing national and international structures and instruments.
6. *The Vilnius Forum* welcomes the progress being made by countries to take the measures necessary, within the context of their own laws, to assist in the identification and restitution of cultural assets looted during the Holocaust era and the resolution of outstanding issues.

A Comparison of the Washington and Vilnius Principles and Resolution 1205⁷

P.J. O'Keefe

RESOLUTION 1205 (1999) of the Parliamentary Assembly of the Council of Europe on 'Looted Jewish Cultural Property'⁸ called for 'the organization of a European conference, further to that held in Washington on the Holocaust-era assets, with special reference to the return of cultural property and the relevant legislative reform.' The Government of Lithuania offered to host such a conference, which was attended by representatives from thirty-seven States (mainly European) and seventeen non-governmental international organizations (mainly Jewish, but also including auction houses and dealer organizations). At the conclusion of the plenary session, the Vilnius Forum Declaration was adopted.

The Vilnius Forum called on all participating States 'to take all reasonable measures' to implement Resolution 1205 of the Parliamentary Assembly of the Council of Europe. This was a significant step forward. The resolution had previously been adopted by the Parliamentary Assembly on 4 November, 1999. The text had been transmitted to the parliaments of Member States who, following paragraph 10 of the resolution, were invited to give immediate consideration to ways in which they might be able to facilitate the return of looted Jewish cultural property. However, the Vilnius Forum was the first endorsement of Resolution 1205 by European governments. Certainly the endorsement is qualified by reference to 'reasonable measures,' and the preamble also notes that solutions to issues of restitution may vary 'according to the differing legal systems among countries.' Nevertheless, States have now indicated that the issues raised in Resolution 1205 are significant and need to be considered by governments.

Forty-four governments, by consensus, adopted the Principles on Nazi-Confiscated Art at the Washington Conference on Holocaust-Era Assets in 1998,⁹ but these principles take a limited approach to dealing with the aftermath of the Holocaust. Firstly, they refer solely to art. On the other hand, Resolution 1205 refers to cultural heritage and cultural property. The need to go beyond a concentration on high-profile objects of significant monetary value was illustrated by several speakers at the Vilnius Conference. Rabbi Dunner of the Conference of European Rabbis spoke of the return of books from his father's library – objects of little monetary value but with great personal and emotional attachment for the former owners or their heirs. There are religious objects

⁷ 10 *International Journal of Cultural Property* (2001) 127–33.

⁸ See text at p. 140. Discussed in 5 *Media and Arts Law Review* (2000) 121.

⁹ Ed. Note: These principles were presented to delegates to the meeting on the first day and were adopted unchanged on the last day of the meeting.

that may also be art objects but are not necessarily so. Archives and libraries must also be included. The Vilnius Declaration refers to 'cultural assets,' a concept which, however ill-named, obviously goes well beyond art. Secondly, the Washington Principles limit themselves to stating that 'steps should be taken expeditiously to achieve a just and fair solution' to claims for restitution. Resolution 1205 went further in emphasizing restitution as the primary way of achieving justice. This was endorsed in the Vilnius Declaration, which 'asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs.' The Parliament of Lithuania put this to practical effect on 3 October 2000 when it passed the 'Law on the Transfer of Religious Manuscripts Copied Exclusively for the Purpose of Observance (Toras) to Jewish Religious Communities and Societies.' As the name indicates, the legislation establishes a procedure for transferring Toras kept in State depositories into the ownership of Jewish communities or societies.

Three major themes ran through the forum: access to information; the modalities of restitution, particularly in respect of heirless property; and implementation of procedures for restitution. These were not always fully articulated but underlay much of the discussion at the forum and the drafting of the declaration.

Access to records is emphasized both in the Washington Principles and in the Vilnius Declaration. The latter asked 'governments, museums, the art trade and other relevant agencies to provide all information necessary' for restitution. Information is essential to establish and verify claims. After fifty-five years or more, much of this has been lost or is contained in unknown or inaccessible depositories. The opening up of government archives in Eastern Europe was one factor in the realization that there was a major need for justice even now in the resolution of these claims. But governments could do more to make holdings under their control accessible. Museums in a number of countries are making attempts to examine their records, but the situation overall is uneven. The two major problems are cost and a lack of qualified personnel. Participants in the art trade – dealers, auctioneers and collectors – possess valuable information. For example, a leading Swiss dealer, Walter Feilchenfeldt, indicated that he was willing to respond to specific requests for information from his archives, although in the 1930s 'it was dangerous and risky to record artworks.' Gilbert Edelson, of the American Art Dealers Association, indicated that dealers have a moral obligation to respond to specific requests for information relating to art during the Holocaust era. The Vilnius Declaration states that the information to be provided must include 'the identification of looted assets; the identification and provision of access to archives, public and commercial; and the provision of all data on claims from the Holocaust era until today.'

But information is of limited value unless its existence is known to persons who can make use of it. These people may live in different countries from where the information is located and speak a different language. Research is expensive and time

consuming. Few have the training and ability to search through masses of information to locate that which is relevant to particular issues. In order to reduce these difficulties, the Vilnius Declaration asked governments and other bodies to make the information available on 'publicly accessible websites.' Furthermore, it called for the establishment of hyperlinks between these sites and a centralized website to be set up in association with the Council of Europe. There are many ways this could be done, including the council's arranging for another body to set up the hyperlinks.

Setting up electronic databases and creating hyperlinks takes time. Meanwhile, researchers are faced with the problem of ascertaining precisely who has the information they need within a particular country. The Vilnius Declaration calls on governments to 'establish a central reference and point of enquiry to provide information and help on any query regarding looted cultural assets, archives and claims in each country.' A researcher should be able to approach the designated body with a query and be referred to those most likely to hold the desired information.

Among the modalities of restitution that remain unresolved is the method for dealing with heirless cultural objects. These may have belonged to individuals who died during the Holocaust with no heirs, but might also have been the communal property of a Jewish community that disappeared or is only a fraction of its pre-Holocaust size and significance. Resolution 1205 stated that 'restitution to original owners or their heirs (individuals, institutions or communities) or countries is a significant way of enabling the reconstitution of the place of Jewish culture in Europe itself.' There are many conflicting interests involved. Some States do not recognize the concept of a community as a legal entity. In general it seems that the Jewish communities of Europe believe that this heritage belongs to them; it is part of their historical and cultural past and future and an essential part of their relationship with wider society. On the other hand, some international Jewish organizations, particularly those connected with the United States of America and Israel, do not want material returned to communities that they regard as mere remnants of Jewish cultural and religious life. They see it as 'Jewish heritage' regardless of the country it comes from and believe that it therefore belongs in Israel. More significantly, they do not want it handed back to the States that actually destroyed the communities. But such States argue that the Jews were and are part of their culture and this needs to be remembered. The declaration does not attempt to resolve any of these issues. It recognizes the previous Jewish ownership of heirless material and the need to achieve a just and fair solution for its distribution, although there is no universal model for doing this.

Some indication of what States were not prepared to countenance at the Vilnius Forum can be seen by comparing the set of draft recommendations developed prior to the forum with the declaration that was eventually adopted.¹⁰ Most significantly

10 These were available on the website and were reproduced in the official forum programme.

this concerns the implementation of procedures for restitution. The draft had the forum welcoming ‘the establishment of a Task Force on Holocaust Era Looted Assets to monitor the implementation throughout Europe of the Washington Principles, Council of Europe Resolution 1205 and the Vilnius Recommendations.’ The task force was to report at regular intervals to European and international institutions having the power to bring issues and problems to the attention of governments with a request that action be taken to remedy the situation. No names were given for the institutions concerned, but obvious ones would have been the Council of Europe or UNESCO. Some States appear to have regarded this as too drastic a step. They may well have been concerned at any suggestion of a watchdog – even one without real teeth – or at the financial considerations. Others may still be thinking of taking this idea forward, albeit in a less formal way.

The Vilnius Declaration proposed ‘to governments that periodical international expert meetings [be] held to exchange views’ on the implementation of the various principles, resolutions, and so on. These meetings ‘should also serve to address outstanding issues and problems and develop, for governments to consider, possible remedies within the framework of existing national and international structures and instruments.’ The first difficulty with this is that no procedure for calling these meetings is indicated. The matter is left entirely to governments to come to some arrangement, which in practice will probably mean one government taking the initiative – one that is prepared to pay the costs of staging the meeting. If such a meeting were to be arranged, it is seen as only suggesting remedies within existing structures, leaving little scope for innovative suggestions.

The draft recommendations had urged countries to ‘move towards changes in their legal systems that may be necessary to assist in the commitment to restitution, and to work towards the creation of a future Convention.’ Resolution 1205 had outlined a range of legal issues, the effect of which States might consider in furthering the cause of restitution. For example, the Culture, Media and Sport Committee of the United Kingdom House of Commons has said: ‘Where a claim has been upheld and restitution is seen as appropriate by all parties, it is essential that legislative barriers to such restitution be removed.’¹¹ The Vilnius Declaration welcomed ‘the progress being made by countries to take the measures necessary, within the context of their own laws, to assist in the identification and restitution’ of looted cultural assets. This reflects the opening paragraph of the Washington Principles, where it is said that the conference ‘recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.’ Such an attitude would be welcomed by States that may not wish to make legislative changes, but does little to advance the cause of restitution in the European context. An additional factor is the

11 Culture, Media and Sport Committee, House of Commons, *Cultural Property, Return and Illicit Trade, Vol. 1, Report and Proceedings of the Committee* para. 199 (xviii) (Stationery Office, London, 2000).

difference between the legal situation in the United States and that in Europe. The former has virtually no export laws, while Europe has a range of them. The *bona fide* purchaser rule and laws on limitation of actions in Europe create a completely different situation from that in the United States. For example, under Dutch law it would seem that even a purchaser in bad faith acquires a good title twenty years from the time someone other than the true owner engages in acts of ownership in relation to the property.¹² In New York, by contrast, the three-year limitation period does not commence until the dispossessed owner has made demand on the current holder for return of the object and been refused. It is only a matter of time before a situation arises in some European State which starkly pits restitution against retention in the context of looted Holocaust-era cultural heritage.

The Vilnius Declaration, as already noted, encourages all participating States to take all reasonable measures to implement Resolution 1205. They could thus be said to have undertaken to consider the legal issues raised in that document. The Resolution does not require more. It is not drafted in the imperative but rather suggests issues that States should consider. The draft recommendation was a small advance on this in recommending that countries move toward actual changes in their legal systems to facilitate restitution.

There is no mention of a future international convention on restitution of looted Holocaust-era cultural heritage in the Vilnius Declaration. One cannot but acknowledge that the preparation of this would take many years. However, the drafting is itself of value as an educational process. States are forced to consider in depth the issues raised while preparing the draft and confront the range of possible choices that may be made.

The Vilnius International Forum on Holocaust-Era Looted Cultural Assets was a success inasmuch as valuable information was exchanged and advances made in providing information services. States did not see a need to do more.

12 J. Blom 'Laying Claim to Long-Lost Art: The Hoge Raad of the Netherlands and the Question of Limitation Periods' 9 *International Journal of Cultural Property* (2000) 138.

‘Restitution’: *Art Treasures and War*¹³

W.A. Kowalski

THE CONCEPTS OF ‘*restitutio in integrum*’ and ‘restitution’ have featured in legal thinking since the development of Roman Law. Although the terms have been used in many different contexts, they have, to this day, maintained their original meaning – the restoration of the previous state of affairs. Within current international law, the phrase *restitutio in integrum* defines the objective of the State’s responsibility; each violation of an interest of another subject creates the obligation to restore the situation to the *status quo ante*. For the elimination of the material effects of war, the aim thus defined can be achieved through restitution and reparations.

The most common areas of restitution are:

- the return of property looted during military operations or during the occupation of a territory;
- the restoration of property, rights and interests seized as enemy property;
- the handing over to the wronged State a certain number of equivalent objects that compensate for losses defined individually (restitution in kind);
- restitution (repatriation) of cultural heritage in connection with territorial changes, such as the ceding of territory or dissolution of multi-national States.
- Another area of restitution is the specific case of the distribution of reclaimed goods among the wronged States, especially when the explicit place of origin of an individual object cannot be identified (restitution by distribution).

A common feature of all of the above forms of restitution is the tendency towards a complete or almost complete restoration of the *status quo ante*. This is possible either directly, that is by the return of the looted objects and the restoration of the property, rights and interests seized, or indirectly, by the handing over of an object identical with the one lost (e.g. gold for gold), or similar (e.g. one painting by the same master or from the same school of painting for another one). Restitution must be distinguished from reparations; to achieve the aim of *restitutio in integrum*, the indirect method is employed, compensating for the loss only in an approximate manner. It is usually accomplished by handing over goods or money of equivalent value.

13 (Institute of Art and Law, Leicester UK, 1998) 80–90. A more detailed version is to be found in ‘Restitution of Works of Art pursuant to Private and Public International Law.’ 288 *Recueil des Cours*, (Hague Academy of International Law/ Martinus Nijhoff, Dordrecht, 2002).

The works of Jakub Przyluski, Hugo Grotius, Georg Friedrich Martens, John Locke, Emer de Vattel and other philosophers and writers make clear that although looting and pillaging during war was condemned centuries ago, legal restrictions on such activities have been only slowly and reluctantly implemented. Through time, a ban on looting works of art became customary in international law, and eventually, found its way into regulations of the codified law of war. The obligation of the restitution of a looted work of art correlates with the ban on pillaging. As early as the nineteenth century, it was based on the principle of identification, which provided for the return of exactly the same and only the same objects which had been removed, as well as on the principle of territoriality, according to which an item is returned to the place from which it was taken. In many cases, when claims were examined, the period of time that had passed since the loss of the object was not taken into account.

From the beginning of the nineteenth century, claims relating to cultural heritage emerged, indicating the development of the principle of the special territorial bonds attaching to works of art, which had previously applied only to archives. This principle is connected with the protection of the integrity of national cultural heritage, and has increasingly influenced both bilateral and multilateral international agreements.

All the principles relating to the restitution of works of art were fully recognized and developed in the peace treaties signed after the First World War.

The requirements for restitution became especially difficult in the face of the range and scale of works of art plundered during the Second World War. The restitution law enforced after the war's conclusion included new elements and a number of very detailed regulations. Restitution as performed in the territories of Germany and Austria was limited initially to the return of the works of art that had been removed by Nazis from the occupied areas. The Allied authorities introduced a restitution law that was based on the following principles:

- Restitution had a public-legal character, and was performed exclusively by specialized services of the Allied occupational armies and foreign restitutional missions representing the wronged States.
- Only those objects that were proved to have been looted were subject to return. The identification process was facilitated by the fact that there was a total ban on the art trade in the territory of occupied Germany, and Germans were obliged to declare all objects which were likely to be subject to return.
- A necessary condition for restitution was the need to establish that a given object had been taken 'by force' or 'under duress,' in the broad meaning of these terms. To clarify this issue, in 1948, a new criterion was introduced providing that a given object was exempt from restitution only if it was proved to have been purchased by means of a 'normal commercial transaction.'

- All items that had been removed from a given territory were subject to restitution, regardless of who owned or held such items at the moment of seizure.

The Allied Restitution Law represents a very important step in the development of the restitution of looted cultural goods as a norm in international law. Never before had the rules and procedures been so elaborate and detailed, and so widely used in practice. For the first time in history, restitution covered neutral States, where special regulations removed the protection of a good-faith purchaser in order to provide a more efficient implementation of the claims of wronged persons.

At first, the restitution law that was adopted in Germany provided for restitution in kind in the case of cultural goods that could not be returned. However, this was never applied in practice on the basis that the principle of the protection of the integrity of the cultural heritage also had to be implemented in the case of Germany and its former allies; that was at least the official line used for the final refusal to undertake restitution in kind and cultural reparations which had been expected by several Allied nations, at the expense of the German cultural heritage. Resolutions regarding this issue were included in the peace treaties of 1947.

The same principle should have governed the regulations resulting from the 1944 territorial changes. It must be stressed, however, that there was a considerable difference between the changes that took place after the First World War and those which followed the Second World War. After the First World War the interested nations focused on the repatriation of cultural goods that had been removed from their territories, in some cases even from a period before they were ceded. After the Second World War, on the other hand, the whole issue was much more complicated, and in fact, historically exceptional due to the resettlement of large numbers of people away from their homelands, where they had lived for centuries. The decisive rule that applied in this situation was the principle of recognizing a territorial link with the cultural heritage in question; repatriation of cultural items was limited only to certain private property and a small number of other objects of special interest and significance.

Another form of restitution discussed in this work – restitution by distribution – was not introduced in the field of cultural property although the scale of looting, and the post-war conditions in Europe might well have justified it. Delegates to the Conference of Allied Ministers of Education as well as MFA&A Officers and officers from national allied restitution missions were fully aware of the problems surrounding items whose rightful owners, and often even countries of origin, could not be identified. The first proposal aimed at resolving the problem, namely a project to create a ‘Common Exchange Museum,’ which would hold all cultural goods of unknown origin for the benefit of all nations who suffered during this war, was submitted to the American authorities at the end of

1942. However this idea was not accepted and the question was left open for many years; it remains a source of debate today.¹⁴

Following the Second World War, the restitution principle entered a new phase of development, and in 1954, became a treaty standard. Although it did not feature in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, it did appear in the Protocol signed on the same day as the Convention.

Its provisions did not conclude the process of regulating restitutional issues. Since the early 1970s, restitution has received more attention in the international arena, and the wartime aspect has become only an element of a wider problem, generally defined as the return of cultural goods to the country of their origin. It was mentioned in two resolutions of the General Assembly of the United Nations, following which the work on its application was ceded to UNESCO.¹⁵ In 1978, the General Conference of UNESCO, created a special inter-governmental committee to work out forms and procedures, in the most general terms, to promote the return of works of art removed during colonial periods and in wartime, as well as in peacetime through illicit export.¹⁶ The Committee undertook work on various aspects of restitution believing that:

The reassembly of dispersed heritage through restitution or return of objects which are of major importance for the cultural identity and history of the countries having been deprived thereof is now considered to be an ethical principle recognized and affirmed by the major international organisations. This principle will soon become an element of *jus cogens* of international relations.¹⁷

One of the results of the UNESCO Committee was the creation of the Standard Form Concerning Request for Return or Restitution,¹⁸ which is also to be used for filing a claim for cultural goods looted during the occupation of a foreign territory.

In practical terms the question of restitution emerged on a wider scale in connection with political changes in Central and Eastern Europe at the end of the 1980s; changes in 1989 reopened many post-war issues, and another – and possibly the last –

14 The project was prepared by Charles Estreicher and presented to governmental bodies as well as to several scientific organizations during his visit to the US at the close of 1942 and early 1943. He suggested the creation of a 'Common Exchange Museum' to keep all works of art and other cultural property of unknown provenance found after the war on the territories of Germany, Japan and Italy. According to his plan, approximately every ten years, this museum should travel from one European city to another. The crucial idea behind this concept was a kind of indirect and symbolic return of the cultural goods to countries that had most probably lost them.

15 Discussed by Protz in Part 1 of present publication.

16 Discussed by Protz in Part 1 of present publication.

17 One of the suggestions included in the study on the problem, prepared by the International Council of Museums for UNESCO (Doc.: CC-78/CON/609/3 Annex I).

18 Text available at <http://portal.unesco.org/culture/fr/files/24701/11032757403formef.pdf/formef.pdf>

chapter of the restitution matters resulting from the Second World War opened. Many of the original issues have now received wide coverage in the press and other media.

An excellent example of these latest developments in the post-war restitution of looted works is provided by the return from Poznan Cathedral of seven Renaissance bronze grave plates, for which a search had been conducted for many years in Germany; they were identified accidentally in 1989 in the storerooms of the State Hermitage, in what was still Leningrad, and restored to their place of origin. In the same year the Royal Castle in Warsaw recovered four paintings by Pillement which had initially been looted by Nazis and were discovered in the reserve collections of Tsarskoe Selo in Russia.

Official Russian–German talks on restitution commenced after the Treaty between the two States in 1990. In Article 16 of the Treaty, both States bound themselves to return ‘the works of art lost without a trace or unlawfully held, found in their territories.’ As a result of the first negotiations a special additional agreement was concluded in Dresden two years later for the joint conduct of the search for and return of cultural goods lost during the war. It was also agreed to set up four commissions to study detailed questions, including the form of compensation that Russia expected to obtain from Germany for destroyed or lost works of art in the event that Russia returned the German collections hidden until now in the storerooms of the Moscow and St. Petersburg museums. Independent of the work of these commissions, several cultural items found in other countries were recently returned to Germany. For example, medieval ivory relief plates were returned by France in 1994, three albums of prints by the Ukraine in 1995, and around 100,000 books, a part of the Red Army spoils from Bremen, Magdeburg, Lübeck, Hamburg and Leipzig libraries, were found in Georgia and restituted in late 1996. In February 1997, a painting by J.F.Tischbein was handed over by Sotheby’s, New York, to a representative of the Kunstsammlungen zu Weimar.¹⁹

On the Russian side all activities connected with restitution are now coordinated and supervised by the State Commission for the Restitution of Works of Art set up on the strength of a Government resolution of 28 December 1992. The State Commission is to ‘regulate the mutual claims of Russia and other countries concerning the restitution of works of art’ (part 1 of the resolution), which had been ‘translocated in the period of the Second World War’ (part 2). In its work, the Commission is under a duty to ‘secure the protection of the national interest of the Russian Federation [and] prevent any harm to the cultural heritage of the people of the Federation’ (part 3).

19 See respective notes in *Spoils of War* (International Newsletter) No. 3, December 1996, and No. 4, August 1997.

However the most important recent development is the law aimed at nationalizing the cultural items gathered in Russian depots at the end of the Second World War, which was finally adopted by the State Duma in early 1997 after a long process.²⁰

The scope of the application of this Federal Law is indicated by the statement that it ‘regulates relations in connection with cultural items removed to the USSR as a result of the Second World War and located in the Russian Federation territory’ ... ‘irrespective of the actual possessor and the circumstances which led to this possession’ (Introduction and Article 3). According to Article 6 such defined cultural items ‘are in the ownership of the Russian Federation and constitute federal property.’ There are five exceptions to this principle provided in the form of the rights to claim certain objects if prescribed conditions are met. The following objects can be reclaimed:

- cultural objects which were ‘plundered and taken away during the Second World War by Germany [or] its war allies’ from the territories of the former Soviet republics, namely Belorussian, Latvian, Lithuanian, Moldavian, Estonian and Ukrainian republics, and which were their ‘national property’ (Article 7);
- cultural objects removed from, so called, ‘affected States,’ which according to Article 4 means ‘any State whose territory was fully or partially occupied by the forces of former enemy States,’ namely Germany, Bulgaria, Hungary, Italy, Romania and Finland (Article 8.1);
- cultural objects that were ‘the property of religious organizations or private charities and which were used exclusively for religious or charitable aims and did not serve the interests of Militarism and/or Fascism’ (Article 8.2);
- cultural objects ‘that used to belong to individuals who were deprived of these because of their active fight against Nazism/Fascism, including their participation in national resistance movements against the occupation regimes, and/or because of their race, religion or nationality’ (Article 8.3); cultural objects that are ‘family relics (family archives, photographs, letters, decorations and awards, portraits of family members and their ancestors) which have become federal property according to Article 6 of the Federal Law’ (Article 12).

All claims, with the exception of those claiming the property of the former Soviet Republics, and family relics, must be submitted to the special Federal Body within the period of eighteen months after the Law enters into force. If the return of the object is decided all claimants must pay the costs of ‘the expenses for its identification, expert examination, storage and restoration, as well as its transfer (transportation costs etc)’ (Article 18). In the case of family relics, ‘the family which used to be the

20 ‘Federal Law on Cultural Values Removed to the USSR as a Result of the Second World War and Located in the Territory of the Russian Federation’; see unofficial translation of the full text and its parliamentary history dating from 1994 in *Spoils of War* (International Newsletter) No. 4, August 1997, 9.

owner' is also expected to pay the value of the relics to be returned (Article 19.2). In the case of these objects there is another exception to the general rule, in that the interested families can file their claims directly with the Federal Body, while all other claimants must be represented by their respective States.

Finally, the condition limiting 'affected States' claims should be noted. Their cultural losses will be returned only if the States in question are able to present evidence of having produced their original restitution claims within the time limits prescribed by post-war laws, in particular Peace Treaties and procedural provisions of Soviet Union zone of occupation (Article 8.1). These time limits were: until 15 March 1948 with regard to Bulgaria, Hungary, Italy and Romania; until 15 September 1948 with regard to Finland and until 1 February 1950 with regard to East Germany.

This Federal Law met with much criticism at the outset because of its lack of coordination with generally accepted principles of international law.²¹ It will be sufficient to emphasize two points that have not yet been raised by commentators.

The first results directly from the main objective of the Law. The intention of the State Duma was to deal with the issue of 'trophy art' on a legal, as well as political level; during the last few years Russia has been faced by growing international concern about the problem of collections hidden in Moscow; these could not be kept in secret any longer and some of them have recently been on show for the first time since the war. One of these exhibitions, entitled *Masterdrawings in the Hermitage: Rediscovered Works of Art from German Private Collections*, was opened officially in the Hermitage Museum in St. Petersburg on 4 December 1996.²² Now is the time to clarify their legal status and definitive location. Serving as a remedy for these problems, the Federal Law underlines the legality of the USSR action in connection with the removal of cultural goods; Article 6 states, for example, that they 'were brought into the USSR by way of exercise of its right to compensatory restitution.'²³ However, such a formula raises a question: what does 'compensatory restitution' mean, especially in the context of international law? Is it a restitution in kind, as suggested by the very term itself, or is it rather a way to justify reparations? Although from the practical point of view the retention of 'trophy art,' in its present form, could only be explained in terms of reparations, it is quite unlikely that the authors of the draft of this law (Institute of State and Law of the Russian Academy of Science) would suggest this solution. Reparations in works of art are not recognized at all by international law. Therefore the only

21 See comments by V. Akulenko, P. d'Argent, M. Boguslavskii, J. Geher, T.R. Kline, K. Siehr and W. Kowalski *Spoils of War* (International Newsletter) No. 4, August 1997, 10 ff.

22 See 'Trophy Art exhibition in the Hermitage' in *Spoils of War* (International Newsletter) No. 3, December 1996, 68.

23 Article 4 is even more descriptive when defining 'removed cultural values.' This notion embodies 'any cultural values that have been removed by way of compensatory restitution from the territories of Germany and its former war allies – Bulgaria, Hungary, Italy, Romania and Finland – to the territory of the USSR, pursuant to orders of the Soviet Army military command, the Soviet Military Administration in Germany or instructions of the other competent bodies in the USSR and that are now located in the territory of the Russian Federation.'



Collection of early German aeroplanes removed from Berlin to secure them from bombing during the Second World War. On the front, left is the LFG Roland D-VIb. This German, single-seater fighter aircraft was designed by Eng. Tanzen and produced in 1918 at the Luft-Fahrzeug Gesellschaft, Berlin Charlottenburg. The aircraft on display is the only one of its kind preserved in the world. © Polish Aviation Museum in Krakow, photo by Jan Hofmann

reasonable explanation is that the term ‘compensatory restitution’ means restitution in kind, as adopted by post-war laws. This solution is, however, difficult to accept in this situation because Russia is not in a position to satisfy the fundamental condition upon which this form of restitution can be effected. It cannot provide the necessary documentation of losses which would allow it to follow the principle of maximum similarity or likeness of the rendered objects in relation to the lost ones (‘object for similar object’ rule) on which restitution in kind is based.

It should be noted that this form of restitution is likely to be adopted in other cases currently under negotiation. According to Article 28.3 of the Polish-German Treaty,²⁴ the German side claims a collection of early aeroplanes relocated for security reasons from one of the Berlin museums to the east during the carpet bombing of the cities of Germany. The collection was found after the war in western Poland and is now in the museum in Krakow. Arguing for the retention of it on the basis of restitution in kind, the Polish side was able to present a list of aeroplanes corresponding in number, quality and origin that were destroyed by the Nazis in Poland and therefore argues that the collection cannot be returned.

The second aspect of concern within the Federal Law refers to Russia’s external obligations and agreements which have already been executed. Article 22 states that:

²⁴ *Treaty between the Republic of Poland and the Federal Republic of Germany on Good Neighbourhood Policy and Friendly Co-operation*, signed 17 June 1991. Polish-German Treaties of 14 November 1990 and 17 June 1991, Bonn.



The Grigorovich M-15 a Russian two-seater reconnaissance flying boat was designed by Dimitri Grigorovich and produced in 1917 in St Petersburg for the Imperial Russian Navy. The aircraft on display is the only one of its kind preserved in the world. © Polish Aviation Museum in Krakow, photo by Jan Hofmann

the Russian Federation concludes treaties under international law which promote the resolution of the aims of this Federal Law, including treaties under international law ... on the settlement of questions connected with the reimbursement of the expenses of the Russian Federation and its cultural institutions for the preservation and restoration of removed cultural items which were handed over to foreign States not by way of concluding a treaty or in accordance with international treaties that have no provisions for such reimbursement, and which were concluded by the Government of the USSR or the Government of the Russian Federation with the Governments of other States before the enforcement of this Federal Law.

Does it really mean that Russia will try to re-negotiate the terms of restitution established in 1940s and 1950s? These difficult areas help to explain why President Yeltsin refused to sign the law.

There are two further areas of restitution that need to be considered. The first is a case that to a certain extent followed the principle of 'restitution by distribution.' In the 1980s it became widely known that the Austrian authorities had kept about 8,000 cultural items, deposited in 1955 in Austria by the US Army to try to locate their owners. After very limited restitution action, the collection remained in Austria, because the origins of its individual components could not be established. In 1984, the Government of Austria decided to close the matter by selling the collection (which included valuable works of art) at auction. This proposal was greeted with considerable public opposition.²⁵ As a result, after an additional round of new claims,

25 See, for example A. Decker 'A Legacy of Shame,' *Art News* 1984, No. 12, 55.

which resulted in the return of some objects to successful claimants (350 out of a total of 3,282) the remaining items in the collection were officially transferred by the Austrian Government to the Federation of Israeli Communities of Austria.

The second issue concerned territorial changes; in this field a number of recent events have occurred within the framework of the political changes of the late 1980s, although certain earlier transfers of objects originating from the neighbouring countries did take place in this context.²⁶ These can rightly be quoted as good examples of the growing acceptance of the 'territorial link' rule as the only solution for the final settlement of cultural heritage problems resulting from the post-war border changes, even when accompanied by mass relocation of the indigenous peoples. Further examples of such acceptance came later in the indirect form of court decisions and the direct form of bilateral international agreements. In at least two cases, courts refused to recognize the claims concerning former German private property nationalized after the war and located in Poland. One of them referred to cultural objects left in Silesia and then sold abroad; when these objects were offered for subsequent sale in Sweden, the previous owners tried to stop the auction arguing that the Polish State lacked a good title as a result of nationalization. The Civil Court in Stockholm did not accept this argument.²⁷

The 'territorial link' principle was adopted directly in Article 28 of the Polish-German Treaty. This obliges both States to protect the cultural goods of other groups located in their territories, as parts of the common cultural heritage of Europe. The same concept lies behind the Polish-Ukrainian Treaty and Agreement on Cultural Co-operation, both signed 18 May 1992. Both documents allow, however, certain exceptions: Article 5.1 of the Treaty stipulates that the sides 'will co-operate ... in bringing together collections of art, libraries and archives that had been scattered due to historical events.'²⁸ The adoption of such exceptions is dictated by the history of these two neighbouring nations. It makes possible, for example, the reunification of certain collections of the Ossolineum Foundation, which are now dispersed in various places in both countries.²⁹

26 For example, in the early 1980s Poland transferred a religious sculpture found near Zgorzelec which came from one of the churches in Gorlitz, the town located on the other side of the nearby new Polish-German border.

27 The claim was dismissed in 1992 (T 3-402-92), unpublished. The second case referred to land and was decided in 1991 by the German Constitutional Court (1 BvR 1268/91) and later by the European Commission of Human Rights, (20931/92).

28 For more details, see W. Kowalski *Liquidation of the Effects of World War II in the Area of Culture* (Institute of Culture, Warsaw, 1994) 100.

29 M. Matwijow 'Ossolineum. The Case of the Dispersed Library' *Spoils of War* (International Newsletter) No. 3, December 1996, 14.

Japanese Swords Taken During the Occupation After the Second World War

T. Kono³⁰

Editor's Note

THIS ARTICLE IS A RARE ASSESSMENT OF ISSUES of restitution and return for Japan. The losses from Japan that it deals with include, besides the question of swords in this extract, at least seventy cannon taken from Simenoseki in 1864 by European troops, one of which is now on loan to the Simenoseki Municipal Museum from the Musée de l'Armée in Paris; war paintings taken by the American occupiers after 1945; and royal treasures which vanished from Okinawa after its capture by American forces, some of which were returned to Japan in 1953. There is also a study of books taken by Japanese forces during its occupation in Asia.

Introduction

A sword is a weapon. If we focus on this characteristic, then disarmament could be seen as reasonable to secure the safety of the occupation by the Supreme Commander Allied Powers (SCAP), although it is questionable whether disarmament of civilians was appropriate for the purpose of security. However, when you watch Kurosawa's samurai films, you can see that during the Japanese mediaeval period, swords were proudly exhibited in the samurai's living area, and were not stored elsewhere. This is an indication of their cultural significance to the person, the clan and Japanese culture generally and of the respect given to their makers.

Making swords requires the finest workmanship. The hand-guards of Japanese swords often represent the finest craftsmanship. Japanese swords need special care, otherwise they very easily become rusty. However, swords that are well cared for resemble mirrors. Under the current Law for Cultural Property Protection, 911 swords and knives, including seventy-four archaeologically important swords excavated from ancient tombs, are designated as national treasures or important cultural property. Currently ten people (six master swordsmiths, three master sword-polishers and one master hilt maker)³¹ are designated as bearers of intangible cultural property (so-called

30 Extract, condensed and slightly revised from *Return of Cultural Property Displaced During Occupation and/or Armed Conflict: a Japanese Point of View*. International Expert Meeting on the Return of Cultural Property and the Fight Against Its Illicit Trafficking, 30 September – 3 October 2002, Seoul (Korean National Commission for UNESCO, Seoul, 2002).

31 www.bunka.go.jp/pub/index.html

living national treasures), that is, bearers of the finest techniques for sword-making, sword-polishing and hilt-making.

Swords have often been the treasures of shrines or temples or *go-shintai*, that is, objects of worship housed in a Shinto shrine and believed to contain the spirit of a deity. It was not rare for old Japanese families to hold swords as heirlooms for centuries. Without doubt, the sword has a central position in Japanese traditional culture. This has changed twice in Japanese history, once when Toyotomi Hideyoshi ordered the surrender of swords in the sixteenth century and for the second time when SCAP ordered that swords be handed over to them.

A tangled history

On 2 September 1945, after Japan surrendered in acceptance of the Potsdam Declaration, Directive No. 1 was issued, ordering the disarmament of the Japanese military. To this Directive was attached an Appendix: General Order No. 1 of SCAP. Article 1 of General Order No. 1 ordered the Japanese Government to prepare to collect and deliver 'all arms' owned by all Japanese nationals.³² The phrase 'all arms' was so vague that the Japanese government inquired of SCAP if it included 'swords' and 'bayonets.'

On 7 September 1945, SCAP issued a directive that swords owned by Japanese military personnel could be retained, if they were household treasures.³³ However on 11 September 1945, SCAP withdrew this directive and issued a replacement stating that all swords including those privately owned should be considered as symbols of militarism and therefore abandoned.³⁴

On 15 September 1945, the Japanese Government asked SCAP to approve its weapon collection policy which stated that swords owned by civilians, excluding those with artistic value, were to be collected by police stations (Interior Ministry).

On 24 September 1945, SCAP admitted in a directive issued on the same day (SCAPIN No. 50) that swords with artistic value could be retained by civilians. Thus SCAP officially recognized the exception of swords as art objects.

On 13 October 1945, based on this directive, the Interior Ministry instructed each prefectural police station that the ownership of swords of important artistic value such as national treasures, treasures owned by shrines or temples, or heirlooms should be established and the swords returned to the owner.

32 SWNCC21/8. Cf Revision of General Order No. 1, SWNCC21/5, 11 August 1945, *Foreign Relations of the United States* 1945, Vol. VI, 635–39.

33 Office of SCAP (Sutherland) to Chairman of the Military Commission in Yokohama (SCAPIN-12), 7 Sept. 1945.

34 Sutherland to Chairman of the Military Commission in Yokohama, 11 Sept. 1945.

On 3 December 1945, a letter from Commanding General 25th Infantry Division was issued to the Central Liaison Office (CLO), Nagoya, stating that SCAP orders were rescinded as regards retention of artistic and historic swords and that all such weapons were to be seized and turned over to the nearest US Army forces.

On 13 December 1945, the Japanese Government requested that the qualification of swords as art objects should be made by the Japanese Government,³⁵ reporting that US Army authorities were collecting swords classified as national treasures and works of art and requesting a clarification of policy and the services of qualified experts to classify swords.

On 10 January 1946, as a response to the request of Japanese Government, SCAP issued a memorandum (AG 336.3 (10 Jan 46) CIS)(SCAPIN N0.574), stating,

This headquarters reaffirms the policy established in SCAP Radio ZAX 5981, to the imperial Japanese Government, dated 24 September 1945. This policy permits swords to be retained provided they are actually objects of art and are in the hands of bona-fide civilians.

This is not a clear response to the above-mentioned inquiry of 13 December 1945.

On 29 January, a meeting was held between CIE, the General Planning Board, CLO and the Ministry of Education. It was reported that 569,013 swords were collected as weapons and 86,462 retention permits were issued. It was also reported that national treasures, swords and others material of value as art objects, were being damaged by careless handling and turned over in some cases to occupation personnel as souvenirs.

On 21 February 1946, a draft letter of supplemental directives was sent to the Civil Intelligence Section. On 11 March 1946, an order of the Commanding General 25th Infantry Division was prepared, requiring surrender of all weapons except those, including objects of art, licenced by the Japanese government for retention by individuals or groups.

On 29 April 1946, a meeting was held at the office of the Provost Marshal, Eighth Army, with representatives of the Eighth Army, SCAP and Japanese Government. They reached the following agreement:

- (1) the Japanese Government will furnish the Provost Marshal with the schedule of examination of swords by qualified experts designated by the Ministry of Education, showing places, dates and personnel;

35 Central Liaison Office, Tokyo to GHQ, SCAP, Retention of Swords Classified as objects of Art in Civilian Hands, C.L.O.No. 1074 (1.3), 13 December 1945.

- (2) The Japanese Government will publicize that schedule described above to the nation;
- (3) The Provost Marshal will take steps necessary to inform subordinate commands of schedule of sword examination in order that occupation commanders can facilitate the programme;
- (4) Certificates will be issued authorizing owners to retain possession of swords described by examining experts as important artistic or historical objects.

Importantly, the office of the Provost Marshal suggested at this meeting that owners be encouraged to place swords which they are authorized to retain, in central repositories designated by agencies of the Japanese government as a means to prevent depredations.

On 16 May 1946, SCAP and representatives of Japanese Ministries agreed that classification as objects of art should be undertaken by experts selected by the Japanese.

Thereafter it took another three months until, on 25 August 1946, the Eighth Army issued a directive (Operational Directive No. 75) that collection and qualification of swords should be left to the Japanese Government and that swords retained by the US military should be delivered to Japanese police stations.³⁶

From the above-mentioned directives and memoranda, we can assume that there was confusion concerning swords as objects of art during the above-mentioned negotiation period. This confusion is problematic, as is the confusion that characterized the period which followed.

I shall cite just one example: in December 1946 Iemasa Tokugawa, a descendant of the Shogun Family, turned in three swords to the local police station. One of these swords was designated a 'national treasure' and two legally registered 'important art objects.' We should remember that, at the meeting on 29 April of the same year, the office of the Provost Marshal encouraged owners to place swords which they were authorized to retain, in central repositories designated by agencies of the Japanese government as a means to prevent depredations. Mr. Tokugawa may have followed this line. But he was informed later that these swords were taken out of the country by the Occupation forces (Report to Ministry of Education, dated 22 August 1947).³⁷

Seventy-six institutions (such as museums, shrines and temples) were asked for information. Individual collectors filed petitions to the Ministry of Education. It was revealed that in the period up until December 1947 forty-three national treasures and important art objects went missing.

36 Hq. Eighth Army, United States Army, Office of the Commanding General, Operational Directive No. 75, Collection, Classification and Disposition of Japanese Swords and Firearms, 25 August 1946 CAS.

37 CCD Intercept: P O J-3965, 209-9-15.

As mentioned above, in 1946 around 86,000 swords were designated as objects of art. This number does not include swords from certain prefectures including Kagoshima prefecture, where swords were traditionally very much beloved. The real number of swords with artistic value, must be significantly higher. More than 560,000 swords and knives were gathered in several central depositories in Japan. Swords collected in North Japan were gathered in the depository in Akabane, Tokyo. Curators of museums volunteered to sort approximately 5,000 swords not classified as national treasures or important art objects, but with high artistic value, out of several hundreds of thousands. These sorted swords were stored in the basement of Tokyo National Museum for fifty years. In 1997, a law was promulgated to return these swords to previous owners and, for most of the cases, where the owner was not identifiable, to nationalize these swords. These swords are now called 'Akabane swords' and are distributed to local museums for exhibition. Most were in terrible condition and required substantial restoration work; however, they were rescued.

While many regular swords must be presumed to have been abandoned, one article on this issue assumes that 3 million swords and knives were taken abroad.³⁸ It is highly likely that numerous swords with artistic or historic value were taken as 'war trophies.'

The *New Yorker* magazine, in its issue of 5 September 1945 stated that

In Japanese eyes, samurai swords used to be regarded as the work of gods ... sword making grew to be so highly regarded that emperors became honorary smiths ... the name of the sword maker's family was worked on the tsuka in gold or lacquer. Prosperous samurai used to cover their tsuka with sharkskin and fine silk and make a hand-guard of silver and gold, and tourists have often been fooled into paying fancy prices for weapons thus embellished. We say 'fooled' knowingly, because a paradox is involved here: a well-to-do samurai, fallen on evil days, would sell the trimmings before parting with the sword, so a good samurai sword, when finally sold, might be in an unimpressive plain wooden holder, whereas an inferior sword, or even an out-and-out fake, might have a silk cover on it. Of course, a samurai might sell the whole business all at once, during a stock-market crash, but we are told that this was psychologically unlikely.

If the psychological resistance of owners was the only obstacle to obtaining samurai swords (due to post-war inflation, money was not an issue, even if US soldiers were ready to pay), there was practically no hindrance, since at that time owners were forced to give up their swords. What, then, was the legal situation?

38 Kokuho (ed.) *Geijutsu Shincho* (1993) 32.

On 28 September 1948, the Japanese Government filed a petition for inquiry and return of these missing swords. This petition was transmitted to the US State Department. Their negative response, dated 3 May 1949,³⁹ was sent back stating that

Inasmuch as the original recipients of the swords are now widely scattered, some of them having left the armed services, it is not unlikely that many of the weapons have subsequently changed hands. From the practical standpoint it is obvious that to trace, secure and return to Japan such weapons would be an exceedingly expensive and time-consuming task. The Department has given careful consideration to all aspects of this matter and has reached the conclusion, in which the Department of the Army concurs, that it is neither expedient nor practical to attempt to effect the return of these swords.

No such action has been taken since then. The only positive case was that of an American collector of Japanese swords who voluntarily returned a national treasure, which is now once more in the possession of its former owner, Terukuni Shrine in Kagoshima.

The Law

National law

From the point of view of Japanese domestic law, there are two legal aspects concerning the legal situation of swords: one is the law on ownership, the other is cultural property law.

Ownership

Article 27 of the Japanese Imperial Constitution, which was valid until replaced by the current Japanese Constitution, stated that ownership is guaranteed, unless it is necessary to dispose of it in the public interest based on law. In the case of swords, all necessary measures were taken based on SCAP orders, directives and memorandums. Various orders of Japanese Ministries were issued based on these SCAP orders or directives, not on laws made by the Parliament. The Instrument of Surrender signed on 2 September 1945 by the representatives of Japan provided that the governing power of the Emperor and of the Japanese Government would be subject to the Commander-in-Chief of the Allied Powers who would take steps to implement the instrument.⁴⁰

39 File N0.236, subject: Swords to be returned to Japan as National Treasures, Mr. Finn 26–5528, from DS to CIE, date: 3 May 1949.

40 Final paragraph of text, available at <http://historicalresources.wordpress.com/2008/07/28/japanese-instrument-of-surrender-september-2-1945/>

To collect swords legally means confiscating the property of Japanese nationals. According to the instrument of surrender, all measures taken to collect swords based on directives or memorandums were lawful only when the disarmament of civilians can be said as an ‘appropriate measure ... taken to implement the instrument.’

In my view, the disarmament of civilians could not pass this test. Even if it was for the purpose of maintaining the security of SCAP soldiers, I find no reason why it was necessary to confiscate swords that had been enshrined for several hundred years in ancient shrines as objects of worship and were believed to contain the spirit of a deity.

Furthermore it is quite apparent that there were policy discrepancies among SCAP divisions concerning the collection of swords. It must be further researched how and why these discrepancies occurred. However, it could be said that this disorganized policy implementation should not be resolved by burdening the nationals of the occupied country.

Cultural property law

With regard to cultural property law, I see a problem in taking national treasures and important objects of art abroad. Before the Second World War Japan had two laws to protect cultural property:

No National Treasure shall be exported or shipped without the permission of the responsible minister. (National Treasures Preservation Law (1929), Art.3)

When any object that has historical and artistic value (except a National Treasure) is to be exported or shipped out of the country, application for permission shall be made to the Minister of Education except where such an art object is an owner’s own original, or a work made within fifty years, or imported not more than a year before. (Law on Preservation of Important Art Objects (1933), Art. 1)

The shipping abroad of swords which were national treasures and important objects of art was subject to permission by the Japanese Government. In the case of the missing swords, this requirement was clearly ignored. As long as no SCAP order or directive was issued to lift this export control, it was simply breaking Japanese law.

International Law

From this perspective, we have to consider two treaties. One is the Hague Convention for Respecting the Laws and Customs of War on Land 1907; the other is the Peace Treaty with Japan 1951.

The 1907 Hague Convention

It was the general policy of the Allied Powers to follow the 1907 Hague Convention. The State-War-Navy Coordinating Committee (SWNCC) mentioned this Convention in its SWNCC 322, that:

The introduction of looted objects of art into this country is contrary to the general policy of the United States and to the commitments of the United States under the Hague Convention of 1907 ... It is incumbent on this Government, therefore, to exert every reasonable effort to right such wrongs as may be brought to light.

The relevant provisions of the Hague Convention 1907 are as follows:

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated. (Art.46)

Pillage is formally forbidden. (Art. 47)

All measures taken to collect swords were based on directives and memorandums. Therefore it does not fall under 'pillage' in the Convention. If the collection of swords was planned for the purpose of obtaining objects of art, it would be a different story, but there is no evidence in support of this. However, in my view, the collection of swords from civilians amounts to confiscation of private property, unless the swords were borrowed from the State. It is prohibited by this Convention, and therefore was at the very least 'unlawful confiscation.'

It is remarkable that the Civil Information and Education Section (CIE) of SCAP was also of the same opinion. On 29 October 1948, CIE sent its opinion to the Diplomatic Section,⁴¹ citing the two Japanese laws and the SWNCC 322 policy, that

In view of the fact that these swords were removed from Japan by Occupation personnel in direct violation of Japanese law respecting cultural property and in violation of SCAP policy as expressed in references listed in (1) above, CIE cannot understand doubts entertained regarding the illegality of the removals.

And CIE requested in the same letter, that 'this matter be brought to the attention of the Department of State for necessary action.'

41 File No.: 007, subject: Swords Mr. Bunce 26-5686, from: CIE, to: DS, Date: 29 Oct 48.

The Treaty of Peace with Japan 1951

A possible counter-argument might have been that, even if collecting swords was ‘unlawful confiscation’ or even ‘pillage’ under the Convention, the 1951 Treaty of Peace with Japan waived legal claims, so that the only remaining issue today is not legal, but rather a moral one. However to this author the 1951 Treaty of Peace with Japan, Article 19 (a), does not seem to be an obstacle to claims for return:

Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

Let us compare the first phrase and the second phrase carefully. The first sentence clearly waives claims of Japanese nationals as well as claims of Japan as a State. On the other hand the second sentence mentions only ‘all claims.’ The term ‘all’ shows how far the objective scope of the treaty reaches, but not necessarily the subjective scope, in other words, the Treaty remains silent concerning whose claims these ‘all claims’ are. But considering the fact that the first phrase expressly refers to ‘Japanese nationals,’ and the fact that the second phrase does not use expressions such as ‘all those claims’ or ‘all claims of Japan and its nationals,’ we could read the second sentence as ‘Japan ... waives all [her](inserted by the author) claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.’

If so, the owners of missing swords did not lose their claims. Claims for return could still be filed against current possessors, depending upon statutes of limitation. If these swords are still in the United States, then the chance of getting them back is still quite high – bearing in mind the procedures for recovery available – by a combination of rules relating to ‘*bona fide* purchase’ rule and the rules of statutes of limitation, which are more generous to original owners in American law than is generally available in Civil Law systems. Legal opinion in the United States on this issue is not clear. In 1949, upon the request of CIE, which I cited above, the Department of State gave a negative reply. From the legal point of view, this is an irresponsible and unsustainable statement.



This samurai sword named ‘Kunimune’, was made between 1185 and 1333 AD and originally owned by the Shimazu Family in Kagoshima Prefecture. It was donated to Terukuni Shrine in 1927 and designated a national treasure. Taken by United States forces during the occupation period, Dr. Walter A. Compton, a famous collector of Japanese swords, obtained it at auction in the US and in 1963 returned it voluntarily to the shrine. The sword is exhibited at the Kagoshima Prefectural Centre for Historical Records © Kagoshima Prefectural Centre for Historical Records Reimei-Kan

Colonial Contexts

Editor's note

THE FOLLOWING STUDY was the first effort of an international organization to try to assess the losses of badly affected developing countries in three quite different regions of the world. A 'preliminary survey' designed to expose the gravity of the situation for these countries and to justify and guide the establishment of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, it was intended to be followed by other such studies. However, relatively little has been done to follow up this start by ICOM, which assembled the report from three separate studies. Many countries still have no such survey, even of a preliminary kind. This document is therefore both of historic significance, and, for the countries concerned, of continuing current relevance.

Return of Cultural Property to their Countries of Origin: Bangladesh, Mali, Western Samoa – A Preliminary Survey of Three National Situations⁴²

ICOM ad hoc Committee for the Return of Cultural Property

Introduction

The International Council of Museums (ICOM) as a non-governmental organization and in its professional capacity has been closely associated with the action undertaken by UNESCO with a view to promoting the return or restitution, in case of illicit appropriation, of cultural property to the countries of origin.

The General Conference (USSR, 1977) responded to the special message addressed to it by the Director-General of UNESCO, by adopting, in the framework of its triennial programme (1977–80), the following lines of action:

⁴² UNESCO Doc. CC-79/CONE206/5 Annex.

As a contribution to the common task of the restitution or return to the countries of origin of the most significant objects of their cultural heritages the ad hoc Committee created to study this topic will:

- a) define professional ethics for the restitution or return of objects;
- b) collect data on countries which appear to have been largely deprived of their cultural heritage;
- c) identify and gather information on these objects;
- d) study the agreements already made between countries;
- e) study, with the assistance of the appropriate International Committees, all technical aspects involved;
- f) advise UNESCO on the potential role to be played by its Intergovernmental Committee;
- g) propose to UNESCO practical measures of assistance to Member States for the conservation and presentation of the objects restituted or returned to the countries of origin.

The ad hoc Committee will entrust the ICOM Secretariat and the Documentation Centre with the tasks of collecting information and preparing the necessary background materials. The coordination of the work of the International Committees will also be ensured by the ad hoc Committee, which will report regularly on the progress achieved to the Advisory Committee.

ICOM's ad hoc Committee⁴³ prepared, at the request of UNESCO, a 'Study on the principles, conditions and means for the restitution or return of cultural property in view of reconstituting dispersed heritages.'⁴⁴

This document was considered by the UNESCO meeting held in Dakar in March 1978, which was attended by thirteen experts from as many Member States and an observer. This meeting was entrusted with making suggestions concerning the aims and Statutes of the 'Intergovernmental Committee for promoting the return of cultural property to its country of origin or its restitution in case of illicit appropriation,' which was then created by UNESCO's twentieth General Conference, held the same year.

As a follow-up to the above, ICOM accepted the suggestion of UNESCO to prepare a preliminary survey dealing with the situation of individual countries concerned with the return of cultural property as a result of foreign occupation.

43 The composition of this committee as appointed by the Executive Council of ICOM: Herbert Ganslmayr, Hubert Landais, Geoffrey Lewis, Pascal Makambila, Paul N. Perrot, Jean W. Pré and Jacques Vistel.

44 The International Council of Museums, Paris, August 1977, 19. (77/SEC.8).

In order to implement such a project, a contract was signed between UNESCO and ICOM according to which a meeting of the ad hoc committee was held in Paris on 7–9 May 1979. During this first meeting the preparation of case studies of different countries that had lost an important part of their cultural heritage was envisaged and discussed. Due to financial and time limitations it was decided, in agreement with the UNESCO Secretariat, to choose three countries that would give a representative picture of the problems involved. The following were selected: Bangladesh, Mali and Western Samoa.

The case studies should cover main questions and facts concerning the present collections, conservation structures, relationships with other museums, needs for the creation of representative collections, and ways and means to improve the present situation. A basic format was suggested outlining topics to be covered by these case studies and the fields concerned, taking into account that each case requires its own individual emphasis and variations and its treatment will depend on the availability of information in each country. It was understood that these studies could not tackle all the problems involved.

Furthermore, three teams of two experts were appointed to work together as follows: for Bangladesh Dr. Enamul Haque, Director of the National Museum Dacca and Mr. Tom Hume, Director, MUSEP Project, Paris; for Mali, Mr. Oumar Konaré, Ministre des Sports, des Arts et de la Culture, Bamako and Dr. Herbert Ganslmayr, Director, Übersee-Museum, Bremen, German Federal Republic; for Western Samoa, Mr. Albert Wendt, Western Samoa and Dr. Götz Mackensen, Übersee-Museum, Bremen.

These teams of specialists were in charge of jointly carrying out the three studies. In order to fulfil such a task, national experts met the foreign specialists in their own countries: Bangladesh, Mali and Western Samoa. In the case of Western Samoa – different from the others due to the lack of professionals – the study was carried out jointly by some Samoans interested in the problem and the foreign specialist. The studies were carried out in June and July 1979, to be finalized during a two-day meeting of the three teams, which was held in Bremen (German Federal Republic) on 6–7 September, 1979. During this meeting, the participants agreed that the diversity of the three studies and of the problems tackled reflected a representative picture of the wide range of problems related to the topic. Viewpoints were discussed and noted, which led to the first outline of a report covering common elements of the studies, as well as divergences. A series of suggestions was made according to the various propositions expressed by the authors of the studies. This preliminary survey was completed by the Secretariat with abstracts of the findings made by the experts in the three countries chosen for the study.

It has to be noted that the three case studies (produced *in extenso* by ICOM as separate documents) have been carried out over a very short period of time and for this reason they must not be regarded as exhaustive but rather as a starting point for further and more detailed investigations. Finally, it has to be stressed that the survey was realized as a purely professional exercise.

Summary of the three case studies⁴⁵

Collections: those held in the country and important missing elements

Bangladesh

Most of the collections, specimens and objects of greatest significance to the cultural heritage of Bangladesh lie outside the country. They are held essentially in five countries: India, the United Kingdom, Pakistan, the United States and the Soviet Union.

The largest depletion in recent years has been in traditional sculpture – in particular sculpture dating from the second century BC to the ninth century AD. Only fragments of sculpture, or damaged examples, are still in Bangladesh museums. Iconographical examples of the least produced styles are missing.

In the field of dying or lost crafts, there are no good samples or even mediocre ones. This is the case for the art of weaving cotton muslin, for which Bangladesh was famous from Antiquity. It is also the case for a folk art, that of embroidered quilts, of which the finest specimens are in the United States and India.

Decorative elements left the country to be transferred to foreign museums, mostly in the United Kingdom, as was the case with temples from which sacred sculptures were removed, as well as terracotta plaques and varnished tiles.

There are particularly large and serious gaps among the past relics of historic interest. Illuminated manuscripts, inscriptions and coins are indispensable sources of historic information. Besides the fact that manuscripts are the oldest examples of painting known in Bangladesh, of thirty known to date from between AD 750 and AD 1200, only one is not outside of the country. The others are in India, United States and various European countries. Four hundred polychrome illuminated manuscripts, for instance, are held in the Soviet Union. The oldest inscription known, dating from the third century BC, is in the Indian Museum in Calcutta. Gold and silver coins are dispersed mostly in museums in Calcutta, London, Oxford, Paris and Karachi. Arms and armour, especially swords, daggers and knives, were often taken as war trophies and can be found in complete collections in the United Kingdom, France, the Netherlands and Portugal. Documents and archives from the colonial period are held in London. These documents are indispensable for the study of the period between 1757 and 1947 for three countries: India, Pakistan and Bangladesh. Porcelain imported from China, examples of decorative arts and testimony of the relationships that existed between Bengal and China are almost non-existent. An

⁴⁵ This summary follows the outline suggested to the authors of the case studies. Each chapter includes the three different countries in alphabetical order.

entire private collection was bought by the National Museum of Pakistan in Karachi in 1962. On the whole, these collections or objects have never been published.

Even in modern art, most of the works of the contemporary Bangladesh painter Zainul Abedin are in India, Pakistan, the United Kingdom or the United States.

Mali

Archaeological and ethnographical collections in the *Musée national du Mali*, in Bamako, have been counted. Out of a total of 11,278 archaeological objects, there are 9,866 pieces and fragments of pottery, and 1,412 stone and metal objects from archaeological digs that have been carried out on 13 different sites. There are 19,665 ethnographic objects, mostly masks, statuettes, musical instruments, traditional clothing and household objects mainly from six different ethnic groups. Of the total number of ethnographical objects, 124 are from other African Countries (Ivory Coast, Guinea, Cameroon, Upper Volta, Sierra Leone and Ghana) and 215 are of unknown origin. The people of Mali also own a certain number of art objects that are still used in religious ceremonies. However, the collection of the *Musée national du Mali* is minimal – no ethnographic collection covers entirely one region or one ethnic group. It cannot be said that the entire collection represents the cultural heritage of the country.

Still within Mali are thousands of manuscripts in Arabic (books, copies of the Koran, correspondence) in Timbuktu and the surrounding areas. Most are to be found at the Centre for Islamic Culture in Timbuktu, which should be enlarged to become a centre of Islamic studies in the Sahel area. An international conference is to be held in this city in the summer of 1980. The most interesting manuscripts date from between the thirteenth and eighteenth centuries. They are considered to be sacred objects, so that for the time being there is no danger that they will be sold. Outside of the country, the inhabitants of oases in Algeria and Morocco also have manuscripts. Some are in libraries in France, Libya, Tunisia and Egypt.

Archaeological and anthropological collections have been transferred to the Netherlands and are kept in safe-keeping in this country until conservation conditions in Mali have improved. These collections will be studied and published.

The collections now in the museum in Bamako are difficult to use due to lack of proper indexing and cataloguing, and also to the fact that in the past no policy was followed in collecting, which fluctuated with the conditions at the time. In addition, the collections are stored in precarious conditions, resulting in deterioration, of textiles in particular.

There is no inventory of collections in Mali, nor is there a comprehensive inventory of objects outside the country.

Western Samoa

At present, there is no national public collection in Western Samoa. In addition, the number and quality of artefacts still in the country do not sufficiently represent its cultural heritage. This heritage is essentially based on the social organization of Samoan peoples, in particular oratory and ceremonies that lie at the core of the social and economic life of the country.

A few rare specimens of historical or artistic importance remain in the country, such as mats, small fishing boats still in use, and a few larger fishing boats and fishing implements. The same applies to traditional tools.

The gaps are found in all fields of cultural material: important objects of historical and traditional interest, examples of decorative arts and archaeological material. Some objects for ceremonial use are still produced in villages, but have modern decorations. There is no collection of traditional decorative arts, such as bark cloth or ceremonial costume. Tattooing is still practised, but there is no collection of tattoo designs.

The most important *lacunae* are in the non-tangible arts: traditional music and oral history.

In certain cases, there is absolutely no trace of an object in the country itself: archaeological artefacts, ceremonial objects, such as royal bowls; double canoes and boats for the high seas which could carry up to 300 people, proof of the existence of an important maritime commerce before the arrival of Europeans. There is no collection of stone tools that are no longer in use, or of any ceremonial armour made of wood, shell or stone.

There are only two fields in which material is sufficient: traditional houses and contemporary crafts (mats, wooden bowls, etc.).

A certain number of pieces still exist in private collections and will be deposited in a future cultural centre.

The only examples of some categories of objects lie outside of the country, in particular in Great Britain, the United States, New Zealand, Australia, the Federal Republic of Germany and the German Democratic Republic. These are kept in archives, museums, libraries or in private collections.

Very few objects from Western Samoa have appeared on the art market. There is no inventory of collections from Western Samoa.

The situations in these three countries vary considerably – however, one common factor is the impossibility for these countries of constituting a collection representative of their cultural heritage, of which indispensable objects for a large part lie outside the country.

Reasons for the gaps

Bangladesh

The majority of losses incurred by Bangladesh are due to the history of the country, notably the numerous changes of political boundaries. However, it was under the two centuries of colonial rule that most of the cultural goods left the country.

Means which were in appearance legal and peaceful also contributed to the loss of cultural property. Calcutta, while it was the official capital of the colonial government, became the cultural centre of the entire region. Starting in 1784, collections of Bengali sculpture, manuscripts and coins were transferred to Calcutta, where they were deposited in the Indian Museum following its creation in 1814. The museum thereafter continued to receive objects from archaeological surveys and excavations. No similar institutions existed then in what is today Bangladesh (at that time known as East Bengal). Starting in 1854, different art schools and universities established their own museums – in particular the Asutosh Museum of Indian Art in Calcutta, and the transfer of cultural goods to Calcutta by rich Bengali families was an additional support to the capital. The Gurusaday Museum of Bengal Folk Art, created by a cultural society in Calcutta, holds Bengali objects collected since 1929. Even though the Dacca Museum has existed since 1914, objects collected on the territory of what is today Bangladesh continued to be deposited in the Calcutta museum.

When India was divided into two states in 1947 – Pakistan and India – and East Bengal was separated from India to become East Pakistan, Bangladesh found itself once again outside the share of cultural property. Most objects gathered from archaeological sites in the country were sent to the museum in Karachi, separated from Dacca by about 2,000 kilometres.

The war of independence and the years which followed 1971 when the State of Bangladesh was created nearly emptied the country, with plundering, illicit traffic, and the presence of foreigners with much needed money. Efforts were made to impose the law and a few trials took place, but many objects left the country. In addition, the tropical climate and frequent floods were a frequent source of destruction or deterioration.

The long-delayed building of the Dacca Museum had serious consequences for the collection, conservation and study of cultural property. In 1913, thirty-nine museums had already been created on the Indian continent, whereas the first public museum in Bangladesh had just been founded. A poor financial situation restricted the possibilities of museum collection, which is still the case. The only known illuminated pre-Mughal manuscript from Bangladesh was found in a British antique shop in 1976 and at a price three times as high as the annual budget of the museum in that year. Most collecting has been limited to the region immediately around Dacca.

Mali

In Mali, during the French colonial period, objects were transported to Dakar where some still remain. Collections were transferred to Paris, in particular to the *Musée de l'Homme*, which today owns the most important collection of Mali artefacts, especially representative of the Dogon and Bambara peoples. These collections were used for study, and theses have been published based on these objects as examples of the religion and philosophy of these ethnic groups.

In the international art market, statues and masks, particularly from the Dogon and Bambara, are held in high esteem. The long borders of Mali are difficult to control, allowing easy traffic in the export of objects sold in the United States or Europe via Abidjan or Dakar. This exportation seems to have increased during the last drought in Mali.

Archaeological digs are still carried out in Mali and others have not yet begun on sites already known. Illegal digs continue to provide objects for the international art market. Inside the country, different Malian ethnic groups own many cult objects which are difficult to record.

Western Samoa

Concerning Western Samoa, there are many reasons why these islands lost a large part of their cultural heritage. First, the lack of repositories and conservation facilities resulted in exportation of many objects to countries abroad that had museums and conservation specialists. On the other hand, a large number of objects, particularly arms, became obsolete with the arrival of Europeans and a new way of living. These objects were no longer manufactured and quickly disappeared, accelerated by rapid deterioration under tropical conditions. The only examples of traditional objects from Western Samoa are outside the country. Finally, a large number of objects, particularly woven mats, were taken away by Europeans who had received them as presents during ceremonies. This is contrary to local tradition, according to which all presents received remained in the ceremonial circuit, and would later be handed on to someone else by the person who had received it. Appropriating a present as personal property was considered to be a theft by Samoans, who had not foreseen that part of their heritage would leave the country this way. Colonial wars of the nineteenth century also contributed to the impoverishment of these islands and to the fact that so few objects remain there. The situation brought about by these wars has not improved since the beginning of the century.

The history of losses suffered in these three countries share several points in common:

- Underestimation of traditional culture, intensified by the presence of foreigners who had considerable influence on the country, with the result that certain

categories of objects fell out of use and were sold, given in exchange or as presents, and taken abroad;

- Export of cultural objects, often illicit according to the standards of the country who owned them;
- Transfer of archaeological and ethnographical material gathered by scientists who sent it back to their own country;
- International trading in works of art, which has led to important losses of cultural property.

Conclusions and suggestions

The authors of the three case studies – Bangladesh, Mali and Western Samoa – came to the conclusion during the final meeting that three prior conditions had to be met for the solution of the problem of return or restitution of cultural heritage:

- building of museums or cultural institutions
- training of museum experts
- establishing of inventories and records of collections, both inside and outside of the countries of origin.

The primary requirement for the return or restitution of cultural heritage is adequate buildings that can guarantee, as far as security and preservation aspects are concerned, adequate conditions for storage and exhibition. The authors of the case studies agreed that as far as the conservation treatment of the collections is concerned, it was not of absolute necessity that standards be set for highly technical installations. Technology should be adapted to the construction and installation of museums insofar as it guarantees accepted standards for conservation.

Furthermore, the authors agreed that the respective countries should not only think in terms of building one national museum, but propose regional museums to create closer contacts between the collections and their creators, that is to say, between the ethnic groups of these regions and their cultural heritage.

Closely connected with the demand for a museum infrastructure is the problem of training museum experts of all categories, ranging from the conservator to the high administrative official. Such training should be carried out intensively with international organizations such as UNESCO, the International Council of Museums (ICOM), the International Centre for the Study of the Preservation and the Restoration of Cultural Property (ICCROM), as well as national institutions and organizations in the different countries in order to achieve the highest training standards possible.

In this context the UNESCO training programme needs to be reviewed and enlarged. This applies particularly to the former UNESCO training centres and their results, and for example the training centre in Jos, Nigeria.

Such training, besides guaranteeing the availability of technical possibilities and knowledge, can only be successful if genuine collaboration exists between the various museums and institutions.

This training should not only comprise museum techniques and administration methods, but also include the scientific aspects of museum work. These aspects are of the utmost importance when it comes to the return or restitution of cultural property, which requires the establishment of inventories, documentation, etc. The most urgent tasks could actually be undertaken by foreign experts, but this would be contradictory to the spirit of cooperation and above all to the right of self-determination in the field of research in the countries concerned.

Only complete records of the collections and objects remaining in the countries of origin and records of those collections and objects now outside of the country of origin, could provide the necessary basis for final solutions concerning the return or restitution of cultural property. The extent of the losses should be established, alongside a list of the part of the cultural heritage now in foreign countries. This provides a sounder argument for refuting the statement that the return or restitution is not necessary, since a sufficient number of collections still remain in the countries of origin, often not assessed by the persons in charge.

Coping with this task requires more than the establishment of inventories and the necessary complementary documentation; criteria for recording the collections will have to be set. These preliminary operations require immediate action. They should be realized in cooperation with the UNESCO-ICOM Documentation Centre and the corresponding international committees of ICOM.

The establishment of inventories in the countries of origin should, however, not be restricted to national and regional museums, but comprise as well private collections and include objects still owned by ethnic groups who still partially use them in their cults and ceremonies. Only by this procedure will it be possible to obtain a relatively complete survey of the cultural property of a particular country – the basic condition for a catalogue of national property.

A number of additional elements that serve to promote the return of cultural property were suggested and discussed, such as a change of public opinion on the subject. A series of possibilities were discussed: besides the public relations work of UNESCO in the form of different campaigns, conferences, seminars, etc., the utmost importance should be given to the impact of public opinion in the countries of origin themselves, making the population aware of the importance and value of

objects of their cultural heritage and of the fact that the cultural heritage of individual ethnic groups represents an important part of national heritage.

It is also important that the countries of origin draw the attention of other countries to their problems of return or restitution of cultural property. This task should be assumed by the mass media (or exhibitions), who will be able to highlight the gaps in the collections of the countries of origin.

The authors of the case studies also agreed that the ICOM ad hoc Committee should continue the work already begun in its capacity as a group of professional advisers, especially to the Executive Council of ICOM, who would transmit information to UNESCO. This Committee, with the financial support of UNESCO, would then work in close cooperation with other organizations such as ICCROM, and above all with regional organizations such as OMMSA (the Organisation of Museums, Monuments and Sites of Africa).

An important part of the work of the Committee would consist in developing parallel strategies for the return or restitution of cultural property, such as long-term loans, permanent loans and exchange programmes. An exchange programme should not only include the exchange of collections, objects and exhibitions, but also provide for exchanges of publications and professionals. This type of programme would help promote personal contacts between staff members of different museums, thus creating personal relations between professionals, which are indispensable.

These first studies have brought to light fields for which international cooperation is necessary in order to promote the return to the countries of origin of that cultural property which has a fundamental significance.

This preliminary outline cannot give a complete assessment, in terms of the technical, human and financial means to be provided by the international community to start the actual process of returning cultural property.

It is suggested to the Intergovernmental Committee that new studies be undertaken at the request of the Member States and that the three studies already effected should be developed as a way of helping each country to inform others of their needs.

Editors' note: A major effort has been made by anthropologists of Melanesian and Polynesian cultures to record the holdings outside their countries of origin.

Editors's update: A considerable amount of work has been done to locate and describe holdings in Australia, Canada, Ireland, New Zealand, United States and the United Kingdom of items from Samoa and other Pacific Island countries: See J. Specht and L. Bolton, 'Pacific Islands' Artefact Collections: the UNESCO Inventory Project' (2005) 17 *Journal of Museum Ethnography*; P. Gathercole, "Recording Ethnographic Collections: the Debate on Return of Cultural Property" (1986) 38 *Museum* 187-192; L. Bolton, 'Collection of Inventories and the Return of Information to Oceania': the Australian experience 18 March 1985 UNESCO Doc. CLT-85 UNESCO Doc. 202/5 and A.I. Kaepler and L. I. Stillman, 'Pacific Island and Australian Aboriginal Artefacts in Public Collections in The United States of America and Canada' 1985 UNESCO Doc CLT-85 WS/12. Work has also been done in Mali in connection with a pilot project on the Object-ID basic inventory system.

International Law, Museums and the Return of Cultural Objects⁴⁶

A.F. Vrdoljak

THE DESTRUCTION OR REMOVAL OF CULTURAL OBJECTS viewed as embodying the identity of certain groups was central to the discriminatory and genocidal policies of the Nazi and other fascist regimes during the 1930s and 1940s. Equally, the victorious Allied nations affirmed the importance of the restitution of cultural objects to these victims as a means of ameliorating or reversing the effects of such acts.

The policies of these regimes stemmed from the race-based theories that had also informed the colonization of non-European peoples since the nineteenth century. However, by the mid-century, the scale of civilization that had been espoused by International Law and anthropology was no longer sustainable. The cultural Darwinism which it represented was gradually replaced by the ascendancy of cultural pluralism, and the barbarism visited on particular groups during the Holocaust and the Second World War propelled the international community to acknowledge the contribution of all peoples to the ‘cultural heritage of all (hu)mankind.’

Yet, as the twentieth century progressed, whilst the overt structures of colonialism were slowly dismantled, its underlying principles were implicitly reinforced. A stark reminder of this ongoing inequality within the international community was the retention of the cultural objects of formerly colonized peoples by metropolitan powers following decolonization.

The cultural losses suffered by colonized peoples before and after independence were fuelled by the free-trade agenda of Anglo-American States, and by their promotion of an unfettered international art market. They maintained that the cultural objects of non-European peoples were the common right of humanity – a ‘cultural resource’ to be exploited and exchanged, like any other commodity. Non-European cultural objects were further decontextualized with their inclusion in the Western art canon as ‘primitive art.’ Thus labelled, these objects became a foil to modern art and were mined by artists and museum officials within States who sought to develop an authentic national art movement. This agenda has shaped significantly current international legislation which governs cultural objects in a way that undermines the ability of indigenous peoples, and other non-State groups, to protect and develop their cultural heritage and identity.

⁴⁶ This text comprises extracts with minor revisions from the publication of the same name (Cambridge University Press, Cambridge, 2006) 13, 299.

From 1815 to the present day, the framers of restitution programmes have been acutely aware that the return of cultural objects is not merely a physical act. Instead, it is an integral component of ‘an open-ended process’ of material and moral restitution addressing the effects of policies and practices that fuelled the removal (and destruction) of cultural heritage.

These spoils ... impede a moral reconciliation between France and the countries she has invaded ... [W]hilst these objects remain in Paris, constituting, as it were, the title deeds of the countries which have been given up, the sentiments of reuniting these countries again to France, will never be altogether extinct.⁴⁷

While in theory closure can be obtained on material restitution, moral restitution is an open-ended process that ought not to be limited in time, as there can be no point at which we stop trying to confront the past honestly.⁴⁸

Three distinct rationales for the restitution of cultural objects in international law have been identified in this book. These rationales, and their interrelation to each other, reinforce the role of restitution of cultural objects within this broader, open-ended process.

The first rationale for restitution of cultural objects seeks to restore the ‘sacred’ link between people, land and cultural heritage. Lord Castlereagh acknowledged perceptively the symbolic value of these objects as: ‘the title deeds of the countries.’ In the colonial relationship, the possession of these cultural objects was central to the collective imaginings of the occupier and the occupied. For colonial occupiers, these objects represented the possession of people, territories and resources within an empire. Their centralization and public display reinforced and projected a national imperial imagining. Conversely, for colonized peoples, the removal of these cultural objects represented the dispossession of their lands, autonomy and identity. Independence movements were often accompanied by claims for the restitution of cultural objects held in imperial collections, in order to reconstitute and revitalize an autonomous collective cultural identity.

The second rationale promotes the restitution of cultural objects as a means of ameliorating or reversing internationally wrongful acts, including discrimination and genocide. Those seeking to eliminate a group usually target its cultural manifestations – ‘the very essence of its being’ – through its systematic destruction and confiscation.⁴⁹ The Allied restitution programme, following the Second World War, affirmed the importance of restitution of cultural heritage as a means of addressing the effects of such policies and ensuring the continuing contribution of the group to the ‘cultural heritage of all (hu)mankind.’

47 Note 15, Memoir of Lord Castlereagh [to Allied Ministers], Paris, 11 September 1815, PRO FO 92/26, 115 at 121; and Parliamentary Debates, v01.32, ser.1, 298 at 300, (1816).

48 E. Bronfman *Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report* 2000.

49 *Minority Schools in Albania case* (1935) PCIJ, ser. A/B, No. 64, 17.

The third rationale for restitution of cultural objects in international law is intimately tied to the broader notion of the right to self-determination that evolved following decolonization. It is argued that restitution of cultural objects held by the museums of former metropolitan and national capitals is an essential component of a people's ability to maintain, revitalize and develop their collective cultural identity. This rationale draws from the preceding two rationales for restitution. It emphasizes that self-determination is a process that includes the return of land, ancestral remains, cultural heritage and resources. In addition, these claims also call for the recognition and amelioration of the ongoing effects of colonial policies of discrimination, assimilation and genocide.

The advocates of the third rationale, in particular, have exposed the importance of the process of restitution. The removal and destruction of cultural objects was part of the process of colonization and genocide. Therefore, efforts to reverse or ameliorate their effects must also involve a multilayered process. Fundamental to each of these rationales for restitution is the requirement that the holding parties 'confront the past honestly.' Moral restitution is an essential step on the path to reconciliation between the claimant and the holding party. However, material restitution is also crucial. In 1815, Castlereagh charged: 'If the French people be desirous of treading back their steps, can they rationally desire to preserve this source of animosity between them and all other Nations [?].'⁵⁰

The underlying purpose that binds all rationales for the restitution of cultural objects in international law is ensuring the continuing contribution of a people and their culture – not cultural objects *per se* – to the cultural heritage of all humankind.

It is no coincidence that, in the last two centuries in international law, the question of restitution of cultural heritage has directly or indirectly arisen when the international community has resolved to guarantee the 'very essence of [the] being' of minorities within and across States. The importance of protecting peoples' ability to preserve and develop their cultural identity, to the stability of the international community, States and the sustainability of these groups and their cultures was recognized by the European powers from at least the nineteenth century. However, the implementation of discriminatory, assimilationist and genocidal policies that accompanied the European colonial and capitalist expansion meant this recognition was often selectively applied or ignored.

From the mid-twentieth century onwards, the international community has gradually abandoned cultural Darwinism and its supporting race-based theories in favour of cultural diversity. The barbarism of fascist regimes during the 1930s and 1940s, the independence movements of colonized peoples, and the campaigns for

50 Ed. Note: cited note 47.

self-determination by indigenous peoples led to the repudiation of the unilinear 'progression' of civilization. There has also been an increasing recognition of the supremacy of peoples' interest in their own cultural heritage over external scientific, artistic, commercial and national interests.

The international community is tentatively addressing the following key areas of reform in international law to ensure the ongoing contribution of all peoples to the cultural heritage of humankind. These four overlapping areas represent compromises forged in response to the anxieties of certain States, fuelled by the Cold War and secessionist fears during decolonization.

First, the absence of the cultural elements of genocidal practices from the definition of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 has become a matter of contention once again. Recently, the International Criminal Tribunal for the former Yugoslavia conceded that, although the international community has not accepted any alteration to the 1948 definition, there are multiple means of eliminating a group beyond the physical extermination of its individual members.⁵¹ It is a sentiment implicit in the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage adopted following the destruction of the monumental Buddhas of Bamiyan, Afghanistan by the Taliban in 2001. The confiscation and destruction of the cultural and religious manifestations of the targeted group has consistently been a primary mode of implementing such policies. The ongoing silence of the 1948 Genocide Convention regarding the cultural aspects of genocidal programmes ignores their threat to the continuing contribution of the group to the common heritage of all humankind. In addition, it diminishes the applicability of restitution of cultural heritage to ameliorate or reverse their effects.

Second, the effective exercise of the right to self-determination by all peoples, including indigenous peoples, must be recognized by States and facilitated by the international community. Indigenous peoples and minorities were denied the effective exercise of this right during decolonization. The unequal application of this foundational human right perpetuates the scale of civilization originally formulated to justify and facilitate European colonial and commercial expansion. To counteract this legacy, the UN General Assembly must adopt, as a matter of urgency, the 1993 Draft UN Declaration on the Rights of Indigenous Peoples recognizing indigenous peoples' right to self-determination including their cultural development.⁵²

Third, there is a trepid acknowledgement that the ability of non-State groups, including indigenous peoples, to maintain and develop their cultural identity must be recognized and enforceable in international law as a group and individual right.

51 *Prosecutor v. Radislav Krstić*, Trial Judgment, No. IT-98-33-T, Trial Chamber I, ICTY (2 August 2001) 574.

52 The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly on 13 September 2007. Article 3 declares that 'Indigenous peoples have the right to self-determination.'

This right must impose a positive obligation on the international community, States and transnational corporations to guarantee the continued cultural sustainability of these groups and cultural diversity generally. Indigenous peoples and other non-State groups must be able to invoke and seek enforcement of rights and obligations expounded under the existing international and regional frameworks for the protection and restitution of cultural heritage.⁵³

Fourth, the international community must recognize that legal ownership and control of their cultural heritage by a group is crucial to the right to determine the preservation and development of that group's cultural identity. The international community, particularly former metropolitan powers and settler States, must 'confront their [colonial] past honestly' and acknowledge the role of their museums in the cultural losses sustained by colonized peoples. Whilst settler States have shown a degree of willingness to engage in this process, by contrast, former metropolitan powers and their holding institutions have been reticent about doing so, especially when compared to their eventual response to the claims of Holocaust survivors and their heirs. Effective mechanisms must be established at the international and national levels for the restitution of cultural objects removed, at any time, from these peoples 'without their free and informed consent or in violation of their laws, traditions and customs.'⁵⁴ The urgency of this requirement has been raised recently in several quarters.⁵⁵ These mechanisms must form part of broader legislative frameworks encompassing the right to self-determination and economic, social and cultural development and embracing a holistic interpretation of cultural heritage.

The history of museums shows that these institutions have facilitated, justified and benefited from colonialism and related policies of discrimination, assimilation and genocide. They have also often served to inform and engage broader societal concerns. The present-day 'commitment to righting historic wrongs' by former metropolitan powers and their museums must include the restitution claims of indigenous and other colonized peoples. Museums must be actively involved in reversing and ameliorating the ongoing effects of these policies and practices. This 'open-ended process' should include the education of the general public about colonialism, and discriminatory, assimilation and genocidal policies which support it and its effects

53 See generally UNESCO Universal Declaration on Cultural Diversity 2001; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1995; Framework Convention for the Protection of National Minorities, Council of Europe 1995 and the Lund *Recommendations on the Effective Participation of National Minorities in Public Life* (Foundation on Inter-Ethnic Relations, September 1999).

54 Art. 12, 1993 draft UN Declaration on the Rights of Indigenous Peoples, UN Doc.E/CN.4/Sub.2/1994/56 now Article 11(2) of United Nations Declaration on the Rights of Indigenous Peoples GA Res.61/295 of 13 September 2007 (some extracts from the final text of this Declaration are included in Part 3).

55 Working Document for Discussion on a Strategy to Facilitate the Restitution of Stolen or Illicitly Exported Cultural Property 2005 (UNESCO Doc. CLT-2005 CONF. 202/4); Y. Yokota and the Saami Council, Guideline for the review of the draft principles and guidelines on the heritage of indigenous peoples 2004 (United Nations E/CN.4/Sub.2/AC.4/2005/3); and ILA, Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, *Report of the 72nd Conference of the International Law Association, held in Toronto, Canada, 4-8 June 2006*: (International Law Association, London, 2007), including Explanatory notes on these Principles. Text of the principles is given in Part 1.

on individuals, communities and their cultures. Also, they must provide active support (technically and financially) for the realization of indigenous peoples' right to self-determination and cultural development within and outside the walls of their institutions. This process must involve the formal recognition of indigenous peoples' ownership of their cultural heritage held in museum collections. In addition, museums, archives and other collecting institutions must facilitate the claims of indigenous, and other colonized peoples, for reparations and related relief arising from international wrongful acts perpetrated during colonial occupation.

It is imperative that the international community generally, and museums specifically, acknowledge the pre-eminence of the rights, laws and customs of indigenous peoples in their cultural heritage over those of the scientific or artistic communities, or national interests and laws of the relevant State. Indigenous peoples must be involved in and approve the development of any international and national frameworks for the protection and restitution of their cultural heritage.

This book has concentrated on the impact of Anglo-American colonialism on indigenous peoples in the Asia Pacific region, from the nineteenth century to the present day. However, this colonial project has been neither uniform nor is it exclusive. Investigation of the effects of Anglo-American colonialism on other regions, the impact of rival contemporaneous colonial projects and Civil Law tradition would enrich our understanding of the development of the pertinent areas of international law and museum practices. In addition, the current wave of globalization and the overlapping and growing impact of transnational corporations on the cultural sustainability of all peoples must be compared and contrasted with these earlier waves of 'globalization'.⁵⁶

Indigenous peoples, too, are transcending State boundaries by increasingly turning to international organizations and by formalizing relations with other indigenous groups within and across existing States to achieve their goals. Indigenous organizations have recently indicated their intent to formulate their own international principles and guidelines concerning the protection and restitution of their cultural heritage.⁵⁷ The response of States and museums, nationally and internationally, to these international principles and guidelines will need to be monitored and assessed in the future.

This work has deliberately focused on issues arising from the return of cultural objects removed during colonization. As explained, the cultural losses sustained by affected communities escalated, rather than dissipated, following decolonization. Most of the States that host the centres of the international art market have recently accepted the 1970 UNESCO Convention. Perhaps this development may encourage

56 El-H. Guisse, *Working Paper on Globalization and Economic, Social and Cultural Rights of Indigenous Populations*, 2003.

57 E-I. Daes *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, 2000.

source States not already party to it to follow suit. Indigenous organizations have stressed continually, and the proposed framework of rationales highlights, that restitution of cultural objects is a process intimately entwined with the return of land, ancestral remains and protection of intangible cultural heritage, including 'traditional' knowledge. Accordingly, it would be beneficial to examine whether the trends in international law relating to the protection and restitution of cultural objects of indigenous peoples are replicated or distinguishable in respect of these other elements of cultural heritage. For example, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003, in combination with the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage 1972 on which it is modelled, could conceivably provide a more effective international legal framework for the protection of various forms of cultural heritage, including cultural objects, of these groups. Significantly, the 1972 World Heritage Convention has a far greater take-up rate in the Asia Pacific region than the 1970 UNESCO Convention.

The restitution of cultural objects in international law has progressed in fits and starts in the last two centuries, with the pendulum swinging away from cultural Darwinism accompanied by genocide, assimilation and the confiscation and destruction of the cultural manifestations of groups and towards cultural diversity accompanied by expansive restitution and cultural reconstruction programmes. International law and museum collections and practices are 'document [s] of civilization' and at the 'same time document[s] of barbarism.'⁵⁸ Despite unspeakable regressions, one lesson has not been and cannot be unlearned – the need for the international community to ensure the continuing contribution of all peoples and their cultures to the common heritage of humankind.

Current international circumstances leave States vulnerable to the seduction of policies and practices promoting cultural Darwinism. Yet, it is at this very moment that the international community, its member States and their populace must 'confront the past honestly and internalize its lessons.' This process must include recognition of their positive obligation to enable all peoples to preserve and develop their cultural identities.

58 W. Benjamin *Illuminations*, Zohn, H. trans. (London, 1992) 248.

The Sanggurah Stone: Java or Scotland?

Editor's Note

This is a request from Indonesia to an individual and to a Scottish trust. Note that there seems to be some confusion on both sides as to whether this should be an inter-state or private negotiation. As can be seen from other cases listed in Part 5, many claims move from one mode to the other.

NEGOTIATIONS ARE TAKING PLACE for the return to Indonesia from Scotland of a 1,000-year-old stone tablet known as the Sanggurah Stone (also known as the Minto stone). The historical artefact originated in Malang, East Java and is a column 2 metres tall inscribed with ancient Javanese characters. The inscription is dated CE 982 and includes the name of a Javanese king, Sri Maharaja Rakai Pangkaja Dyah Wawa Sri Wijayalokanamotungga, who ruled over Malang at that time. The column was taken from its site near the modern-day town of Malang in East Java in 1812.

‘The Minto Stone is an important historical artefact and a crucial source of information. It contains the history of the Mataram kingdom in Central Java and its eventual shift of power to East Java,’ Culture and Tourism Ministry Director-General of history and archaeology Hari Untoro Drajat announced at a media gathering on 24 January 2008.

The 3.8 tonne icon was originally taken from the town of Malang in East Java by British colonial explorer Sir Thomas Stamford Raffles in 1812 after he instigated the capture of Java from the Dutch. (Although the Dutch East Indies had been a Dutch colony since 1799, it was conquered by the British in 1811, when the Netherlands was under the control of Napoleon from 1806–15. It was returned to the Dutch during the general settlement in 1816). Raffles governed Java and parts of the island of Sumatra from 1811 to 1816. He was appointed Lieutenant Governor by Lord Minto, Governor of India. As a token of appreciation, Stamford Raffles gave the stone to the first Earl of Minto who transported it to his home in Scotland. Currently the column is held by the Minto Trust, a family trust in Scotland, on a private estate near Hawick in Roxburghshire, Scotland.⁵⁹

59 Statement by Hadi Untoro Drajat of the Indonesian Ministry of Culture, media meeting 24 January 2008. Reported in <http://www.thejakartapost.com/>; <http://msn-list.te.verveg.com/2008-January/009121.html> 16 May 08; AFP 24 January 2008 <http://www.haaba.com/news/2008/01/23/7-80636/indonesia-negotiates-return-of-ancient-stone-from-scotland.html> and the BBC. http://news.bbc.co.uk/2/hi/uk_news/scotland/south_of_scotland/7226292.stm all accessed 16 May 2008.

According to the Indonesian spokesman, the Indonesian government had been trying to secure the return of the stone since 2004, but government-to-government negotiations had proven difficult because the relic is currently in the custodianship of the Minto trustees. However Hashim Djojohadikusumo, businessman and art collector, was asked to lead negotiations for the stone column to be returned to what Indonesian officials describe as its rightful home in Jakarta, where it would be put on display at the National Museum. Based in London, Hashim heads a charitable organization dedicated to the preservation of Indonesia's cultural and archaeological heritage (YKHD). The government therefore requested that YKHD step in to facilitate the return, because it 'recognized that non-State parties would have more leeway in negotiating.' YKHD has been involved in the negotiations for the return of the Minto Stone since early 2007.

According to reports in Jakarta, Hashim, who offered to fund efforts to return the stone, including transportation costs of more than £3 million, has met with Timothy Melgund – the seventh Earl of Minto and head of the estate where the stone still stands – to discuss its return to the island of Java. Hashim said: 'In April 2007, we accepted a mission from the State conveyed to us by the Director General and Dr. Soeroso, and have since met thrice with Lord Minto himself in London to negotiate the return of the artefact.'

Lord Minto has stated that talks are under way. He said that the stone had been on the estate for nearly 200 years and was as important to the family now as it was when it first arrived. He said: 'There has been no demand by the Indonesian government for it to be returned. We received an approach from them and we're currently in talks.' He confirmed that the trustees were willing to enter into talks about its future. Both First Minister of the Scottish Executive, Alex Salmond, and Culture Minister, Linda Fabiani, have declined to engage in the debate over the Minto Stone which, they say, is a private matter between Minto trustees and the Indonesian government.

'The Indonesian government has a policy of not paying for the return of ancient artefacts, but we are ready to cover the transfer costs and compensation to the Minto Trust,' Hashim said at the press conference. 'We are in negotiations to return the Sanggurah stone back to Indonesia,' Drajat said.

A spokesman for the Indonesian culture ministry confirmed it was seeking the return of the inscribed stone.

Dismembered Items

Council of Europe ‘Recommendation No. R (98) 4 on Measures to Promote the Integrated Conservation of Historic Complexes Composed of Immovable and Movable Property’⁶⁰

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose, inter alia, of safeguarding and realizing the ideals and principles which are their common heritage;

Considering Article 1 of the Convention for the Protection of the Architectural Heritage of Europe, which defines monuments as ‘all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings’;

Considering that movable cultural heritage constitutes an irreplaceable expression of the richness and diversity of Europe’s cultural heritage;

Considering that more account should be taken of the protection and conservation of movable cultural heritage in cultural heritage policies and practices in Europe;

Considering that a complex of historical, archaeological, artistic, scientific, social, technical or cultural interest cannot be confined to buildings alone but also includes the movable heritage which lies in those buildings;

Considering that, where movable heritage is an integrated part of the complex, its dispersion would result in an irrecoverable loss and would deprive future generations of a part of their common European heritage;

Considering that owners, whether public or private, are faced with specific problems in maintaining the unity of such complexes and ensuring their conservation, and that these problems require collaboration not only between owners but also with society as a whole;

Considering that the evolution of the art market makes conservation of movable complexes ever more difficult since the commercial value of the movable heritage,

⁶⁰ Adopted by the Committee of Ministers on 17 March 1998 at the 623rd meeting of the Ministers’ Deputies.

whether situated inside or outside the building, can often be greater than that of the building with which it is associated;

Considering that the State should create preconditions necessary for the conservation of historic complexes composed of immovable and movable property while respecting the constitutional principles and fundamental rights affecting ownership;

Considering the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1985 European Convention on Offences relating to Cultural Property and the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects,

Recommends that the governments of the member States, as part of their general policies for the conservation of the built heritage, create conditions to ensure the protection of historic complexes composed of immovable and movable property in accordance with the guidelines set out in the appendix to this recommendation.

Appendix to Recommendation No. R (98) 4

I. Definition

1. For the purposes of these guidelines, the term ‘historic complexes composed of immovable and movable property’ (hereinafter called ‘historic complexes’) is taken to include movable property situated inside or outside a building and associated with it on account of historical, artistic, archaeological, scientific, functional or cultural links which give these complexes a conspicuous coherence which ought to be preserved.

II. Protection

A. *Object of protection*

2. Each State should put in place legislation providing for the protection of historic complexes against their removal or dispersal. This legislation should afford the same level of protection to all historic complexes, irrespective of ownership. These complexes should be protected through the application of the current legislation governing monuments, groups of buildings and sites.
3. The State should also create the necessary preconditions for the preservation of protected historic complexes by establishing appropriate measures, including the promotion of private initiative.

4. Protected historic complexes used for religious purposes should remain subject to the existing legislation.

However:

- given the nature of these complexes and their function, any alterations required by changes in the form of worship and other factors of a religious nature may be authorized, taking account of the coherence of the complex, after coordination with the competent civil and religious authorities;
 - where a church or a religious community has its own set of rules on cultural heritage conservation, there should be regular coordination and consultation with the competent authorities of the State with a view to these being implemented in harmony with existing laws and regulations without prejudice to the paragraph above.
5. States are invited to identify these historic complexes and to introduce a listing or classification system to ensure their protection.
 6. The listing or classification should specify, if possible, the parts of buildings and movables to be protected, which should be explicitly mentioned in the documents drawn up for this purpose.
 7. The owner of a historic complex should be involved in the protection procedure and have the opportunity to comment on or object to the proposed listing or classification.
 8. Owners may also request the competent authorities to protect a historic complex.
 9. The advantages and obligations arising out of the listing or classification of a historic complex should be the subject of information as comprehensive as possible aimed at public or private owners, occupiers other than owners, and any other parties concerned, notably elected local representatives.

B. Effects of protection

a. Obligations

10. Public or private owners of historic complexes should be obliged to conserve the complex as defined at the time of listing or classifying.
11. Any proposed modification or separation having the effect of altering a protected historic complex wholly or in part should be subject to approval by a competent authority. In the event of a legal transfer of the ownership of a

protected historic complex, encumbrances arising from the protection should be transferred to the new owner.

12. The relevant public authorities and scientific institutions should pool information on objects which, being integrated parts of protected historic complexes, have been unlawfully separated therefrom.
13. Any purchaser of a movable object who learns that it is protected under the regulations governing historic complexes and has been illegally sold should be required to inform the competent authorities of his or her country. States should consider establishing bilateral and multilateral agreements with other States for the exchange of information about illegally altered protected historic complexes.
14. Considering the growth in illicit traffic in cultural property and therefore the risk of crime, appropriate measures should be strengthened, where necessary, to prevent theft, handling of stolen goods and their consequences.

b. Sanctions

15. States should establish a system to ensure as far as possible that an object which has been illegally separated from a historic complex to which it is linked is returned and replaced. Questions of title and compensation for *bona fide* purchasers should be dealt with in accordance with the general principles applicable in the State concerned.
16. The person responsible for any action calculated to alter, illegally and deliberately, all or part of a protected historic complex, or to separate one of the integrated parts, irrespective of whether that person is the owner, should be subject to a major sanction as defined by each country's legislation.
17. The public authorities should order the restitution of the historic complex or the integrated part of it and its return to its original location, at the expense of the person responsible, irrespective of whether that person is the owner.

c. Incentives

18. The protection, conservation and promotion of protected historic complexes require the introduction of appropriate fiscal, financial and administrative measures.
19. Owners of a protected historic complex should be encouraged to preserve it, through the use of incentives suited to the type of complex protected, taking into account its economic, cultural and social role, in particular as regards regional and local development.

20. Incentives may be of several types, including tax relief, public subsidies, low-interest loans and contributions in kind such as the provision free of charge of equipment and labour. Technical assistance on management and conservation methods could also be provided.
21. Exchanges of ideas and experience in this field should be organized on an international basis in order to compare different countries' practices, develop approaches already successfully applied and explore new forms of compensation.

III. Management

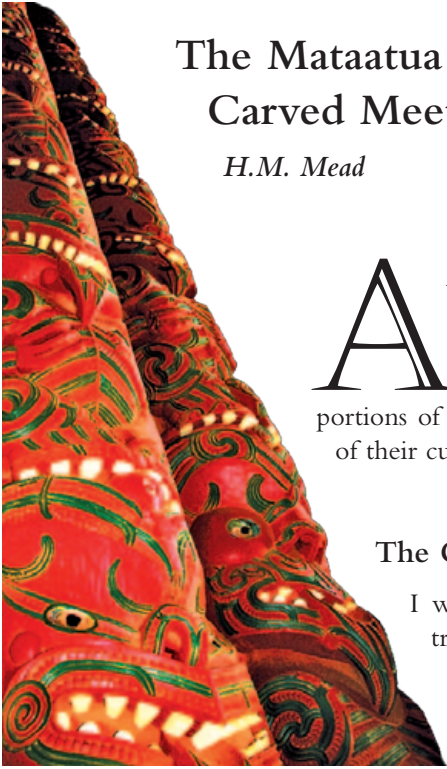
22. The administrations concerned should, where necessary, appoint a body with responsibility for historic complexes to coordinate the authorities responsible for architectural and movable heritage. This body should provide advice, support and assistance to owners, whether public or private.
23. The authorities responsible for supervision of protected historic complexes should have the right to inspect the latter at regular intervals after giving adequate notice, and whenever an emergency situation so requires. They should have authority to report any unauthorized alterations of protected historic complexes, with a view to preventing their continuation, in accordance with the relevant procedures.
24. It should be possible for the competent authorities to require the owner of a protected historic complex to carry out or authorize conservation work, prescribed by the supervising authority on all or part of the complex. The owner should be able to request the assistance, including financial assistance, of the public authorities.
25. These authorities should ensure that all conservation and restoration work is carried out in accordance with the International Charter for the Conservation and Restoration of Monuments and Sites (ICOMOS, Venice, 1964) and the appropriate rules prepared by national or international conservation bodies.
26. A particular effort should be made to promote training within conservation and restoration professions and crafts relating to historic complexes.
27. Protection and conservation policies for historic complexes must seek to ensure that they are recognized as constituents of cultural identity and sources of inspiration and creativity for future generations.
28. Recognition of the importance of the conservation and enhancement of historic complexes requires appropriate information and awareness programmes directed towards public authorities and, more particularly, elected local and regional representatives, public or private owners who have direct responsibility

for their property, the public in general and, more importantly, young people, by encouraging their participation and promoting the dissemination of information using the techniques and means of mass communication.

29. While acknowledging that public access to protected historic complexes should be encouraged, their opening to the public should make allowances for the requirements of conservation, the nature of the property and, in the case of private ownership of property, the owner's rights and resources.

The Mataatua Declaration and the Case of the Carved Meeting House, *Mataatua*⁶¹

H.M. Mead



AMONG INDIGENOUS PEOPLES who own many of the objects held by museums there is unanimous agreement that important items of their cultures should be returned to them. It is part of a process of reassembling the dislocated portions of a culture. For some indigenous peoples who have lost most of their culture, the process is like trying to rebuild Humpty Dumpty.

The Carved Meeting House, *Mataatua*

I will now discuss the particular case of a *taonga tuku iho* (a treasure handed down by the ancestors) that went on a journey of exhibitions and did not reach home again. It belongs to my *iwi* (tribe), *Ngati Awa*,⁶² and we have a claim before the Waitangi Tribunal. The Tribunal examines cases of breaches of the Treaty of Waitangi, which my people signed on 16 June 1840 at Whakatane. We have been engaged in discussions and negotiations with the Government of New Zealand since 1981.

Mataatua is the name of a carved meeting house built by *Ngati Awa* between 1873 and 1875 and opened officially in March 1875, at Whakatane, by Donald McLean who was then Minister of Native Affairs. It stood at Whakatane as a functioning meeting house of the people for four years.

What subsequently happened to the carved meeting house is well documented. The Department of Maori Affairs wrote a report on it in 1989 in response to a request from *Ngati Awa* to return the house.⁶³

I have been working on behalf of my tribe for ten years and have been responsible for conducting research into the various aspects of our case against the government of New Zealand. We did our own research into what happened to *Mataatua*.

61 Extracts from article published in Special Issue 'Material Culture in Flux: Law and Policy of Repatriation of Cultural Property' *University of British Columbia Law Review* (1995) 71.

62 *Ngati* means 'tribal group.' *Awa* is the name of a tribal group of the Whakatane and Te Teko areas of New Zealand.

63 T. Woods *The Report of the Department of Maori Affairs on the Claim of Ngati Awa for the Return of Mataatua House* (Whakatane, Te Runanga o *Ngati Awa*, 1989).

The Tribunal, which considers grievances such as ours, commissioned its own report and appointed an art historian to research the case.⁶⁴

The case is cited as a grievance in *Ngati Awa's* Statement of Claim. The whole case is known among the people of *Ngati Awa* as *WAI-46*. It is mentioned in the supporting documents placed before the Waitangi Tribunal and especially in a research report entitled 'Ethnography of the *Ngati Awa* Experience of Raupatu.' Raupatu is the Maori word for the confiscation of tribal lands by the government of New Zealand.⁶⁵

Thus the Mataatua case is indeed well documented. Despite this, it is little known internationally. What, then, is this case all about?

The Agricultural Society of New South Wales, Australia, proposed to hold an international exhibition from 17 September 1879 to 20 April 1880. New Zealand was asked to participate in the exhibition and it agreed to do this. The government of New Zealand thought it would be a wonderful idea to send a carved meeting house to Sydney and it set about finding one. The quest proved to be difficult.

Eventually the government turned to *Ngati Awa*, which it had subdued in 1865 and whose lands it confiscated in 1866. Mataatua was the only carved house in the territory of *Ngati Awa*. The chiefs were asked by the government to allow the house to be pulled down and taken to Sydney to be exhibited to the people of the Empire. The women of *Ngati Awa* did not agree but the chiefs, with great reluctance and with an eye towards winning some favour with the government, agreed.

Mataatua is a large meeting house measuring 24 m (79 feet) in length, 12.5 m (41 feet) in width, and 6.7 m (22 feet) in height. It contains within it carved representations of the ancestors of the tribes of Mataatua.⁶⁶ It is one of two houses carved by *Ngati Awa* at about the same time, roughly ten years after the confiscations. The other house stands in the Auckland Museum. Mataatua was dismantled in 1879 and shipped aboard the steamship S.S. Staffa to Tauranga and then onto a bigger ship which took it to Sydney. After the Sydney exhibition Mataatua was taken to Melbourne and exhibited there from October 1880 to April 1881.

It was then sent to the South Kensington Museum, London, in 1881 and was on exhibition there in 1883. Mataatua was then dismantled and stored in the basement of the Victoria and Albert Museum for forty years. In 1916, Dr. H. D. Skinner, ethnologist of the Otago Museum, viewed the stored parts of the house and he advised other museum ethnologists in New Zealand that the carvings of Mataatua were stored in the basement of the Victoria and Albert Museum.

64 J.N. Mane-Wheoki *No Wai Tenei Whare Tipuna? A Report on Ngati Awa Claim (WAI-46)* (Waitangi Tribunal, Wellington, 1993).

65 See S.M. Mead, H. Moko and J. Gardiner *Te Kaupapa o Te Raupatu i te o Ngati Awa* (Ethnography of the *Ngati Awa* Experience of Raupatu) Research Report No. 9 (Te Runanga o *Ngati Awa*, Whakatane, 1994).

66 See W.J. Phillipps and J.C. Wadmore *The Great Carved House Mataatua of Whakatane* (Valley Printing Co., Wellington, 1956); H.D. London 'The Great Carved House Mataatua of Whakatane' 26 *Whakatane Historical Review* (1978) 15.



Te Ngarara. A significant chief of *Ngati Awa*. Photo © *Ngati Awa*, New Zealand

The meeting house was reassembled for the Wembley Exhibition in London in 1924. This was one of those grand exhibitions staged by the British government to show off the cultures of the far-flung Empire. It was while *Mataatua* was being prepared for the Wembley Exhibition that the officials of the Victoria and Albert Museum offered to return the house to the government of New Zealand. This was a gesture motivated as much by the lack of space at the museum as by any other considerations.

The next adventure of *Mataatua* was the South Seas Exhibition, held in 1925 at Dunedin, in the South Island of New Zealand. The house was shipped back and re-erected for the fifth or sixth time at the exhibition grounds in Dunedin. Most of the exhibits in the New Zealand pavilion came from Wembley. After the South Seas Exhibition, *Mataatua* was given on 'permanent loan' by the government of New Zealand to the Otago Museum in 1925.⁶⁷ *Mataatua* has now been in the museum for nearly seventy years.

The following points need to be made:

- (1) Once *Ngati Awa* agreed that *Mataatua* should be allowed to go to Sydney, the government of New Zealand began to act as the owners.
- (2) There is no bill of sale and no agreement to show *Ngati Awa* had given the house to the government. In fact, an offer to sell the house to the Crown was turned down by the government.
- (3) A story has been fabricated by various officials to rationalize the actions of governments of the land, specifically that *Ngati Awa* 'gifted' *Mataatua* to the Queen of England. In fact, this was never done and it is highly unlikely that *Ngati Awa* ever intended the house to be taken away permanently.
- (4) *Ngati Awa*, as owners of *Mataatua*, was not consulted about the various venues to which the house was sent. Nor was *Ngati Awa* consulted about 'loaning' the house to the Otago Museum, although the Otago Museum claims otherwise.
- (5) Eventually, the people of *Ngati Awa* accepted the government's story and behaved as though they no longer owned the house.
- (6) In 1983 I wrote formally to the Minister of Internal Affairs requesting that the house be given back. The legal advisers of the government cited the Statute of Limitation to block the return of the house. It advised *Ngati Awa* to negotiate directly with the trustees of the Otago Museum.

⁶⁷ Ed. Note: Dunedin, in the Otago region of New Zealand, is in the far south of the South island of New Zealand. Whakatane is in the north of the North Island. The distance between them is over 1,000 km.

- (7) Delegations from *Ngati Awa* did in fact visit the museum on 25 June 1986 and again on 20 May 1987 and spoke with the trustees. But our claim remains against the government and not specifically against the museum.
- (8) In April 1994 the government was asked why *Ngati Awa* should not take a civil case of theft against them. The reply of the Minister of Justice was that *Ngati Awa* should include the house in our *WAI-46* case and have the issue discussed by the Waitangi Tribunal.
- (9) One reason that the government is reluctant to give the house back might be because this could cause a public outcry from the largely white community of Dunedin. Politically, the case is worrisome.
- (10) Some government ministers have suggested, as an excuse for not returning the house, that other tribal groups might request the return of their cultural property and so cause a depletion in the stocks of the nation's museums. *Ngati Awa* argues that if a cultural object was acquired illegally it should be returned forthwith.

You might ask whether *Ngati Awa* is clear about what it wants and whether it has the economic and other resources to care for the house. *Ngati Awa* is clear that it wants its house returned. On the next point there is a difference of opinion. *Ngati Awa* wants the house returned as a living and functional treasure and not as an art piece designed solely for exhibition. The house when it was removed was a functioning meeting house called a *wharenui* (large house) and it stood on a *marae* (the ground set apart for the ceremonial house of the descent group). It should be restored to what it was at the beginning of its life. Government officials and museum ethnologists, however, see *Mataatua* as a valuable art object to be protected and kept in a climate controlled room. These officials argue that if *Mataatua* were returned to *Ngati Awa*, the house would have to be placed in such an environment, which of course involves considerable expense. State funding would be required in order to provide the facilities to protect *Mataatua* as an art object.

Mataatua was taken away from *Ngati Awa* in 1879. It has been away from home for more than 115 years. It has been dislocated from its cultural foundations and has been redefined and given a different function by officials of governments and of museums acting together. Once redefined, the treasure is incorporated into the cultural practices of the other colonizing cultures.

In this case, *Mataatua* was defined as a valuable art object and kept in a museum with other similarly redefined objects from other cultures. Once locked in such an institution it becomes difficult for the owning culture to get it back. There have been many exceptions recently but this is no comfort to us. *Mataatua* remains locked up, imprisoned in a foreign land.



Detail of *Te Ngarara*, an important chief of *Ngati Awa* Photo © *Ngati Awa*, New Zealand

Conclusion

It is clear that *Ngati Awa* is not alone in wanting its cultural property returned. The Mataatua Declaration is very clear on this point and indigenous peoples everywhere would support *Ngati Awa* in its quest. The Treaty of Waitangi safeguards the rights of Maori people to their collective heritage, but in order for the treaty to be effective the government must show good faith and respect its obligations. Without this *Ngati Awa* might have to wait for many more years for a resolution.

The patience of *Ngati Awa* has run out. The Raupatu Committee of *Ngati Awa* has been formed to direct the general claim of the tribe against the Crown. It has decided that the only way to move the government of New Zealand towards returning the house is to go to court and charge the government with ‘conversion of a cultural property.’ This then becomes a matter of civil theft and not criminal theft. It will be an interesting test case but at this point I cannot tell you what the outcome will be.

7 million to Renovate Meeting House⁶⁸

J. Rowan



HISTORIC MEETING HOUSE is one step closer on a long journey home. The Government has announced a NZ\$ 7 million grant to restore the Mataatua *whare* [house], which began life in Whakatane in the nineteenth century and only recently returned to the Bay of Plenty town after stints in museums around the world.

Ngati Awa, the tribe that built the meeting house and fought long and hard for its return, is vowing to restore the unique carved building to its ancestral home.

‘We are never, ever going to put it back in a museum-type setting,’ Te Runanga o *Ngati Awa* chairman Hirini Mead said. ‘It’s a beautiful *wharenui*, and when we finally get it up, it will become an icon for the whole of Whakatane, and for the whole of the nation.’

The *wharenui* was built in 1875 as a symbol of *Ngati Awa* strength after tribal land was taken away in the raupatu (colonial confiscations). But soon after, the Government asked the *iwi* for the meeting house, saying it was needed as an example of Maori art for a British Empire exhibition in Sydney. Several tribes were asked and refused, but *Ngati Awa* felt it had no choice after suffering several military campaigns on its soil.

68 Condensed from *The New Zealand Herald* 19 May, 2008.

At the Sydney exhibition, the *whare* was turned inside out, with interior carvings on the outside walls so people did not have to go inside.

By the time the Crown acknowledged the *iwi*'s [tribe's] claim, the *whare* was no longer its original shape. During various incarnations in museums, the heads and feet of carvings had been chopped off and panels changed.

Now, after the announcement by the Associate Minister of Treaty Negotiations, Mita Ririnui, an entire new shell for the meeting house will be built. *Ngati Awa* carvers and weavers have already spent eight years restoring the original *heke* (rafters) and *tukutuku* (woven panels) and creating some new carvings. Their work has included restoration of a unique depiction of twin *tipuna* (ancestors) and *Ngati Awa* warriors *Wahamama* and *Taitimuroa*. Carvers Danny McRoberts and Lawrence Hohua said it had been a privilege to restore the *totara*⁶⁹ woodwork and think about the ancestors who first worked on the *whare*.

The *whare* will be built on tribal land with views to Whakatane Heads.

A resource consent application has been lodged and project manager Hawiki Ranapia hopes it will be complete in 2010. *Ngati Awa* also plans to build an arts and culture centre on the site, and open Mataatua to the public.

69 *Totara* is a large forest tree with prickly, olive-green leaves, found throughout *Aotearoa* (New Zealand); botanical name *Podocarpus totara*, *Podocarpus cunninghamii*. It provides a popular timber for carving.

The Parthenon Marbles

Editor's Note

THE MOST WIDELY DISCUSSED CASE of dismemberment is that of the Marbles of the Parthenon in Athens, many of which are now in museums outside Greece. Greece has made claims for their return from the institutions and countries where they are now located. This case has generated its own lengthy bibliography and there is a current request before the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. The Editorial Committee assisting the Editor of this volume has therefore decided that, rather than including extracts from the many scholarly and other publications (some of which are quite polemical), it would be more appropriate to give only a short statement of the facts and a Select Bibliography which would allow readers to follow the debate more extensively than can be dealt with in this book.

Summary of Facts

The Parthenon, or Temple of Athena, the most important building on the Acropolis of Athens, was built between 447 and 438 BC. The columns of the Parthenon supported a marble beam to which were attached the *metopes*, high relief sculptures of different subjects on each side. The triangular pediments contained about fifty large statues, which were carved and then hoisted up. The statues were originally painted. The Parthenon frieze by Phidias surrounding the whole building was also carved in relief.

The Parthenon and the other buildings of the Acropolis remained intact through the Roman and Gothic conquests. In the sixth century the Parthenon was converted to a Christian church and the eastern pediment torn down. Many of its sculptures were defaced. During the Ottoman occupation it was converted into a mosque and a minaret was built on the top. Except for the statue of Athena, the statues of the east pediment and the treasures and statues in the interior, the building was still completely intact.

In 1687 an Ottoman ammunition dump inside the building was ignited by a Venetian bombardment. The resulting explosion severely damaged the Parthenon and its sculptures. Francisco Morosini, the Venetian general in charge of the operation, subsequently oversaw the looting of some of the statues. Between 1801 and 1804, Thomas Bruce, the seventh Earl of Elgin in Scotland, removed some of the surviving sculptures. He had sought and received approval from the Ottoman authorities.

The original document has not survived and the text is only available in Italian. No information is available on the accuracy of the translation or its interpretation.

The sculptures taken to Britain arrived there from 1806 and were initially stored at Lord Elgin's London residence in Park Lane, and then at Burlington House in Picadilly. They were sold in 1816 to the British Museum in London, where they are now displayed. An Act of Parliament approved the sale and public funds were used for the purchase.

Not all of the Parthenon Marbles survive down to the present day. There were originally 115 panels in the frieze. Of these, ninety-four still exist, either intact or broken. Thirty-six are in Athens, fifty-six are in the British Museum and one is in the Louvre. Of the original ninety-two *metopes*, thirty-nine are in Athens and fifteen are in London. Seventeen pedimental statues, including a caryatid and a column from the Erechtheion, are also in the British Museum. Other parts of the Parthenon marbles are to be found in the Louvre Museum, Paris, the Vatican in Rome, and the Kunsthistorisches Museum, Vienna. A palm-sized marble fragment detached from the Parthenon was given back to Greece in 2006 by the University of Heidelberg. On 23 September 2008, Greece received a sculpture, a marble foot and part of the robe measuring 35 by 34 cm (14 by 13 inches), from a statue of Artemis, which originally stood above the entrance to the Parthenon as part of a 520-foot frieze that ran round the temple. It is a fragment of a broken block, larger pieces of which survive in Athens and London. It is on permanent loan in Athens from the Museo Salinas, Palermo, Italy.

The influence of the Parthenon, regarded as the epitome of Classical Greek architecture and art, has been immense in the whole of Europe since the Renaissance. In particular the 'Elgin' marbles had an enormous impact on British art. The Acropolis and its buildings, especially the Parthenon, became symbolic for the Greek independence movement and its re-establishment as an independent State in 1832.

Greece has requested the return of the marbles to be reunited in a specially built museum in Athens, which is expected to be fully open to the public in 2009. Return has been raised by the Greek government with the British government on a number of occasions dating from Greek independence. In 1985 the Greek government lodged a formal Request with the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. The request is still before the Committee.

Arguments for and against return have been made on legal, cultural and ethical grounds and these arguments are widely canvassed in the literature. National non-governmental committees for the return of the marbles exist in the United Kingdom (since 1983), and Australia (since 1981). A non-governmental committee representing fifteen nations, the International Organization for the Reunification of the Parthenon Marbles, was established in November 2005.

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Further titles can be found at www.willamette.edu/cla/wviews/parthenon/biblio.htm (accessed 28 September 2008). See also the Reports and Recommendations of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation at http://portal.unesco.org/culture/en/ev.php-URL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html

For more information see http://www.britishmuseum.org/the_museum/news_and_press_releases/statements/the_parthenon_sculptures.aspx

Additional items will also be found in the Selected Bibliography at the end of this volume.

The Mayan Temple Facade

*D. Freidel*⁷⁰

Editor's Note

THIS CASE WAS FIRST WRITTEN UP by Karl Meyer in his book *The Plundered Past*⁷¹ in 1973. He noted that there was persistent confusion about the true provenance of the facade. At first the site was believed to be Kohunlich in Quintana Roo. However it seems that the dealer at different times gave three different provenances, another being in Chiapas. Meyer thought that the best evidence pointed to Calakmul, 'a vast, much plundered site in Campeche.' It has taken forty years for more evidence to emerge, as described in the article below.

The case exemplifies all the difficulties of dismembered objects whose provenance is unknown: the loss of parts of the iconography which were left behind, thus hindering a proper understanding of the monument as a whole; the loss of historical evidence (the kings concerned; the spread and influence of Mayan art and philosophy and the relationships between the dynasties of Teotihuacan, Tikal and Calakmul) as well as the impossibility of relating its story to those who saw it in the museum. A further loss in this case was the exposition of glyphs that might have assisted the deciphering of the written Mayan language much earlier. In fact, the article indicates that the building from which the facade was removed, as well as the airstrip used to transport it, have been found at Placeres.

The Removal

In 1968 looters working in the jungle of Campeche in southeastern Mexico found a magnificent painted stucco facade decorated with the well-preserved face of a young Maya king wearing the distinctive flanged crown of royalty. The whole facade had been carefully buried, most likely during what Mayanists call a termination ritual, a ceremonial closing of an important building. According to the looters, the facade graced a temple or palace at Placeres, a little-known site some 35 miles southeast of the Late Classic (AD 600–900) Maya metropolis of Calakmul. Flanking the king were images of old gods, each of whom held a carved Maya glyph in his left hand. They

70 Edited and updated version of 'Mystery of the Maya Façade: Astute Detective Work Gives New Meaning to a Looted Artwork' 53 *Archaeology* (2000) 24.

71 (Atheneum, New York, 1973) 21.

notified a New York antiquities dealer of its existence who arranged for an associate to fly to Campeche, cut an airstrip near the site, carve the facade into movable chunks, swathe them in plaster for protection, and fly them to New York for sale.

The facade entered the art market just as the Metropolitan Museum of Art was planning *Before Cortés*, a blockbuster exhibition of Precolumbian art. The dealer approached the Met's director, Thomas P.F. Hoving, about acquiring the piece for the exhibition. Hoving turned it down, choosing instead to notify his counterpart, Ignacio Bernal, at the National Museum of Anthropology, in Mexico City. The dealer owned a house in Cuernavaca, and, with the cooperation of Mexican authorities, Bernal made him an offer: give up his house or return the facade. The dealer chose the house, and the looted masterpiece of Early Classic (AD 250–600) Maya architectural art was flown to Mexico City, where it was restored and put on display in the museum's Maya hall.

The man who had been sent to oversee the clearing, cutting, and shipping of the facade to New York had taken a series of colour photographs documenting the looting process, including images of the intact facade *in situ*. In the mid-1980s, the Mayan researcher David Freidel obtained copies of the photographs from a colleague who, as an expert in Mesoamerican art, had been shown the facade when it was for sale in New York. Though the expert had declined to purchase it, he was allowed to retain the photographs for study.

The Detective

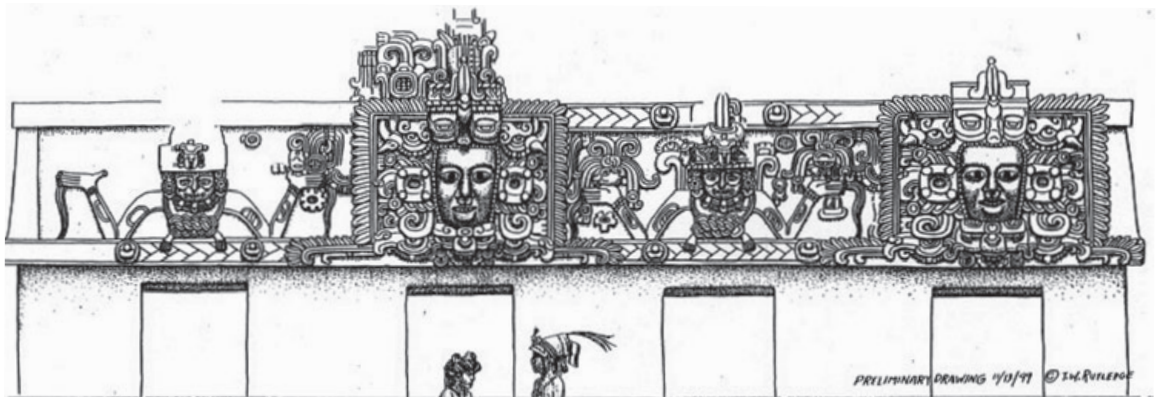
In February 1998, Freidel was preparing a lecture on Maya ideas concerning Tollan, the primordial founding city of Mesoamerican mythology.

Harvard epigrapher David Stuart had argued at a conference that *Tollan*, a Nahuatl word, may have been the ancient Aztec name for the site of Teotihuacan (Place of the Gods), in the Valley of Mexico, some 30 miles north of Mexico City. Freidel recalled that each of the old gods carved on the Mexico City facade held a rendering of an upside-down sky glyph represented by a cattail, which Stuart had recently deciphered as *Puh*. He believes *Puh* is a Maya translation of the word *Tollan*, and has made a strong case for the *Puh* glyph in Early Classic (AD 250–600) Maya contexts as being associated with what scholars have termed Teotihuacan symbolism – images of feathered serpents, the water god Tlaloc, speech scrolls, and distinctive talud-tablero architecture in which sloped steps are capped by entablatures. It was entirely possible, he surmised, that *Puh*, like *Tollan*, referred to Teotihuacan.

Why would the Maya have regarded a city some 700 miles away from their own cultural area as their original homeland? We know that Teotihuacan had strong ties to kingdoms in the Maya lowlands during the fourth and fifth centuries AD. Stuart and several other scholars suggested that Teotihuacan actually conquered



Facade looted from Placeres, Mexico, as it now appears in the National Museum in Mexico City. The drawing below shows how the original facade would have appeared with its damaged fourth panel, which was found when an archaeologist uncovered the site from where it had been looted. This discovery changed completely the interpretation of the building and added important facts to the history of the area. The panel on the far right is the one which is missing from the exhibited facade in the Museum. Drawing: Terry Routledge. © Drawing by T. W. Routledge and Photo © by David Freidel.



the Maya cities of Tikal in the Petén region of Guatemala and Copán in western Honduras, establishing new dynasties at each of them. Evidence for such conquest includes the Teotihuacan-style talud-tablero architecture of the tomb of Copán's fifth-century king Yax Ku'k Mo' (Green Quetzal Macaw).

The hypothesis that it was foreigners in the Maya region who declared their home to be Puh/Tollan, might be tested within the context of the *Puh* glyph carved on the Mexico City facade. For, unlike examples of this glyph found on Early Classic monuments at Tikal and Copán, the Mexico City facade showed no obvious relationship to Teotihuacan or its associated symbolism. It was purely Maya in style.

Examination of the photographs, which had been set aside for ten years, revealed surprising and critical facts about the *Puh* glyph and its context. The old god on the viewer's right displays the *Puh* glyph over the carved profile of a grotesque mask that Mayanists have identified as an effigy incense burner, meaning 'throne' or 'place of power.' It thus seemed that the combination of glyphs means 'place of Tollan' or 'throne of Tollan.' The small *Puh* glyph held by the old god on the viewer's left, however, appeared not with a mask, but beside a large cartouche containing a *Kan* cross. *Kan* means 'sky' in Maya, the cross signifying the place in the night sky where the Milky Way crosses the plane of our solar system's planetary orbits. In Maya mythology, it marks the symbolic birthplace of Ixim, the God and father of creation.

In Mayan there is an established homophony linking the words sky, four and snake. All of these words, in Yucatec, begin with k (*kan*, *ka'an*, *kaan*). There is another homophony, of the words precious, yellow and cordage (umbilicus), and these all start with k': *k'an* (precious/yellow), and *k'aan* (cordage, umbilicus.) Now the ancient Maya clearly saw a connection between this first set and this second set: what I call a sacred alliteration. This is demonstrated by the fact that from the Preclassic period onwards we have examples of snakes that are also umbilicus cords (twisted cords).

Guatemalan scholar Enrique Florescano had proposed that the Feathered Serpent, Quetzalcoatl, the great hero of Tollan, was analogous to the Maya Maize God Ixim. Stories recorded at the time of the Spanish Conquest in highland Mexico tell that Quetzalcoatl discovered maize as the critical sustaining food for human beings. The Mexico City facade also suggests the Maya regarded Kan, the birthplace of the Maize God, as equivalent to Tollan, the city of Quetzalcoatl.

There are numerous examples of old gods presenting objects in Maya art. In some cases, they hand objects to lords or kings. The portrait at the centre of the Mexico City facade is clearly that of a king wearing a royal crown, its flanged form complete with elaborate ear flares, a zoomorphic chin-strap and bird headdress. If, however, both of the old gods were handing *Puh*-place objects to this Maya king, why did the god on the viewer's right hold his *Puh*-place object in the wrong hand?

The Iconography

On closer inspection Freidel found that several frames showed the crumbling remains of a second large facemask depicting a king on the far right of the facade. It was clear that centuries of erosion and exposure to the elements had taken their toll. Clearly, in the estimation of the looters, it was simply not worth transporting to New York. No one ever missed the second mask. Without it, the facade is symmetrical with two old gods flanking a central king, but the Mexico City facade was never meant to be symmetrical. It was radically and wonderfully different. In one corner was an old god, in the other was a king's portrait. Looking at the original building, one would have seen two kings, each in the company of an old god.

While the composition is unique in Maya sculpture, it is common on Late Classic (AD 600–900) painted ceramic vases, most of which were crafted more than a century after the Mexico City facade. Mayanists call this scene the 'Holmul Dancer,' after the site of Holmul in the Petén where a number of vases showing the scene were excavated in the early twentieth century.

A particularly fine vase showing the meeting of two lords was recently excavated at the site of Buenavista, Belize. Its inscriptions tell us that one lord is from Naranjo, the other from either Dos Pilas or Tikal. We know from inscriptions that the families of Dos Pilas and Naranjo were related, so it is likely that the lords depicted are from these two cities. Given this iconographic tradition, the Mexico City facade may show such a meeting of kings.

Who are they? The answer lies in the *Puh* glyphs held by each of the old gods, which Freidel believes represent each king's ancestral source of legitimate authority.

The old god on viewer's left is proffering a glyph to the preserved young lord that features a *K'an* Cross, and this reads precious or yellow, with a definite allusion to the maize god, who emerges from a *K'an* Cross marked turtle carapace in resurrection following his sacrifice. I argue that this emblem is also a reference to snake (*kaan*), which is the leitmotif of the kings of the snake dynasty who contested for hegemony in the central lowlands with the kings of Tikal and other allies of Teotihuacan in the period of the Placeres palace.

The old god on the viewer's right holds the combination of glyphs that reads *Puh*-place or 'place of Tollan,' assumed to mean Teotihuacan. In the god's other hand is a rabbit head that David Stuart has translated as *bah*, meaning portrait or image. So the king beside him is being identified as a lord of Teotihuacan. The image of the king, however, is not that of a Teotihuacano, but of a Maya king. This lord, then, is a person who claims ancestry at Teotihuacan, believed by Freidel to be a king from Tikal. Following the work of Stuart, British epigrapher Simon Martin, and Nikolai Grube of the Universität Bonn, we know that Tikal saw the establishment of a new

line of kings in AD 378, following its military victory over many of the cities of the Maya Lowlands, which had been led by a site represented by a snake-head emblem glyph. The first of these kings, Nuun Yax Ain (Green Crocodile), claimed descent from a Teotihuacan lord that scholars have dubbed Spear-thrower Owl, his ancestry evident in portraits carved on Tikal stelae 4 and 31.

Who then is the lord of the Puh-K'an? Though K'an is generally regarded as a purely mythical location, being the birthplace of Ixim, the Maya Maize God, Freidel thinks that the Lowland Maya had a real geographical place in mind when they referred to it. To identify it, however, he delves into epigraphy and recalls the Maya penchant for outrageous linguistic puns. Such word play served to illustrate natural connections between powerful sacred forces and ideas. The word for sky in Yucatecan Maya, for example, is *kaan*; the word for snake *kan*. In Maya texts the sky is often shown as a great snake, a practice begun in the Late Preclassic (300 BC–AD 250). There is another homophony, described above and emphasized in the book *Maya Cosmos*,⁷² of the words precious, yellow and cordage (umbilicus). The ancient Maya saw a connection between the first set and second set ('sacred alliteration'). This is demonstrated by the fact that from the Preclassic period onwards we have examples of snakes that are also umbilicus cords (twisted cords). With this in mind, the *kan* glyph can be seen as a representation of the snake-head site thought by many Maya scholars, to be Calakmul, a massive site in southern Campeche. If this is the case, the lord depicted on the well-preserved portion of the facade is probably a king of Calakmul.

The Site

We know the kings of Calakmul called themselves Holy Snake Lords. It might be taken as a coincidence that they called themselves by a word that sounds like the word for the birthplace of the Maize God. Calakmul was the capital of a widespread and powerful hegemony of Lowland Maya kingdoms during the Late Classic period. Recent excavations at Calakmul, directed by Ramon Carrasco of the Instituto Nacional de Antropología e Historia, have confirmed that it was already a major urban centre in the Early Classic period. Just how early Calakmul began to establish its political and military hegemony remains an open question since there are so few Lowland Maya centres where archaeologists have conducted excavations of Early Classic structures. Moreover, texts from this early period are relatively rare; those that exist are biased, as they come from Tikal and Copán, enemies of the snake-head site.

What remains problematic is the notion of Calakmul as an ancestral city. Even though the site attained some degree of prominence in the Early Classic, it seems

72 D. Freidel, L. Schele and J. Parker *Maya Cosmos* (William Morrow and Company, Inc., New York 1993).

unlikely that, being such a newcomer on the Lowland political landscape, it would have been regarded as the city where Maya civilization began.

There is such a city elsewhere, in the geographic centre of the Lowland Maya world. Twenty-five miles south of Calakmul lies a city of such vast monuments that they dwarf all later efforts by kings and potentates. It is El Mirador, 'the lookout,' the most powerful city in the Preclassic Maya world. By the fourth century AD, however, it had become a ghost town, inhabited by a few intrepid families of master artists who, living in the shadows of the great ruined temples, made El Mirador and nearby Nakbé their home. Some of the finest ceramics ever made in the Maya world were created at El Mirador.

According to Simon Martin, glyphic texts on some of the codex-style vessels list kings of Kan, a snake-head city. He does not believe they are referring to Calakmul, but to its predecessor, El Mirador. The idea is that Calakmul inherited the mantle of El Mirador and with it the stewardship of the place where humanity was fashioned of the flesh of the Maya Maize God.

The argument is that the preserved young lord is a scion of the snake dynasty and the place of the maize god's resurrection – the old Mirador Basin heartland of the snake dynasty. In contrast, the old god on viewer's right is proffering another young lord, the one decayed and not included in the looting, a glyph that reads *Puh*, referring to Teotihuacan and the Maya kingdoms in Péten allied with Teotihuacan in that period. As it happens, the profile head below the *Puh* glyph reads *Chan Chen*, meaning centre of a community, which would seem to confirm this reading.

Freidel suggests that the facade depicts an encounter between the kings of Calakmul and Tikal, who regarded themselves as the scions of two primordial creation places, K'an and Puh, associated in their time with El Mirador and Teotihuacan. If, in fact, the facade was commissioned as a testament to a detente between Tikal and Calakmul, possibly during the reign of Green Crocodile in the late fourth century, it was short-lived. From the fifth century onward, the Lowland Maya world was engulfed by war. Both cities collapsed in the ninth century, in part because of their inability to come to a lasting peace.

What is interesting is that one of the looters claimed that the facade was actually taken from Calakmul. However, this site attribution was probably meant to throw off other looters. The building from which the facade was removed as well as the airstrip used to transport it have been found at Placeres, a relatively obscure centre halfway between Calakmul and Tikal's outpost at Río Azul. The facade may have commemorated the most important event ever to happen in that place.

The Mexico City facade is an extraordinary work of art and it is remarkable that, despite the depredations of looters, it has survived. It is also an object lesson that

even very large and richly complex examples of Maya art lose crucial meaning when torn from their contexts. If the looters had not recorded their work photographically, no one would have suspected that the composition included a second monumental king mask. That information is absolutely vital to a true understanding of the historical and cosmological meaning of the facade. Freidel concludes that only time and more research will tell if this interpretation is correct. The Mexico City facade is certain to be a key to understanding the politics of Early Classic Mesoamerica.



Note: The Casenoves Frescoes

A further fascinating case of a dismembered immovable which has been returned to its place of origin is that of the Casenoves frescoes returned by the Abbegg Foundation of Geneva to Roussillon, France mentioned by Marie Cornu in Part 4 and the concluding Editor's Note in Part 5.⁷³

Christ in Majesty (fresco dating from the end of the eleventh century in the Chapel of Casenoves in Switzerland - inv. 1976-333).
© Musée d'art et d'histoire, Ville de Geneva

73 L.V. Prött 'Movables and Immoveables as Viewed by the Law' 2 *International Journal of Cultural Property* (1992) 389; E. De Roux 'Le retour miraculeux du Christ de Casenoves après quarante ans d'errance' ['The Miraculous Return of the Casenoves Christ after 40 years of Wandering'] *Le Monde* 3 September 1997, 26.

Sacred Objects

Repatriation of Sacred Objects⁷⁴

P.J. O'Keefe

REPATRIATION OF SACRED OBJECTS is a vast subject with many facets. In this article it is possible only to give some examples of repatriation at work across a range of sacred objects; to indicate some of the interests at play and to discuss the broader rules that control its operation. These involve human rights; ultimately repatriation is a human right although so far little developed as such. But first it is necessary to establish what these terms – repatriation and sacred objects – mean.

'Repatriation' is mainly used by professionals working with cultural heritage materials. It conflates two concepts – that of demand and that of return. A claim is made on the holder of an object who decides to return it. The reason underlying the decision is irrelevant. It may have a moral or legal basis but this matters not. Repatriation is not limited in time. Old claims are covered as well as recent ones although the means of obtaining repatriation may well depend on how old the claim is. Repatriation does not depend on the subject matter. What is claimed and what is seen as capable of return are questions that can only be answered when negotiated by the parties concerned. It applies to returns between States as well as those within States. Repatriation is not a widely accepted legal term. It is much broader in scope than 'restitution' which is used when legal rights are at issue.

The notion of 'sacred' as used here relates to religion or belief that transcends everyday life. Applied to objects, it means that they have a special place in the existence of a people. The objects themselves may be regarded as occupying a position of power, acting as intermediary with a power beyond the people, or used in ceremonies which attempt to connect the people with that power. 'Sacred objects' as used in the context of a secular tradition which people would not wish to see disturbed are not the subject of this article. For example, a commentator on a dispute involving

74 This text comprises extracts from the article published in 13 *Art Antiquity and Law* (2008) 225.

the non-wearing of the baggy green cap by Australian cricketers in the Caribbean referred to a push 'to elevate the cap to almost sacred status.'⁷⁵

Repatriation of sacred objects raises particular problems. Often the objects are central to a belief system or used in rituals requiring them to be treated with special reverence. Their absence means that the system cannot work correctly and the bond between the people and the spiritual is flawed if not broken. The object may have been taken in a simple theft, by fraud or have been part of systematic plundering by State authorities.

The sacred object may have associated economic value. Those coming to venerate it or to seek union with the spiritual through its medium will spend money on local accommodation, food and entertainment. For example, in medieval times in France it is said that a monk stole the remains of St. Foy, a young woman martyred in the fourth century, from Agen and installed them at Conques. Doubtless the monk was concerned with spiritual matters but the presence of the relics raised Conques from obscurity to a major site on the route to Santiago de Compostela – thus attracting pilgrims and wealth to the town. Although they do not say so, modern museums are no doubt aware of the interest the sacred objects in their collections have for visitors. Where this is the case, repatriation of the object would mean the loss of revenue not only for the institution but the local economy as a whole.

How Sacred Objects are Lost and Repatriated

Consider objects used in the rituals of the major religions. Relics of Buddha have been long venerated in Asian countries where they play an integral role in religious traditions.⁷⁶ The most sacred object in the Sikh religion is the holy book – *Guru Granth Sahib* – which was designated by the tenth Guru as his successor, to be treated as a living Guru. In Judaism there are the torah scrolls.

The written Torah, in the restricted sense of the Pentateuch [the first five books of the Old Testament], is preserved in all Jewish synagogues on handwritten parchment scrolls that reside inside the ark of the Law. They are removed and returned to their place with special reverence.⁷⁷

75 P. Lalor "'Respect" led to doffing of baggy green' *The Australian* 19 May 2008, 3. Indeed, a commercial website states 'Please note we do not supply the Baggy Green cricket cap as worn by the Australian cricket team ... we are quite respectful of the image and aura regarding the famous "baggy green." The Australian baggy green cap with the Australian test team logo ... has been worn by such cricketing greats as Sir Donald Bradman ... we have never and will never supply individual collectors or memorabilia chasers with an individual replica of the Australian test team baggy green cap.' <http://www.baggycaps.com/baggygreencap.htm> Similarly hagiography of sporting heroes occurs in other countries with strong secular traditions, e.g. memorabilia of Babe Ruth, the baseballer, in the United States.

76 J.S. Strong *Relics of the Buddha* (Princeton University Press, 2004).

77 *New Encyclopaedia Britannica* (Encyclopaedia Britannica, Chicago, 15th edn. 1986) 850.

During the Nazi era in Europe, torah scrolls were subject to destruction and various other indignities as part of the persecution of the Jews. In Lithuania many were seized and placed in State depositories. This was a case of systematic plundering of sacred objects by State authorities. However, in October 2001, Lithuania passed legislation entitled the Law on the Transfer of Religious Manuscripts Copied Exclusively for the Purpose of Observance to Jewish Religious Communities and Societies. This was to establish a procedure for transferring these sacred objects back to the communities.

The relics of saints play a special role in the Roman Catholic and Orthodox Churches. These are themselves much more than human remains and broader in scope. Articles of clothing, objects used by the saint, and the means by which they were tortured are all capable of being considered relics. Such relics are to be venerated by the faithful. Regarding their movement, Canon Law states that relics 'of great significance and other relics honoured with great reverence by the people cannot be alienated validly in any manner or transferred permanently without the permission of the Holy See.'⁷⁸

However, relics of saints have been the subject of both secular and religious conflict. St. Titus is an example. He was a disciple of St. Paul who appointed him Bishop of Crete. He died about the end of the first century CE and was buried at Gortyn. During the sixth century a basilica was erected to house his remains but this was destroyed by the Saracens in 824 CE.⁷⁹ Local Christians saved the skull of the saint, which was preserved in a church in what is now Heraklion. In 1204 the Venetians bought Crete from Boniface of Montferrat and began to turn it into a colony. The skull of St. Titus came to play a political role.

... sacred relics were prestige objects that could 'play an important role in deeply divided communities.' If the Venetian colonists could appropriate the special civic qualities that associated Titus with Crete, they would be able to ratify their conquest of the island ... official ceremonial made the cult of Saint Titus an integral part of state religion on the island; it reinforced the relationship of Venice to the past history of the island and enhanced her claims on Cretan territory.⁸⁰

In 1669, as the Turks were taking the town, the skull was transferred to Venice where it was kept in St. Mark's Basilica. However, on 22 August 1965, it was returned to Crete by the order of Pope Paul VI and is now preserved in the Church of St. Titus in Heraklion.

78 Canon 1190, Title IV: The Veneration of Saints, Sacred Images, and Relics: <http://www.vatican.va/archive/ENG1104/-P4D.HTM> accessed 10 May 2008.

79 The town and basilica are now an archaeological site.

80 M. Georgopoulou 'Late Medieval Crete and Venice: An Appropriation of Byzantine Heritage' (September) *The Art Bulletin* (1995) 479, 481, 482.

Mark the Evangelist is thought to have died in Alexandria in 68 CE when the local people tied him to horses and he was dragged through the streets until dead. He was buried in the church of St. Mark in Mazarita. However, by 828 Egypt was under the control of the Moslems. In that year his body is believed to have been stolen and taken to Venice.

This was done in great secrecy: a chest was introduced into the church at night into which the bones of the saint were placed. Then, to discourage the customs authorities from inspecting closely the container, its top was filled with pickled pork and hams. As expected, the customs officials refused to handle the meat and the merchants sailed away with their treasure. On arrival, they delivered their holy load to the house of the reigning doge where it was kept concealed in his private chapel until proper arrangements were made for a church worthy of such a saint.⁸¹

The church is of course the Basilica of St. Mark's. However, Copts believe his head is preserved in St. Mark's Coptic Orthodox Cathedral in Alexandria. On 22 June 1968, Pope Paul VI returned a small piece of bone to a delegation sent to Rome by Pope Cyril VI of the Coptic Church. The bone had been given to Pope Paul by Cardinal Urbani, Patriarch of Venice.

These are only two examples of returns of relics by the Catholic Church. There are others. For example, in 2001 the relics of St. Gregory the Illuminator were returned to the Armenian Apostolic Church to be preserved in the just completed cathedral bearing his name in Yerevan. In 2004, relics of Patriarchs John Chrysostom and Gregory Nazianzen were returned to the Greek Orthodox Church in Istanbul. How they came to the Church in Rome is debated – the Catholic Church says the relics of the latter were brought to Rome by monks in the eighth century while the Orthodox Church claims they were both removed from Constantinople when the city was sacked by Crusaders in 1204. In 2002, the Roman Catholic Church of St. Pantaleon in Cologne, Germany, returned a relic of St. Alban to St. Alban's Cathedral at Hertfordshire in England. The relic had been at St. Pantaleon's since the tenth century having been given to the Bishop of Auxerre in France in 429 by the local church at what is now St. Alban.

Then there are sacred objects taken from indigenous peoples. One of the most famous examples is that of the Afo-A-Kom – a wooden statue closely associated with the hereditary ruler of the Kom, a tribal people in the Republic of Cameroon. In 1973, it was found to be held by a dealer in the United States of America, allegedly having been stolen from the Kom in 1966.

81 F. Hassan 'Bones of Contention' in *Egypt Today* <http://www.egypttoday.com/article.aspx?ArticleID=3374>

The Afo-a-Kom is a statue which is said to embody the soul of the people of Kom. Its spiritual significance is such that it is the personification of the Kom belief in Animism, through which the spirits and soul of a rich cultural heritage communicate with the present citizens of Kom. The effect of its disappearance on the people of Kom was profound. An integral part of their spiritual life was gone.⁸²

The Cameroon Ambassador in Washington said of it: 'It is beyond money, beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together.' After some argument involving the dealer and various experts, it was returned to the Kom. However, according to one account, the Government of Cameroon was initially somewhat reluctant to have it back as it reinforced tribal solidarity at a time when the authorities were trying to form a national identity.⁸³ This case illustrates some of the significance sacred objects play in international politics.

Sacred Objects in International Politics

Icons are particularly important in the Eastern Christian tradition. These are representations of holy persons or events and form an essential part of the church, being given special liturgical veneration.

One such icon is that of Our Lady of Kazan. It is believed to have been found in 1579 in the ruins of a house in Kazan, capital of Tatarstan. Much of its history is subject to differing interpretations. Some say it was kept in the Kazan Cathedral in Moscow; others that it was kept in Kazan and a copy taken to Moscow. Nevertheless, Our Lady of Kazan became known as the protectress of Russia. Some say it was taken from Moscow to St. Petersburg where it was stolen in 1904. However, it seems that about 1970 it was bought from a collector in the United States of America by the Blue Army of Our Lady of Fatima with the intent of safeguarding it at Fatima. But in 1993 they presented it to Pope John Paul II who kept it in his private apartments. In 2004 the Pope handed it over to the Russian Orthodox Church. This took place in a highly charged political and religious situation. The Russian Church was suspicious of the Pope's motives and refused to meet with him, which seems to have been one of the aims of returning the icon. On the other hand, certain Catholic groups were critical of the Pope for returning the icon for what they saw as no obvious gain.⁸⁴ It is interesting that none of the debate seems to have raised the issue of how the icon left Russia and whether it could be regarded as stolen property.

82 L.D. DuBoff *The Deskbook of Art Law* (Federal Publications, Washington, 1977) 71.

83 J.H. Merryman and A.E. Elsen *Law, Ethics and the Visual Arts* (Kluwer Law International, London, 3rd edn 1998) 202.

84 M.T. Horvat 'The Hand-Over of the Icon of Karzan: A Triple Betrayal of the Catholic Church' (October) *Catholic Family News* (2004) available at <http://www.traditioninaction.org/HotTopics/b010htKazanReturned.htm>

Another incident involving sacred objects and international politics concerned what is known as the Holy Crown of St. Stephen of Hungary. This is the only crown to have carried the epithet 'Holy' which it was given in 1256. The Crown has symbolized the union between God and Hungary. The Kings of Hungary were not considered as lawful rulers until this particular crown had been placed on their head. At the end of the Second World War, the Commander of the Crown Guards handed the Holy Crown to officers of the Army of the United States of America fearing it would fall into the hands of Soviet officials. It was taken to Fort Knox. In 1977 President Carter decided to return it to Hungary. This raised controversy in the United States of America among Hungarians in exile, the Roman Catholic Church and various American politicians. A Senator Dole sought an injunction to prevent the repatriation of the Crown. He relied on a supposed implicit agreement in the Paris Peace Treaty 1947 and an argument that the agreement to repatriate itself constituted a treaty that had to be ratified by the Senate. Both arguments were rejected by the District Court. The Court said:

The United States' continued dominion over the Hungarian coronation regalia, in which this country claims no property interest, can reasonably be viewed as a serious 'obstacle' which may impede the 'rehabilitation of relations' between the United States and Hungary. The decision to remove such an obstacle appears to be well within the traditional powers of the President.⁸⁵

The Court of Appeal denied a motion for an injunction pending an appeal.⁸⁶ A ceremony for the return of the Crown was held in the rotunda of the Hungarian Parliament on 6 January 1978. It was handed over by the Secretary of State of the United States of America and then displayed in the Hungarian National Museum in Budapest. On 1 January 2000, by legislative act it was taken from the museum to be displayed in the Hungarian Parliament.

Who Decides whether an Object is Sacred?

Consider the Zuni war gods – *Ahayu:da*. These are cylindrical wooden sculptures. After being used in religious ceremonies, they are placed in shrines around the Zuni Pueblo. Those already in the shrine are placed in adjacent piles of retired war gods. They still have a role in Zuni ritual and are intended to disintegrate and return to the soil. Some were taken by people who believed they had been discarded and were no longer of value to the Zuni. In 1978, Zuni leaders decided to request repatriation of the war gods known to have been taken.

⁸⁵ *Dole v. Carter* 444 ESupp. 1065, 1070.

⁸⁶ *Dole v. Carter* 569 E2d 1109.

Three basic principles were articulated: (1) the *Ahayu:da* are communally owned; (2) no one has the authority to remove them from their shrines, therefore any *Ahayu:da* removed from its shrine has been stolen or illegally removed; (3) the *Ahayu:da* need to be returned to their proper place in the ongoing Zuni religion.⁸⁷

By 1995 some eighty *Ahayu:da* had been returned. The Denver Art Museum formally recognized that the Zuni considered a war god to be an animate deity crucial to the performance of their religion rather than a symbol or art object.⁸⁸

In 2006 the Association of Art Museum Directors in the United States of America released a Report on the Acquisition and Stewardship of Sacred Objects.⁸⁹ This was not directed to the issue of repatriation although the Report urged members of the AAMD 'to use the greatest sensitivity when collecting sacred objects from indigenous societies worldwide.' The Report exhibits an ambiguous, if not inconsistent, approach to the classification of objects as sacred. It states that 'sacred works of art are venerated objects created for use in ritual or ceremonial practice of a traditional religion.' However, it asserts that 'the definition of 'sacred object' must be limited to a comparatively limited class of objects' otherwise it would 'create immensely difficult problems for art museums as secular institutions.' This seems to imply that, although there should be dialogue with people asserting claims, the ultimate test is the benefit to the museum. Decisions regarding stewardship 'rest entirely with the museum' in the absence of any legal requirements. Presumably the authors would apply the same reasoning to claims for repatriation. This may be compared with a decision of the courts in Quebec dealing with sacred objects of the Roman Catholic Church.

The parish of *L'Ange Gardien* in Quebec, Canada is probably the oldest in the country, having been founded in 1664. Over the years it had been endowed with numerous objects created by prominent artists and designed to further religious devotion. However, in 1962 a new parish priest was appointed to renovate and bring back to life the church and the presbytery. This was the time of Vatican II⁹⁰ and its emphasis on a return to simplicity. The priest, in order to fulfil these multiple objectives, sold off a number of objects he judged as surplus to a sculptor for CAN\$800. They were later said to be worth CAN\$100,000. The parish priest neither sought nor received permission to sell from any supervising body. He made no personal profit. The sculptor on-sold the objects some of which eventually ended up in the collections of such institutions as the National Gallery of Canada and the *Musée de Québec*. The priest's successor in the parish questioned the sale and, in 1976, the

87 T.J. Ferguson, R. Anyon and E.J. Ladd 'Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems' 20 *American Indian Quarterly* (1996) 251, 252.

88 *Ibid.* 255.

89 <http://www.aamd.org/papers/documents/SacredObjectsReleaseandGuidelinesCombined8.9.06-dated.pdf> accessed May, 2008.

90 Opened in 1962, the Second Ecumenical Council of the Vatican was the twenty-first such council of the Roman Catholic Church. It ended in 1965.

Parish Council commenced proceedings to have all transactions concerning the objects declared null and void.

Under Quebec Civil Law sacred objects were not capable of being the subject of commercial transactions. The Quebec Superior Court accepted that it was for the religious body to decide what was sacred or not. In this case there had been no desacralization and the sacred nature of the objects had not been affected by the sale.⁹¹ Desacralization would have required the procedures of Canon Law to be followed in order to remove the sacred nature of the objects.

The Quebec Court of Appeal said that sacred objects are those necessary to the cult. In particular, L'Heureux-Dubé J. stated that the Quebec Civil Code should be construed according to the rules of the cult – Canon Law for Catholics, the Torah for Judaism and the Koran for Moslems. This was not introducing the religious codes into the Civil Law but merely referring to their prescriptions in their domain of religious belief. This case is the authority for the proposition that the cult decides what is a sacred object. The sacred objects were returned to the church by their holders.

It is instructive to compare this decision with the attitude of the AAMD Report on the Acquisition and Stewardship of Sacred Objects. The Report sought to draw a distinction between venerated objects as described above and religious works of art which 'serve to express religious ideas, values or feelings.' Where would the objects sold by the parish priest and considered sacred objects by the Canadian courts fit in this classification? They included chalices, a censor, an incense boat, a stoup, two cruets all by master silversmiths, 'two sculpted Madonnas in gilded wood, six candlesticks in sculpted wood, one sculpted wood crucifix from the high altar, as well as two statues of St. John and one of St. Roch.'⁹² These would clearly be religious works of art but would they also be 'sacred objects' in terms of the AAMD Report?

Repatriation Problems

With many objects it is difficult to say where they belong. Like the body of St. Mark they may have been taken centuries ago and, although the original possessor may still desire them, the current holder will point to the lapse of time as giving a better right to them.

Alternatively, the current holder may give back a little of what has been requested in the hope and expectation that this will satisfy the demand. For example, as already noted, Pope Paul VI returned a small piece of the bones of St. Mark to the Coptic Church. However, the bulk of his body remained in Venice.

91 *Fabrique de la Paroisse l'Ange-Gardien v. P.G. du Québec* [1980] C.S. [Recueils de jurisprudence du Québec, Cour supérieure [Law Reports of the Superior Cour of Quebec, Canada] 175. For a comment on the case see B. Pelletier 'The Case of the Treasures of *L'Ange Gardien*: An Overview' 2 *International Journal of Cultural Property* (1993) 371.

92 Pelletier n. 91.375.

Another tactic is to put the object into safe keeping in an institution within the country of the current holder. This has happened recently with *tabots* taken from Ethiopia in 1868. In that year a British expeditionary force captured Maqdala, the capital of the Emperor Tewodros. Following the subsequent looting a number of *tabots* were acquired by a representative of the British Museum. These are inscribed tablets used in the ceremonies of the Ethiopian Orthodox Church. They are wrapped in ornate coverings and have to be kept from the view of all but senior clergy. The British Museum was observing this practice by holding them in a secure area inaccessible even to staff. This rather undercuts the purpose of holding them. On the other hand, the British Museum considered itself unable to deaccession them under its governing legislation. Nor did it want to send them to Ethiopia on loan, as it feared they might be seized. Its solution has been to transfer them to the Ethiopian Orthodox Church in London on a five-year extendible loan.⁹³

The current holder may raise objections to repatriation based on the conditions in which the object will be kept if returned, for example, through a lack of appropriate conservation facilities. These objections are often raised in any case of repatriation. However, where a sacred object is at issue, the arguments can become much more intense. In such cases the object may be wanted because it is intended to be used for the purpose for which it was created – perhaps in a religious ceremony or perhaps just to be left to decay as was the intention with the Zuni war gods.

Here the well-known conflict arises between those who want to preserve the object as a cultural construct and those who want to use it in the way its creators intended. This can arise in many circumstances. For example, in 1993, Aleksei II, Patriarch of Moscow, tried to avert bloodshed between the forces of President Yeltsin and the Soviet Parliament by praying before the icon of Our Lady of Vladimir. This icon dated to the early twelfth century and had been credited with many miracles. The icon was held in the Tretakov Museum; the Patriarch could borrow it but had to return it the same night. The Director of the Museum stated: ‘The icon was badly damaged by being taken out of a controlled environment. We do not know how long it will take to restore it so that we can put it back on display.’⁹⁴ Although not a case of repatriation as such, this instance starkly illustrates the attitudes at play.

An interesting example, and one that has much to recommend it, is that of the Saanich stone bowl in Canada. This had been found by a farmer and subsequently sold to a dealer who applied for an export licence under the Canadian export control system for cultural heritage. The bowl, named SDDLNEWHALA, was sacred to the Saanich people.

93 M. Bailey ‘UK Museums Face Controversial Ethiopian Legacy’ *The Art Newspaper* No. 151 October 2004, 15; ‘Holy *Tabots* to be Transferred from British Museum to Ethiopian Church’ *The Art Newspaper* No. 157 April 2005, 24. According to a personal communication 25 August 2008 from Professor Richard Pankhurst, London, the *tabots* have not yet been transferred.

94 Anon ‘The Resurrection of Holy Russia’ *The Economist* 23 October 1993, 105.

The importance of the bowl to the Saanich Nation has little to do with its age, or whatever scientific information it may reveal. It is an object that is as sacred to our people as holy relics or other traditions are to other people.⁹⁵

In order to prevent export, the bowl was purchased by the Simon Fraser University Museum in Vancouver. Title was then transferred to the Saanich Native Heritage Society with the Museum retaining custody until such time as the Society requested its permanent return. The agreement between the Society and the Museum provided for temporary removal of the bowl if the Society so wished 'for the purposes of exhibition, traditional or ritual use or other purposes to be agreed upon.'⁹⁶

An associated issue arose. The bowl could sustain serious damage if, for example, the Society's proposed use included cleansing the bowl by placing it in a fire. Would the curator have the right to object or refuse to release the bowl, given that title had been transferred to the Society? While the curator has the professional obligation to advise the Society on handling and use of the bowl, the curator cannot dictate handling and use of an object that is not formally part of its collection.⁹⁷

Ultimately it should be for the claimant to determine how the sacred object should be used. Those who hold such sacred objects in art or historical collections are temporary custodians who must recognize the superior moral claim of those who need them for religious practices. As is made clear further below, this approach is consonant with the United Nations Declaration on the Rights of Indigenous Peoples.

Sometimes repatriation can create significant problems – perhaps for the claimant or for society in general. The lack of enthusiasm on the part of the Government of Cameroon for the Afo-a-Kom coming back to the Kom was noted above. While the Kom welcomed it back, the Government saw broader political problems. More narrowly, although a claim is made for repatriation, can the object be used in the same way as before it was removed? It may have been replaced or the ceremonies altered to accommodate its loss. Jones wrote of a collection of *tjurunga* (a sacred representation of an Aboriginal totemic object usually made of wood or stone) that had been deposited with the South Australian Museum for safekeeping by an Antikirinya man and a Wongkonguru man in 1972.

Subsequently, the Antikirinya man asked that his material be sent to him at Mimili, Everard, S.A. where he was staying. It was to be used in an Inma celebration there. The Museum sent the material; the man had a brief moment of

95 D. Henry 'Back from the Brink: Canada's First Nations' Right to Preserve Canadian Heritage' Special Issue *University of British Columbia Law Review* (1995) 5, 8.

96 'Mount Newton Cross Roads Bowl Trust Agreement' in Special Issue *University of British Columbia Law Review* (1995) 321, 322.

97 B.J. Winter 'New Futures for the Past: Cooperation Between First Nations and Museums in Canada' Special Issue *University of British Columbia Law Review* (1995) 29, 35.

glory when it arrived at Mimili, only to find that the Pitjantjatjara men present told him that the material was proper 'red ochre' stuff and too dangerous for him. This was the last he saw of his objects. On hearing this, the Wongkonguru man instructed the Museum that his material was not to be removed from storage under any circumstances.⁹⁸

However, it is not for the holder of sacred material to judge whether repatriation will cause problems. This is a matter for the claimant although the holder should pass on any information it possesses.

Obtaining Repatriation

The first step should be a direct approach with a request for repatriation to the holding person or institution. This should be a straightforward request detailing the basis on which it is made. Threats or accusations of misconduct on the part of the holder are unlikely to facilitate repatriation. This was emphasized in the case of the Zuni war gods:

The success of the Zuni Tribe in repatriating *Ahayu:da* is due in large measure to its concentrated efforts, its quiet approach which has stressed gentle yet persuasive dialogue rather than confrontation, and its willingness to explain its concerns to non-Indians.⁹⁹

If the holder is a museum, attention could be drawn to the Code of Ethics of the International Council of Museums, particularly if the museum is a member of that body. Paragraph 4.4 states that requests for the return of material of sacred significance should be 'addressed expeditiously with respect and sensitivity.' The museum's policies should be studied for guidance in making a request for they should 'clearly define the process for responding to such requests.'

Nevertheless, if the request is rejected or no reply is made then a third party method of dispute settlement may be available. Mediation is preferable but to work it will need the participation of the holder.

If the holder is intransigent, it may be possible in some countries to rely on legislation. Probably the most significant extant example is the Native American Graves Protection and Repatriation Act 1990 of the United States of America. It defines 'sacred objects' as 'specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.'¹⁰⁰ Basically, if there is shown to be a cultural

98 P. Jones 'Museums and Sacred Material: The South Australian Museum's Experience: I. History and Background' 16 *Bulletin of the Conference of Museum Anthropologists* (Australia) (1985) 16, 19.

99 T.J. Ferguson, R. Anyon and E.J. Ladd, above fn.87, 257. See also pp. 241-245 below. See also text of Youngbird at the end of this section.

100 Section 6 NAGPRA.

affiliation between a particular Indian tribe or Native Hawaiian organization and sacred objects in collections of a Federal agency or museum, those objects shall be expeditiously returned at the request of the tribe or organization. There are various conditions to be satisfied before the return occurs but they will not be discussed here. Another piece of legislation is the First Nations Sacred Ceremonial Objects Repatriation Act 2000 of Alberta. Under this a First Nation may apply to the Minister for repatriation of such an object and the Minister must agree unless 'in the Minister's opinion, repatriation would not be appropriate.'

One effective way of obtaining repatriation is through the pressure of public opinion. To mobilize this will usually require a significant investment of resources in terms of time and money. Right from the start it must be realized that many years of effort may be needed. For example, the British Committee for the Restitution of the Parthenon Marbles was established in 1983 'to present the case [for reunification of the Marbles with the structure of the Parthenon] as fully as possible to the British public and to bring the most effective pressure on the Trustees of the British Museum and British Government.' It is still working to achieve this goal.

It is essential that the full range of options available is known. Indigenous peoples seeking the repatriation of sacred objects can use the United Nations Declaration on the Rights of Indigenous Peoples¹⁰¹ in order to support their claims. Article 11(2) reads:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior or informed consent and in violation of their laws, traditions and customs. [Italics added]

Article 12(1) supplements this:

Indigenous peoples have the right to the use and control of their ceremonial objects.

This Declaration has the form of a Resolution of the United Nations Organization. It is not a legally binding instrument in international law but should be respected by those who voted for it. It has great psychological impact in relations between indigenous peoples and States. It can also have long term international ramifications: '... resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.'¹⁰² Using these various aspects of the Declaration, indigenous peoples can develop effective arguments for repatriation of sacred objects.

101 This was adopted on 13 September 2007. There were 143 States in favour, 4 against (Australia, Canada, New Zealand and the United States of America) and 11 abstentions.

102 I. Brownlie *Principles of Public International Law* (Clarendon Press, Oxford, 3rd edn 1979) 14.

The Declaration emphasizes human rights. Article 1 commences by saying that indigenous peoples and individuals are entitled to the full enjoyment of all human rights. The final paragraph states that the Declaration shall be interpreted in accordance with respect for human rights.

The major international instruments – and these are applicable to all persons, not just indigenous peoples – are the Universal Declaration on Human Rights 1948; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights 1966. The first two named both endorse the right to freedom of religion. The second and third refer to the right to participate in the cultural life of the community. If these instruments have been incorporated into national law it may be possible to rely on that legislation. Otherwise it will be necessary to craft an argument that the human rights named require the repatriation of the sacred object. Much will depend on the relationship between the object and practice of the religion.

There is another human right that could cause difficulties for repatriation of even sacred objects and that is the right to property. Could a museum holding a sacred object rely on the major international human rights instruments to argue that repatriation would be a deprivation of its property? The instruments are rather ambivalent regarding this right. For example, there is no provision in the International Covenant on Economic, Social and Cultural Rights on property. One commentator has stated that this was due to the difficulty of obtaining consensus on the modalities of its successful acquisition and use.¹⁰³ The Universal Declaration on Human Rights states that everyone has the right to own property and no one shall be arbitrarily deprived of his property. But there is no suggestion that this is an absolute right or that all categories of objects must be regarded as property.

However, a regional instrument, the European Convention on Human Rights, is much more specific. Article 1 of the First Protocol, reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This is not the place for a general discussion of the implications of the Protocol for sacred objects.¹⁰⁴ As for repatriation, in the Report of the British Government's

103 A. Eide 'The Historical Significance of the Universal Declaration' 158 *International Social Science Journal* (1998) 475, 490.

104 There is a discussion on another aspect in P.J. O'Keefe 'Archaeology and Human Rights' 1 *Public Archaeology* (2000) 181, 184.

Working Group on Human Remains, the Group's specialist adviser on human rights is recorded as saying:

Each case would have to be judged on its merits but there would have to be very compelling reasons for the return of the artefact to prevail over the museum's proprietary rights. In the event that the artefact were returned, then in order to avoid breaching the Article 1, Protocol 1 rights of the museum, compensation is likely to be payable to the museum.¹⁰⁵

In the adviser's opinion, the legal ownership of the museum would probably be the determining factor 'when deciding where the balance of interest lies between the competing interests of an indigenous people and those of the museum.' In his opinion, the proprietary interests of the museum would override peoples' rights to maintain their culture or manifest their religion as set out in the Convention itself. This is only an opinion with no reasons being given. It may well not be accepted by courts or the authorities. On the other hand, it may be related solely to the implementation of the Convention in the United Kingdom. It is interesting to note that when the Convention was being drafted, property rights were relegated to the First Protocol, their inclusion in the Convention itself being considered too controversial.¹⁰⁶ This would indicate that property rights are not to be favoured over other rights even if they are not as well developed.

Conclusion

There are many forms of sacred objects, and they are not restricted to the practices of indigenous peoples as much of the debate would seem to indicate. They are to be found in the belief systems of major religions both Western and Eastern. There are certainly problems on the proper resting place for sacred objects within and between religions such as the Roman Catholic and the Orthodox Churches. There are also major difficulties when objects sacred to a particular religion are held by collectors. Some collectors are now beginning to face the issues involved. But asserting that they hold the objects for the benefit of the general public is not a sufficient response. Who gives the collector the right to decide what is in the interest of the public? What is it that supposedly favours the interests of the public over that of believers seeking repatriation? It may be that the public would favour repatriation if asked for an opinion. These are only a few of the questions that the repatriation of sacred objects will raise in the future.

¹⁰⁵ Website given at n. 147, below.

¹⁰⁶ D.J. Harris, M. O'Boyle and C. Warbrick *Law of the European Convention on Human Rights* (Butterworths, London, 1995) 516.

Ghost Dance Shirts

Repatriation as Healing the Trauma of History¹⁰⁷

R. Thornton

ON 29 DECEMBER 1890, several hundred Sioux men, women and children were massacred by troops of the First Squadron of the Seventh Cavalry at Wounded Knee. Earlier a band of 350 Sioux had fled their reservation in order to practice their new religion – the Ghost Dance – when the cavalry captured them. The massacre occurred when the troops were attempting to disarm the Sioux prior to taking them to Pine Ridge Agency for shipment back to their reservation. The Cavalry left with their dead and wounded after the massacre, and sent out a burial detail a few days later. In the meantime, other Sioux learned of the massacre and collected some of the dead. When the burial detail arrived on 1 January 1891, a heavy blizzard had covered the remaining dead bodies under snow. Eighty-four men and boys, forty-four women and girls and eighteen children were collected and buried in a mass grave.

Some of the Sioux massacred at Wounded Knee had been wearing sacred Ghost Dance shirts; they were stripped of these shirts before being dumped into a mass grave. Six of these shirts ended up at the National Museum of National History; one was displayed in a museum exhibit with the caption that it was taken from the Wounded Knee ‘Battlefield.’ The shirts have bullet holes and are stained with blood; some still have medicine bags attached.

The Smithsonian officially had twenty-nine ‘objects’ taken from those massacred at Wounded Knee. In addition to the Six Ghost Dance shirts, these included a blanket from ‘a dead body,’ a pair of boy’s moccasins, and baby jackets and caps. The return of the ‘objects’ to the descendants of the men, women and children at Wounded Knee occurred in September of 1998. As chair of the Smithsonian Institution’s Native American Repatriation Review Committee, I became involved in the request and ultimate decision to return the objects to the Lakota Sioux. ‘This is part of our healing process,’ the repatriation officer for the Cheyenne River Sioux Tribe informed me.

¹⁰⁷ This article is a condensed version of ‘Repatriation as Healing the Trauma of History’ from C. Fforde, J. Hubert, and P. Turnbull (eds) *The Dead and Their Possessions: Repatriation in Principle, Policy and Practice* (Routledge, London, 2002) 21.

Posing a Challenge for the Future¹⁰⁸

M. Simpson

THE FUTURE OF A GHOST DANCE SHIRT in the collection of Kelvingrove Museum was debated at a public meeting in Glasgow in November 1998. Followers of the nineteenth-century Native American Ghost Dance Religion believed they would drive out the colonizer and that their shirts would protect them from the white man's bullets. Amongst the followers of this religion were the Lakota Sioux, of whom 250 men, women and children were massacred by the Seventh Cavalry at Wounded Knee in December 1890. The Ghost Dance shirt in the collection of the Kelvingrove Museum was acquired by the museum from a member of Buffalo Bill's Wild West show, which visited Glasgow in 1892.

In 1992, a Cherokee lawyer saw the shirt on display in the museum. This led to a formal request being submitted to the Museum in 1994 by the Wounded Knee Survivors' Association for the return of the shirt and four other Lakota items (this latter request was later rescinded). The request was originally refused on the basis that the shirt was not unique and there were several others in the US, some of which had already been returned to the Lakota. The Kelvingrove shirt was the only one in the UK and it was felt by museum staff that the shirt provided a potent vehicle for telling the story of the massacre of Wounded Knee to museum visitors in Scotland. However, following the Museums Association seminar 'Point of No Return? Museums and Repatriation' in November 1997, which launched the report *Museums and Repatriation*,¹⁰⁹ the museum reviewed its policy on repatriation and a member/officer group was established to consider individual requests for repatriation in the future.

The matter of the Ghost Dance shirt was re-examined early in 1998 and a public hearing took place in November 1998. Of the 150 written submissions considered, only six argued for the retention of the shirt in Glasgow.¹¹⁰ Presentations were given by museum staff and by members of the Lakota Sioux. The official museum view was that the museum had legal ownership of the shirt and was under no legal obligation to return it; however, Mark O'Neill, head of curatorial services, explained in his presentation that the decision should be made upon consideration of humanitarian concerns.

108 This article is a condensed extract of 'The Plundered Past: Britain's Challenge for the Future' from C. Fforde, J. Hubert, and P. Turnbull (eds) *The Dead and Their Possessions: Repatriation in Principle, Policy and Practice* (Routledge, London, 2002) 199, 207.

109 M. Simpson *Museums and Repatriation: An account of contested items in museum collections in the UK, with comparative from other countries* (Museums Association, London, 1997).

110 Glasgow City Council, Report to Arts and Culture Committee of 19 November 1998 by the Working Group on the Repatriation of Artefacts: Lakota Ghost Dance Shirt (1998) 2.

If museums represent our better selves, our humane values, then we have to admit to the possibility that there may be other values, which are more important than that of possession. Possession is not an absolute value. If our values lead us to preserve an object because of what it tells us about the history of a particular human group, then it is inconsistent not to give that group the respect of at least taking their views seriously.¹¹¹

Glasgow City Council's Arts and Culture Committee took the decision to return the shirt to the Lakota Sioux on the condition that the shirt would be displayed in a place where the story of the Lakota Sioux and the shirt's history in Glasgow could be told; and that the shirt might be taken back to Glasgow for public display at times agreed to by both Glasgow City Council and the Wounded Knee Survivors' Association. It was also agreed that the Council and the Association would explore opportunities for developing educational and cultural links. The City Council also declared that the decision to return the shirt did not bind the Council to return other artefacts from its museums, and thus no precedent was set.

At the hearing, Marcella LeBeau, a Lakota tribal elder presented Glasgow City Council with a replica shirt that she had made. Today, this shirt is on display in the Kelvingrove Museum with the full story of its donation by the Lakota, the history, acquisition and repatriation of the original Ghost Dance shirt and Wounded Knee massacre. The original Ghost Dance shirt was formally handed over to the Wounded Knee Survivors' Association in a ceremony in Glasgow and, when the shirt was returned to South Dakota, a spiritual ceremony called the 'Wiping of Tears' was held at the site of the mass grave of the Wounded Knee victims. Initially, the shirt will form part of an exhibition at the Cultural Heritage Centre in Pierre, South Dakota, and will later be placed on permanent display in a museum to be built at Wounded Knee to commemorate the massacre.¹¹²

111 M. O'Neill, Presentation by Head of Curatorial Services, Glasgow Museums and Art Galleries, to Ghost Dance Shirt Hearing, 13 November 1998, 1.

112 Editor's note: the ceremony was accompanied by a Scottish bagpiper playing a specially composed *pibroch* (a form of classical music for the Scottish bagpipe especially written to commemorate a specific event or person).

Indigenous Knowledge

Snapshots on the Dreaming: photographs of the past and present¹¹³

J. E. Stanton

THE BERNDT MUSEUM OF ANTHROPOLOGY holds an internationally renowned collection of contemporary and historical Australian Aboriginal cultural materials, as well as collections from Papua New Guinea, South-East Asia and Central Asia. The focus of the museum has, however, long been on Aboriginal Australia, and this emphasis is reflected in the strength of its collections and the significance that these have, both locally and at a regional level. These collections comprise ethnographic items and works of art (which are undifferentiated by the museum), sound recordings, photographs and motion pictures (including cine and video recordings in a variety of formats).

The images of the past represent a powerful stimulus for the present: as historic recordings, they empower the present and engage the future. The earliest photographs date from the late nineteenth century. These have been augmented by photographs donated by staff of government departments, former mission stations, and the like. However, it is the collection of photographs taken by Ronald and Catherine Berndt, commencing in the early 1940s, which represent the core of the museum's holdings and now provide an extraordinarily important resource for the appreciation of Australian cultures in all their diversity. Indeed, among this multiplicity of experiences, photographic and sound collections retain a cultural significance beyond their unique immediacy.

The museum's active programme of acquiring photographs from a diversity of sources has seen the development of an extensive network among Aboriginal communities and their constituent families. Together with non-indigenous researchers, teachers and others, they contribute to the essential documentation and re-evaluation of these photographs, and their incorporation into the contemporary social milieu. Active in the Museum's current exhibition and research programmes, Aboriginal community members inject their own perspectives and insights through both their interpretation of these images and through their participation in their exhibition, enriching the museum's verification and the history of the photographs themselves.

113 This article comprises extracts from 'Snapshots on the Dreaming: photographs of the past and present' from L. Peers and A. Brown (eds) *Museums and Source Communities* (Routledge, London, 2003) 136.

Wedding at the Church at Moore River Native Settlement. The former Moore River Native Settlement was, for thirty years, part of a bold social experiment by the Chief Protector of Aborigines A.O. Neville, aimed at eradicating a race and culture by absorbing it into the dominant Australian society. Children of mixed descent were taken from their own Aboriginal families, punished for using their native language and trained to work in white society. Their lives were irrevocably changed, as detailed in a 1997 government report. The failure of Neville's social experiment testifies to the durability and inner strength of the culture it was designed to destroy.

Text based on Maushart, S. *Sort of a place like home: remembering the Moore River Native Settlement* (Fremantle, W.A. Fremantle Arts Centre Press, 2003).

Photograph © Courtesy of the Berndt Museum of Anthropology of the University of Western Australia

New technologies are providing the means of enhancing the context and meaning of such recordings of Aboriginal societies and the knowledge and experience with which they are associated. The web is extending this process further.

The emergence of collaborative roles between museum staff (comprising both Aboriginal and non-Aboriginal persons), and local and regional Aboriginal community organizations and family groups, promotes the museum's long-term commitment to the contemporary interpretation of earlier visual records, from the perspectives of both producer culture and repository institution.

The museum has always maintained an active research profile, and sees its ongoing exhibition programme (and, particularly, its community outreach programme) as a vital means of communicating the results of this research to a wider population than that of the university alone. It currently employs six curatorial staff, three of whom are Indigenous Australians – two women and one man. Two are employed under a grant from the Aboriginal and Torres Strait Islander Commission to work on the museum's current major project, *Bringing the Photographs Home*, discussed in this article.

Indigenous Australians increasingly perceive museums as partners – potentially at least, if not in fact – in the preservation of heritage. This has provided heritage institutions both with fresh challenges and new opportunities. Responses to these demands for closer collaboration have varied: some museums have retreated, fearful of issues such as repatriation, for example. Others, unfortunately, have seen Federal Government funding to assist repatriation as simply a means of creating additional employment opportunities rather than of enhancing dialogue, until they have come to a sudden realization that the funding is being driven essentially by bureaucratic timelines and outcomes, rather than by indigenous desires, intentions and cultural perspectives. Other museums have sought to actively recruit indigenous staff and provide culturally relevant mentoring programmes that support Aboriginal aspirations. Some museums, like the Berndt, have tried to combine a number of strategies to develop more fully their existing policies of enhancing engagement and the promotion of indigenous interests.

The Berndt has benefited from the maintenance of pre-existing and extensive linkages with indigenous communities throughout the state and beyond, often extending over several generations. These connections have grown out of bonds between communities and anthropologists that sometimes span several generations:



they have guided the museum both in its historic performance and will continue to do so in its future efflorescence. Different projects focussing on elements of the Museum's holdings, such as the historic photographic and sound recording collections, richly support this role.

The museum's active engagement with indigenous communities has refined the expansion of collaborative research and exhibition programmes. This has enabled it to establish an enviable role within the broader Australian setting. Cited for its example of best practice in its ongoing relationships with indigenous communities by the national University Museums Review Committee in 1996,¹¹⁴ the museum has maintained a continuing commitment to extensive consultation and the development of collaborative projects across the western half of the continent. Of course, best practice is always difficult enough to achieve – let alone sustain. There are still many issues to both identify and address and, indeed, these will change constantly over time.

The transformational processes incumbent on today's Australian museums have already been enunciated in policies enunciated by the national body, Museums Australia,¹¹⁵ itself influenced by parallel processes in Canada and, less relevantly, the United States of America, where legislated policies have perhaps inhibited flexibility in terms of response and the development of relationships between museums and constituent communities.

We have sought to develop and maintain an original (though now hardly unique) engagement. As a result, the museum has played a crucial role in changing non-Aboriginal ideas about 'things,' of changing their attitudes to categories, and of changing their definitions of 'art.' In this context, the museum has avoided perpetuating the distinction imposed by some collecting institutions between so-called 'art' and 'non-art,' or of 'artefact,' at all. Every material manifestation of culture is treated as a form of aesthetic expression, of 'art' as, indeed, it is so often labelled by Indigenous Australians themselves. Photographs and sound recordings associated with these art works are inherent components of these material manifestations of indigenous cultures and are best treated, in Aboriginal terms, as a unity.

The museum is currently focussing its curatorial activities on the digitization of its photographic and sound collections. This prioritization has provided an immediate response to a clearly identified requirement from indigenous communities and individual families. While the preparation of documentation in support of claims under the Native Title Act has clearly heightened the level of interest in such materials, it certainly did not create it. Family records, including photographs, have long

114 University Museums Review Committee *Cinderella Collections: university museums and collections in Australia*. (Australian Vice-Chancellors' Committee, Canberra, 1996).

115 Council of Australian Museum Associations *Previous possessions, new obligations: policies for museums in Australia and Aboriginal and Torres Strait Islander people* (Council of Australian Museum Associations, Melbourne, 1993) 3.

provided a key element for people seeking to know more about their own family origins, associations and affiliations. The impact of the so-called 'Stolen Generations' Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families¹¹⁶ (1997) has further heightened such interest, enhancing collaboration and promoting engagement. We believe that objects and their histories, including their collected and accumulated histories (both within and without the institution), say as much about personal perceptions and individual pursuits as they say about a more collectively shared cultural placement.

The Kimberley Website Project

The museum holds several large collections of materials relating to the Kimberley region in the very north of the state of Western Australia. Many of these were assembled by anthropologists working there between the mid-1960s and the mid-1970s. Furthermore, in the course of my own research since the mid-1980s, I identified widespread interest in the museum's holdings among communities. Ad hoc arrangements to return copies of materials required a rather more considered approach, in the light of increasing attention. The more the museum collaborated in this process of restitution, the more other communities wanted to be similarly involved. This interest spread, via community newsletters and official reports, to other areas of the state, and beyond. The Website Project was formulated to develop a culturally-appropriate website in order to expedite the museum's response to community demands for access to collections. It focussed on the Kimberley materials as a prototype exercise. Employing indigenous Kimberley staff, the project embarked on an ambitious programme of extensive consultation with artists, their families, and relevant community and regional cultural organizations, to establish just how, and which, materials should be made available on the web.

Of particular concern from the beginning, however, was the protection of indigenous interests in these materials, given the significance of the museum's collections to Aboriginal communities and families throughout Australia and, especially, in the western half of Australia, from which these objects primarily derive. These priorities shaped the scope of the project, and were to ultimately constrain its development – at least for the foreseeable future. Once adequate safeguards had been set in place to secure culturally sensitive information from public access, it was a relatively easy matter to automate the transfer of information on each item on the museum's database to the website. Indeed, the project devised the means by which Filemaker Pro would drive the website itself, as well as operate the museum's databases. These searchable, relational data bases now require little in the way of ongoing maintenance,

116 National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families *Bringing them home* (Human Rights and Equal Opportunity Commission, Sydney, 1997).

as any changes or additions are immediately mirrored on the website and the system is, therefore, highly efficient.

This was a significant and rapid learning environment, which I have detailed elsewhere.¹¹⁷ In embracing the new multimedia and network technologies, it became rapidly clear that museums such as our own were deliberately positioning ourselves to increase our ability to communicate information about collections, research programmes, exhibitions and other activities. This approach, though, was founded on our own cultural presupposition that an increased rate of information flow was, of itself, a 'good thing.' It failed to identify contexts in which cultural sensitivities might require a diminution – rather than an expansion – of the rate of such information flow. The issue of community control was a key factor here, and the sheer scope of the World Wide Web threatened directly the viability of such curbs on the inappropriate dissemination of cultural material.

This was a serious issue, which the project had to address. Of chief concern here were matters associated with maintaining control of intellectual property, including song and dance, as well as written recordings and visual art, particularly when these included information normally restricted to a limited range of appropriately qualified persons. Within this context, the benefits of the new technology can be viewed as a mixed blessing for the many Australian Aboriginal groups that are seeking to participate more actively both with and within the museum profession. Not only are the new technologies improving Aboriginal access to culturally relevant information, but they are also addressing a much broader audience, perhaps worldwide. Just how are Aboriginal people going to be able to restrict categories of secret information, as well as preventing others from copying their designs, their music, and their stories? How are museums, the present custodians of some of this information, going to respond to these concerns, and at what level?¹¹⁸

Despite the enthusiasm that the project received from many artists themselves, and indeed their strong encouragement, other interested parties expressed strong concern at the implications of providing these images to such a wide, indeed almost universal, audience. A recent Australian experience has been a case in point. The so-called 'carpetcase'¹¹⁹ successfully demonstrated in the law courts a serious and deliberate breach of copyright. Sacred clan designs and original artworks from other regions were reproduced on carpets woven in South-East Asia for sale in

117 J.E. Stanton, 'Opening the highway or tying the Net? A conundrum for Australian Aborigines and museums' *Museums Australia 1995 Conference Proceedings Communicating Cultures, Brisbane 21–25 November 1995* (1996) 86.

118 These, and other, issues, were addressed by a range of delegates at the UNESCO Seminar on New Technologies, Anthropology, Museology and Indigenous Knowledge, 2004), J. Stanton 'Sustaining futures: museums, anthropology and indigenous peoples. Introduction to the Conference: New Technologies, Anthropology, Museology and Indigenous Knowledge' in B. Glowczewski, L. Pourchez, J. Rostkowski and J. Stanton. (eds) *Cultural Diversity and Indigenous peoples: Oral, Written Expressions and New Technologies* (UNESCO, Paris) (CD-Rom).

119 *Milpururnu & Ors V. Indofurn Pty Ltd & Ors* (1994) 54 *Federal Court Reports* (Australia) 240.



Jigsaw - Missing Pieces, a painting by Perth artist Norma McDonald inspired by the Moore River Wedding photograph. In recent years acknowledgment of the Stolen Generation, and access to documents and photographs relating to this period, has enabled and inspired Aboriginal people (and their descendants) who suffered this deprivation of family and culture to record in words and images this harrowing experience.
© Norma McDonald

Australia. The distributors claimed that they had the Aboriginal artists' approval for these reproductions, and that they were receiving directly a share of the profits. The aggrieved artists were awarded subsequently a substantial financial settlement in compensation for this blatant infringement of copyright, but the company went bankrupt before they received, in fact, anything. But it was a moral victory that encouraged the federal government to introduce selected moral rights legislation as part of its revisions to the Copyright Act.

This experience developed a broader awareness of such issues among at least some Aboriginal artists and their representatives. This can only spread. Although it did not involve the internet itself, the 'carpet case' illustrated the ease with which published images could be reused. The potential for the misuse of images posted on the World Wide Web, even low resolution ones, is of a much greater order of magnitude, however. As a result of the 'carpet case,' members of at least one northern Aboriginal community contemplated the imposition of a fifty-year moratorium on the publication of any art from their area. While this move did not materialize, if it had, it would have had very serious implications for a wide range of curatorial and publication practices, as well as for the future of commercial art production in this region.

'Bringing the Photographs Home': issues of restitution and repatriation

It was clear from the Website Project that the broader issues associated with mounting images on the web remained, for the time, insuperable. At the same time, communities had a strong and very clear desire to obtain copies of the materials, and to collaborate in the safekeeping of the cultural knowledge associated with them. Historic photographs were of central concern in this respect, but other categories of collections were also relevant.

With these issues in mind, the museum considered alternative strategies to achieving the same goals. During 1998, an Aboriginal Curatorial Assistant, Deborah Nordbruch, then working at the museum, together with myself, identified a number of priorities and structured responses to these requirements, and sought funding for personnel and equipment to digitize and 'restore' the photographs to their rightful owners. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From their Families published its report *Bringing them Home*,¹²⁰ detailing the long-term destructive and detrimental effects of government policies on Aboriginal families and individuals, the so-called 'Stolen Generations.' This greatly influenced the museum's response to these issues, not least in part because the report itself drew heavily on the museum's historical photographic collections for its illustrations. It became clear to the museum staff that these (and more recent) photographs

120 Cited n. 116 above.

could play a significant role in assisting grieving families to come to terms with both their individual and shared pasts, as well as to play a vital role in affirming contemporary values and future identities.

This project will assist families of the Stolen Generations to cope better with their profound sense of loss and disorientation and, in turn, reduce the stress of everyday living.

This project is urgent, as most of the Stolen Generations need to see these photographs now, as many are ageing and passing on. The Stolen Generations deserve the opportunity to reconnect to their families, even if it is only in the form of a photograph. Sometimes, a photograph is the only record of their forebears. Not only is it important for the older generations to identify their family history, but it is also crucial that this information be passed to the younger generations, which is imperative for reclaiming and forming identity.

This project is targeted at the members of all Aboriginal families and their descendants who were subjected to the provisions of earlier discriminating Western Australian legislation that resulted in children being taken away from their families by State agencies – the Stolen Generations, subject of *Bringing them Home*.

Planned outcomes from this project are to transfer the Museum's Western Australian photographic collection to the Photographic Database, have a print made of each photograph together with a slide, in preparation for the return of photographs of the Stolen Generations, and information about them, to relevant families and communities.¹²¹

At this time, included in the Berndt Museum's photographic collection were approximately 15,000 historical photographs relating to Western Australia (it is envisaged that others, from the Northern Territory and South Australia, will be the subject of future funding applications through appropriate state/territory bodies). These archival photographs are from government and mission settlements and pastoral stations from the late nineteenth century to the mid-1970s, only available as contact proofs on small file cards that were difficult to access. Only a fraction of the records were computerized and usable photographic prints were only available to order. The project was intended to change all this.

The digitization programme initiated for the Website Project provided an opportunity to build on the previous project by creating electronic copies of archival images and preparing these for printing. Not only did this programme safeguard the photographic originals from unnecessary handling, and subsequent deterioration: it also expedited the preparation of useable prints on-site, minimizing potential loss, misfiling and physical damage. The enhancement of the digitization programme

¹²¹ Request for funding from the Aboriginal and Torres Strait Islander Commission 1998.

therefore met key criteria for the project, aiding the preservation and accessibility of the photographic collections, safeguarding originals and preparing digital copies that could be used for making prints, or for other future purposes.

It had been originally envisaged, somewhat optimistically, that the digitization programme would be completed within the first twelve months and that, during the second year, materials would be taken back to the communities around the state, as prints in albums for easy viewing and identification by community leaders. A key element of the project was documenting the process itself of returning the Stolen Generation's family photos.

However, the regular process of review and the evaluation of feedback from project staff and participating community organizations assisted in the redefinition of goals, and the means by which these would be achieved.

Families were particularly interested in receiving photo albums of prints. They did not want web- or CD-based digital records, as they often lacked the technology to view them or else the older people did not have the relevant skills. Few felt comfortable with the new technologies. Many of the photographs in the museum's collections are sensitive, and at times highly personal. These include images of kin now deceased, kin that an individual may be prohibited from seeing, or ritual events or objects of a restricted, secret-sacred nature. Community leaders wanted to be able to control the process of dissemination themselves. They felt that they could do this only if they had photographic albums, where they could sit, in a relaxed and non-alienating environment, and inspect the materials that the museum was sending back to them.

Given the museum's commitment to respect Aboriginal protocols on the involvement, on a purely regional basis, of both female and male staff as partners in the research programme [it was] recommended that the project should, in future, focus on completing, region-by-region, the scanning and assembly of photographic albums, utilizing trained staff working in Perth on the digitization and organizational procedures.

Field trips to communities in the more densely settled areas of the state were an expensive, and at times, rather inefficient use of the project's limited resources. [It was] recommended that future activities should focus more on informing Aboriginal communities of the existence of the Photographic Collection in particular, and the work of the museum and the nature of its collections in general. Visits to key communities, particularly in remote areas, should be focussed on places where local and regional cultural centres and museums could assist the museum in the delivery of its services. The project should emphasize, at a community level, the need to improve the level of documentation associated with these photographs, since this would assist in meeting requests for assistance from Aboriginal community members elsewhere.

It was pleasing when people were able to identify and name a small number of people from the photographs in the display. People requested copies of photographs. Several attendees suggested that this project could be utilized in schools to give an Aboriginal historical perspective about what really happened to Aboriginal people. Other attendees believed the project could be promoted to the wider community giving a perspective on Aboriginal history.¹²²

The experience accumulated during the past four years of the 'Bringing the Photographs Home' Project has greatly enriched the museum's knowledge of, and appreciation of, its collections. It has also demonstrated the museum's commitment to the recruitment and training of curatorial staff to participate in this vital process, confirming the museum's role in the recognition of Aboriginal interests in collections, and the formulation of strategies to achieve the outcomes sought by indigenous individuals and communities.

A local Nyungar artist, Valerie Takao-Binder, was commissioned last year by the Perth International Arts Festival to create an art installation for the entry foyer of the Western Australian Museum. This work was subsequently purchased by our museum. For Val, the world of the Nyungar experienced the full force of the disastrous impact of European settlement; because of this, the world of her ancestors was dramatically transformed and, today, Nyungar people are still fighting to maintain, and sustain, their own unique culture. Elements of language, dance, song and, most importantly, art are being melded together to create what is, in effect, a new identity, a new place for Nyungar people in contemporary Western Australian society.

The historic written and photographic records of the Nyungar world are at the best, patchy. Nyungar families have their own stories, though, knowledge of their own associations with particular places, specific waters and other resources. It is these stories that provide the basis for what it feels like to be Nyungar today.

And it is one of these stories, Val's story, which provides the context for her exhibition *Mia Mia/Dwelling Place*.

The paintings are just my way of telling the story, it doesn't mean to say that they are wonderful works in artistic terms, for me it's my way of telling my story, and for Aboriginal people this is the way we work. It's more the story that's important here, than the paintings. This is what I would like to get across. This is really where Aboriginal people are coming from, and this is where a lot of people don't understand our work. You've got to look right into what's there.¹²³

122 D. Winmar and D. Parfitt *2000 Report on the South-West Photographic Project: Bringing the Photographs Home* (Berndt Museum of Anthropology, Perth). Unpublished manuscript.

123 T. Binder 'Mia Mia/Dwelling Place' in J.E. Stanton 'A Nyungar World' (Perth International Arts Festival, Perth, 2001) 4.

The *mia mia*, the camping place, that Val recreated in the foyer of the Western Australian Museum reaffirms her background as a Swan Valley Nyungar.

With the Camp, I did most of that from the old Native Welfare files, and when I found the file that spoke about the Camp the one that I constructed was almost exactly the same size. I was only a small child, and I remember it being only just large enough to sleep in, about 6' x 8' or something like that, and everything else was done outside, we lived outside, eating and all that as there was no room inside. There were four of us, myself and my sister, and my parents, four of us. We slept on a homemade bed made out of bushes, a bush bed ... The reason I did all this is because it was my way of saying 'This happened to me, this happened to my family, this happened to my people.'¹²⁴

Government policies of dispossession and relocation have had a devastating effect on Aboriginal families throughout the state, as elsewhere in Australia. The museum's role in assisting these families to come to terms with their experiences, to reflect on the particularity of the colonial impact, and the responses of their own communities, is a critical ingredient in the elaboration of future relationships between indigenous peoples and instrumentalities of the nation state. And I have museums in mind here, particularly.

Although the role of photographs in advocacy has focused here on its impact among South-West artists and their constituencies, its application is, in fact, much broader. Communities in remote areas, whose members are more frequently remaining in the occupation of their customary territories, rely nevertheless on photographs for the substantiation of what are sometimes inaccurate and misleading government records from the earlier era. Such images provide incontrovertible evidence of the residence of particular occupants at specific periods. Together with oral recordings, sometimes made decades earlier, photographs have assisted members of a number of communities to define and assert their own rights of membership to present-day corporate or residential associations, for varied purposes such as housing, schooling, or even hunting and foraging rights, for example. Photographs have enabled communities to maintain and revive cultural practices, such as singing, dancing and other art forms, as well as to reaffirm other social activities. Artworks document contemporary experience, just as other visual records do: it remains for museums to harness these new opportunities for an enduring collaboration with indigenous communities, rather than to discard these moments of insight and innovation.

Local community museums, keeping places and cultural centres, by whatever name they are known, represent a fundamental shift towards the restoration of indigenous curatorship and, indeed, custodianship, into the hands of local community members and away from often remote metropolitan museums. This does not signal the end of the museum as we know it: merely its reformation, if not its revival.

Aboriginal families and their respective communities are, then, increasingly telling their own stories: historic and more recent photographs are a focus for community engagement and individual expression through both art and text. Together with objects collections and sound recordings, past imperatives inform present preoccupations, in the same way those contemporary perspectives help shape future understandings of these social processes.

Collections, such as photographs, sound recordings and, indeed, objects, are critical bridges to the future. They provide an insight on past experiences, which is itself a matter for active engagement in the present, for the future. Just as objects incorporate the lives and knowledge of ancestral family members and their respective communities, so too do photographs assist the interrogation of history, the history that informs the present and creates the future.

Working with historic collections reinvigorates contemporary wisdom and understanding, prolonging internal discourses about the nature of history, culture and identity. Together, these bring new scholarship to museums, re-attaching data to collection items and confirming their contemporary relevance and significance. The reinvigorated objects in museum collections gain fresh meanings and a new element of engagement for visitors and scholars alike. The reassertion of indigenous scholarship and the dynamics of its application impels museums to make a more critical apprehension of public (and, more specifically, indigenous) engagement with their respective institutions.

This, then, is the end of museums seeking exclusive rights of custodianship and, indeed, curatorship: it is the beginning of a new process, which is open-ended. It will be part of a process that will re-define the role of museums in the twenty-first century, one that will end some of the patronizing presumptions of the past as well as encourage the debate of the future. It is, then, an end with a beginning, rather than a beginning with an end.

Sharing Knowledge: Digital Heritage¹²⁵

B. Murphy

THERE HAS BEEN SOME CONFUSION RECENTLY about digitization of cultural heritage. In particular, some misunderstanding has arisen about the potentiality of digital repatriation to assist affirmative action on both intellectual property (IP) recognition of indigenous knowledge rights and the reclamation of culture by communities that have experienced great loss historically.

It must be stressed again that work on digitization of heritage, and affirmative programmes of digital repatriation, have never been proposed as a 'soft option' or easy alternative to physical repatriation. On the contrary, digital repatriation may be just one among many paths of additional, complementary support to benefit source communities to regain access, control or physical restitution of important items of their cultural heritage. The situations of need and the particularities of case-claims concerning ownership or control of cultural heritage vary greatly throughout the world.

I might explain (from one context I know well) that in 1992, the museum community in Australia began – collectively and voluntarily – to pursue a collaborative programme of maximum effort across state borders to provenance, and where possible, fully repatriate to their source communities or descendants, Aboriginal and Torres Strait Islander human remains held in museums. Human remains were the first priority for repatriation (to begin to address the worst scars of colonial history), followed by important items of a sacred nature. The latter are items most necessary for ritual use, historical memory or identity-securing transmission of culture among kinship groups and families.

The point I would make is that digital repatriation in Australia, where this has been implemented in recent years, has been a direct consequence of a long-standing programme of affirmative action on community consultation and physical repatriation by museums. One result of this collective effort is that a Return of Indigenous Cultural Property Programme continues in Australia, and is formally recognized and administratively supported (with some funding since 1992) by national and state governments.

A national policy drafted collectively by museums people and Australian Indigenous people (in a joint-consultation process in the early 1990s) has provided a clear and ethically binding framework for reformed relationships between museums and source communities for fifteen years. On indigenous issues it is stronger and more specific than the ICOM Code of Ethics.

125 *ICOM News* no. 4, 2007, 9.

The Return of the *Ahayu:da* to Zuni Pueblo

Editor's Note

THIS CASE IS BRIEFLY DISCUSSED in the article on sacred objects by Patrick O'Keefe. The edited excerpts immediately below provide further details that relate particularly to the importance of the return to the preservation of the intangible heritage of the Zuni.

The Denver Art Museum¹²⁶

The Pueblo of Zuni has been actively involved in the repatriation of cultural property and human remains since 1977, long before the passage of the Native American Graves Protection and Repatriation Act of 1990.¹²⁷ Several key elements of the Zuni position regarding repatriation were incorporated into the act. The Zuni War Gods were mentioned by name as an exemplar of cultural patrimony to be covered by the law during the Senate hearings that preceded its passage.

Ahayu:da are twin deities with great power. They are associated with prowess and physical skill, and they also serve as protectors of the Zuni people. Many non-Zunis refer to *Ahayu:da* as 'War Gods' but their role in Zuni culture encompasses a much wider range of concerns than simply war. Images of the *Ahayu:da* are created in the form of cylindrical wood sculptures at the winter solstice and for the less frequent ceremonies held to initiate new Bow Priests or commemorate the Bow Priesthood. Members of the Deer Clan cooperate in the creation of *Uyuyewi*, the elder brother War God, while members of the Bear Clan undertake the creation of *Ma'a'sewi* the younger brother. The term *Ahayu:da* refers to the twin gods collectively, or to a single god in a generic context. After their creation the *Ahayu:da* are entrusted to Bow Priests who install them at two of a series of shrines surrounding Zuni Pueblo determined by a ritual sequence of rotation. When the newly created *Ahayu:da* are set in the shrines they replace the previously installed deities, which are respectfully placed on an adjacent pile of 'retired' War Gods. These retired *Ahayu:da* retain an important role in Zuni ritual. All *Ahayu:da* are to remain at their shrines exposed to natural elements until they disintegrate and return to the earth.

Over the last century many *Ahayu:da* have been removed from their shrines. Some were taken in the belief that they were discarded; others were knowingly stolen

126 These passages condensed from Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems' 20 *American Indian Quarterly* (1996) 251–55.

127 Extracts from this statute given below in the section on Human Remains.

to sell to museums or art collectors. Once removed from their shrines, the *Ahayu:da* cannot be supplicated by Zuni religious leaders. The Zuni people believe the removal of the War Gods causes war, violence and natural disasters.

In 1978 the leaders of the Deer and Bear clans and the Bow Priests reached a consensus on how to resolve the problems created by the wrongful removal of *Ahayu:da* – all of the War Gods removed from Zuni lands must be returned to their shrines.

Three basic principles were articulated: (1) the *Ahayu:da* are communally owned; (2) no one has the authority to remove them from their shrines, therefore any *Ahayu:da* removed from its shrine has been stolen or illegally removed; and (3) the *Ahayu:da* need to be returned to their proper place in the ongoing Zuni religion. Anthropological research showed that these principles have a long historical continuity. Their expression in modern legal terms was not simply a recent conceptualization.

In 1980 the Denver Art Museum decided to return the three *Ahayu:da* held in its collection, formally recognizing that the Zunis considered the *Ahayu:da* to be an animate deity crucial to the performance of their religion rather than a symbol or art object, and that as communal property the *Ahayu:da* could not have been legally sold or given away.¹²⁸

The Web that Connects the Heart and Mind¹²⁹

Marilyn Youngbird

I recall memories of helping the Zuni Nation repatriate their War Gods from the Denver Art Museum. I still can see the faces of the two old Zuni men, Keepers of the War Gods, when they were trying their very best to explain why it was so important for those Gods to be returned to the Zuni Nation. It was one of the most spiritual lessons I've ever learned. The tribal elders' small-framed statures were unobtrusive. Their everyday clothing, their brown-reddish hands and faces exuded only love and kindness – genuine unconditional love.

As the members called upon them to explain why the museum should return the War Gods, they rose gently from their chairs, one at a time, and addressed the members. Tears streaming down their earth-coloured faces, they told their audience how their fabric of life had been tattered and torn since the War Gods had disappeared from their sacred shrine on the Zuni reservation. They explained how tribal members had lost their way of life. They said many of their members became alcoholics, were

¹²⁸ See discussion above at pp. 230-231

¹²⁹ M. Youngbird (Arihara/Hidatsa): Extract from 'The Web That Connects the Heart and Mind' 9 *American Indian Ritual Object Repatriation Foundation: News and Notes* (Number 1 Spring/Summer 2003).

abusive to family members, and that physical, mental and spiritual sickness seeped into their ancient, beloved culture through the tattered and torn fabric. Weeping silently, they said,

The War Gods were given to the Zuni Nation directly from our Creator. The Creator entrusted us with these sacred objects to protect, guide and direct our people. The War Gods came to us with a language. They came to us with specific prayers, specific songs and specific instructions directly from God. Our War Gods are sad and lonely. No one in America, no people walking by them in the museums know their songs, their names, and their prayers. People who walk past them are filled with anger, hatred, jealousy and greed. Those people spread their sickness onto them. No one cleanses them or prays for them.

They told their audience that the War Gods are not only for the Zuni people; they are also for all the inhabitants who live on our mother earth. They said, 'You have noticed that the weather has been erratic, damaging, and the winds are getting stronger and out of control. Our ancestors have taught us how to pray with the War Gods to speak to Nature – the wind, rain, thunder, lightning, snow and many other of our Creator's creations.'

Spirit, our Creator, directed the breath of life of the two holy Zuni elders right into the hearts of the forty Board of Regents. When our blessed Creator determines the time is exactly 'right,' miracles happen then and there. The Board agreed to give back the War Gods to the Zuni Nation, and promised to help to protect them with a donation of US\$10,000.

The Smithsonian Institution¹³⁰

W.L. Merrill, E.J. Ladd and T.J. Ferguson

In a gentle rain at dusk, *a:pilha:shiwani* (bow priests) installed two wooden images of the twin gods, *Ahayu:da*, in a shrine on a *mesa* overlooking Zuni Pueblo. As they sprinkled a sacred prayer meal over the *Ahayu:da*, the priests instructed them to protect the *A:shiwini* (Zuni people) from harm and to use their powers to bring fertility and good things to all the peoples of the world. The year was 1987, and the ceremony was the repetition of an aged ritual conducted each December, at the winter solstice. The month was March, however, and unlike the new *Ahayu:da*, created and placed in shrines every year, these two were a century old. They had been removed in the 1880s from the Zuni Indian Reservation in western New Mexico by Frank Hamilton Cushing and James Stevenson and eventually placed in the collections of the

130 Extracted from joint comments of W.L. Merrill, E.J. Ladd and T.J. Ferguson 'The Return of the *Ahayu:da*: Lessons for Repatriation from Zuni Pueblo and the Smithsonian Institution' in 34 *Current Anthropology* (1993) 523–47.

Smithsonian Institution. In 1978 the Zuni Tribe began an effort to recover these and other *Ahayu:da*, and for nine years they engaged in negotiations with the Smithsonian institution to attain this goal. When the Bow priests placed the *Ahayu:da* in a shrine on the Zuni Indian Reservation, these gods were finally restored to the purpose for which they were created in Zuni culture and society. The repatriated *Ahayu:da* now serve as sentinels for the Zuni people and as heralds of a new era in the relations between American Indians and Museums.¹³¹

The political and religious leaders of the Pueblo of Zuni felt that working in a conciliatory fashion would be more appropriate to the religious nature of the matters at hand and more productive than lawsuits, which would be used only as a last resort. Underlying this approach was the Zuni ethic that in a dispute a good man goes to his adversary four times to seek resolution through reasonable negotiation before taking drastic action. The Zunis hoped that museums would agree to return their *Ahayu:da* once they were informed of their importance in Zuni culture.¹³²

Arrangements were made to return the *Ahayu:da* to the Zunis in a ceremony at the School of American Research in Santa Fe. The *Ahayu:da* were laid flat on a table their heads facing west so that, at the proper time, the Bow priests could make them rise up and take them home. First offering prayers that marked the beginning of their trip back to the Zuni, the Bow priests picked up the images from the table and left the chapel, the other members of the Zuni delegation following them in single file. They then drove immediately to the Zuni Indian reservation.

That evening, the Zuni delegation arrived at Zuni with the *Ahayu:da*. As is customary in the return of *Ahayu:da*, the delegation stopped before entering the Zuni lands, and an officer of the *Newekwe* society offered a prayer to purify the images and everyone in the delegation. The delegation then proceeded to the fortified shrine, where they placed the *Ahayu:da* among the others that had already been returned and said appropriate prayers.¹³³

Even though emotions were strong during the visits to the Smithsonian institution, the Zuni elders always conducted themselves as religious leaders. In Zuni culture, one does not mix anger into religious undertakings. Emotions are important, and it is vital to remain spiritually cleansed and focused on the purpose at hand. The Zuni religious leaders were always polite, as the religious oath they take requires them to be. They never demanded the immediate return of the *Ahayu:da*, they always said, 'We respectfully request that you return them.' The Zuni approach was forceful in its sincerity, but the religious leaders remained determined to recover what they knew belonged to them.¹³⁴

131 At 530.

132 At 533.

133 At 543

134 Ladd, separate comment to joint article at 547.

The Zuni-Smithsonian negotiations for the repatriations of the *Ahayu:da* were successful even though the two parties justified the return on different grounds. For the Smithsonian institution, the issue of title was paramount. Once it had been determined that the institutions lacked good title to the *Ahayu:da*, there was no question that it would return them to the Zunis, just as it would any other item in comparable circumstances. The Zuni religious leaders noted that the Smithsonian institution's rationale differed significantly from their own, indicating that from their perspective any object created on the basis of Zuni knowledge belong to the Zuni people, even if it had been made by non-Zunis. Although their concern for the return of the *Ahayu:da* reflected the great religious significance of these items, the justification for their return was encompassed by this broader principle, which resembles in many respects the laws governing rights to intellectual property.

The Zunis and the Smithsonian institution worked out their respective positions in terms of the cultural and legal traditions within which each operated at the time.¹³⁵

135 Joint conclusion at 549.

The Repatriation of Haida Ancestors¹³⁶

M. Simpson

HAIDA¹³⁷ REPATRIATION COMMITTEE MEMBERS have approached the process of identifying and claiming ancestral remains methodically and diplomatically but with great persistence, and have successfully negotiated the return of 466 ancestors and associated grave materials.

While the return of the ancestors was welcomed, it presented the Haida with the problem of how to deal with their return and reburial at both spiritual and ceremonial levels.

Under the direction of hereditary leaders and elders, the Haida Repatriation Committee organized spirituality workshops to consider the ceremonial process and drew upon traditional cultural practices to formulate a procedure they felt would provide a respectful mechanism for collecting, transporting and reburying the remains. For the repatriation and reburial ceremonies of the ancestors, it was felt that it would be most appropriate to use 'traditional materials and ceremonial formats that would be in harmony with the age of the remains and the forms of ceremony that would have been used in their initial burial.'¹³⁸

The remains were to be wrapped in woven cedar mats and placed in traditional kerfed (bent) wood boxes, cedar mats and button-blankets for each ancestor, a task that became the focus for collaborative community action involving Haida of all ages. Women skilled in weaving with cedar bark and spruce root made woven mats as wrappings for the remains. Young school children were given the task of making and decorating small button blankets that were used to cover each box. They cut out and applied crest symbols to a fabric backing and sewed buttons around the edges of the blanket and the crest.

As no-one on Haida Gwaii had the knowledge to make the boxes, a carver from Kasaan, a Haida community on Prince of Wales Island in southeast Alaska, was brought to Haida Gwaii to teach the technique to local carvers. Boxes in the museum collections were also studied to analyse the construction techniques. Local Haida artists Christian White and Andy Wilson started production of the first fifty or so

136 Extract from 'Indigenous Heritage and Repatriation: a Stimulus for Cultural Renewal' M. Gabriel and J. Dahl (eds) *Utimut: Past Heritage- Future Partnerships* (Eks-Skolens Trykkeri, Copenhagen, 2007) 64, 72. This article also includes a study of the effect of the return of medicine bundles to the Blackfoot Peigan and Kainai communities of southern Alberta, Canada.

137 An indigenous people of the North American West Coast. The Haida community referred to here lives in Haida Gwaii (islands of the Haida aka Queen Charlotte Islands).

138 N. Collison and V. Collison, unpublished papers *Haida Case Study* 2002.

boxes that would be required but, as the work of the repatriation committee continued, it became evident that far more boxes would be required. An apprenticeship programme was established and a number of teenage boys were selected to work with White and Wilson and learn the skills of preparing the wood, steaming it, and pegging and stitching the corners of the boxes.¹³⁹ The boxes were then painted with traditional designs by school students.

Ceremonies involving speeches, songs, dances, feasting and gift-giving were performed at each museum and again in Haida Gwaii to welcome the ancestors home and provide them with a respectful reburial. These included the renewal of traditional ceremonies and the creation of a number of new elements. The butterfly was adopted as a symbol for repatriation, reflecting the insect's symbolic meaning as a wandering spirit with nowhere to go, and has since been used on stationery and documents produced by the repatriation committee, and also on a line of clothing items that are sold for fundraising. When 160 ancestral remains were collected from the Field Museum in Chicago in October 2003, an old dance, the butterfly dance was learned for the occasion. An observer recalls that: 'The Butterfly dance was performed by two women wearing white button blankets with black butterfly crests. When the dancers used their fingertips to ruffle the edges of the blanket, the wings of the butterfly literally fluttered.'¹⁴⁰

By 2005, the Haida Repatriation Committee had repatriated the remains of 466 Haida ancestors and associated grave materials from eight museums in the United States and Canada. In Haida tradition, an initial ceremony accompanies the burial of the deceased and, at a later date, an End of Mourning ceremony is held. On 21 June 2005 the Haida held an End of Mourning ceremony to:

[...] allow the spirits of the ancestors to rest and to end the public mourning and grieving for – not only their loss of life but – how their remains were treated afterwards. We began the day with food burning to feed the ancestors, and then there was a procession to our graveyard where the grave-markers were unveiled, the memorial plaques honouring our ancestors. Later in the evening there was a feast, that's where we all shared food then there was an end of mourning ceremony with the spirit dance that officially signified that that stage is done, and the celebrations can begin.¹⁴¹

The retrieval of the remains from the museum and their reburial in Haida Gwaii became the focus for collaborative community action providing a stimulus for the production of traditional artefacts and the performance of traditional ceremonies. This resulted in an intergenerational process of teaching and learning involving Haida

139 C. White, Interview, March 2004, presentation at the Haida Repatriation Conference in Haida Gwaii, March 2004.

140 S. Price 'Two Sides of the Blade: Experiencing the repatriation of Haida ancestors' *Spruce Roots Magazine*, July 2004, 1.

141 Collison, 2005 cited n. 138 above.

of all ages from young children to elders, which contributed to the renewal of skills and knowledge associated with box-making, and with the performance of language, songs, dances and ceremonies. Nika and Vince Collison, two members of the repatriation committee, have written about the outcomes of the process in terms of cultural renewal and healing:

More and more people learn the Haida language so that we can speak to and pray for the ancestors. Elders and cultural historians teach traditional songs, dances and rituals. Many more people have begun to look towards and embrace traditions that until Repatriation began, only a handful of people participated in on a regular basis. And perhaps most important, after each ceremony, one can feel that the air has been cleared, that spirits are resting, that our ancestors are at peace, and that healing is visible on the faces of the Haida community.¹⁴²

Repatriation is a social force that can have a tangible and positive influence upon the cultural and spiritual well-being of individuals and the community as a whole. Through this process cultural preservation, which is central to museums, can take on a much more active form whereby culture is preserved, not in a frozen state in a museum but in the dynamic form of living culture. Museums have the capacity to become more actively concerned with the renewal of the cultural practices, knowledge and skills that can lead to the creation of new forms of living heritage and contribute to the social well-being and cultural healing of living cultures. While this means relinquishing control of some materials in their collections, the benefits can be great for societies suffering loss of heritage and post-colonial trauma.

142 Item cited at n. 138 above.

Human Remains

Native American Graves Protection and Repatriation Act 1990 (United States)¹⁴³

Editor's Note

THIS LEGISLATION IS DETAILED AND COMPLEX. Only selected sections and subsections have been copied here and those interested in the precise working of the Act should consult the full text.

Sec. 2. Definitions

For purposes of this Act, the term –

- (2) ‘cultural affiliation’ means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.
- (3) ‘cultural items’ means human remains and –
 - (A) ‘associated funerary objects’ which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.
 - (B) ‘unassociated funerary objects’ which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known

143 [104 STAT. 3048 Public Law 101–601 – NOV. 16, 1990] 101st Congress.

human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

- (C) 'sacred objects' which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and
 - (D) 'cultural patrimony' which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.
- (7) 'Indian tribe' means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- (9) 'Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States.
- (10) 'Native Hawaiian' means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
- (13) 'right of possession' means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 USC 1491 in which event the 'right of possession' shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

Sec. 5. Inventory for Human Remains and Associated Funerary Objects

- (a) In General – Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.
- (b) Requirements – (1) The inventories and identifications required under subsection (a) shall be –
 - (A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;
 - (C) made available both during the time they are being conducted and afterward to a review committee established under section 8.
- (2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term ‘documentation’ means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.
- (d) Notification – (1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.
- (2) The notice required by paragraph (1) shall include information –
 - (A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;
 - (B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and
 - (C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with

that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

Sec. 6. Summary for Unassociated Funerary Objects, Sacred Objects, and Cultural Patrimony

- (a) In General – Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.
- (2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

Sec. 7. Repatriation

- (A) Repatriation of Native American Human Remains and Objects Possessed or Controlled by Federal Agencies and Museums –
 - (1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.
 - (2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

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- (3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.
- (4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5, or the summary pursuant to section 6, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unas-sociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.
- (b) Scientific Study – If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.
- (c) Standard of Repatriation – If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unas-sociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

Sec. 9. Penalty

- (a) Penalty – Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offence.

Sec. 10. Grants

- (a) Indian Tribes and Native Hawaiian Organizations – The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.
- (b) Museums –The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

Sec. 12. Special Relationship between Federal Government and Indian Tribes

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

Joint Statement by Prime Minister Blair (United Kingdom) and Prime Minister Howard (Australia) on the Repatriation of Human Remains 2003¹⁴⁴

The Australian and British Governments agree to increase efforts to repatriate human remains to Australian indigenous communities. In doing this, the Governments recognize the special connection that indigenous people have with ancestral remains, particularly where there are living descendants.

The Australian Government appreciates the efforts already made by the British Government and institutions in relation to assisting the return of human remains of significance to Australian indigenous communities. We agree that the way ahead in this area is a cooperative approach between our Governments. Our Governments recognize that there is a range of significant issues to be addressed in order to facilitate the repatriation of indigenous human remains. Addressing these issues requires a coordinated long-term approach by governments involving indigenous communities and collecting institutions. Consultation will be undertaken with indigenous organizations as part of developing any new cooperative arrangements.

Significant efforts have already been undertaken by individuals and particular organizations in this area. More research is required to identify indigenous human

144 Press Release 4 July 2003.

remains held in British collections. Extensive consultation must also be undertaken to determine the relevant traditional custodians, their aspirations regarding the treatment of human remains and a means for addressing these.

The Governments agree to encourage the development of protocols for the sharing of information between British and Australian institutions and indigenous people. In this respect we welcome the initiative of the British Natural History Museum which has catalogued the 450 indigenous human remains in its collection and provided this information to the Australian Government.

We endorse the repatriation of indigenous human remains wherever possible and appropriate from both public and private collections. We note that several British institutions have already negotiated agreements with indigenous communities for the release of significant remains. In particular, Edinburgh University, following extensive consultation with the Australian Government and indigenous organizations, has recently completed repatriation requests of a large collection of remains.

Human Tissue Act 2004 (United Kingdom): Section 47

47 Power to de-accession human remains

(1) This section applies to the following bodies –

The Board of Trustees of the Armouries

The Trustees of the British Museum

The Trustees of the Imperial War Museum

The Board of Governors of the Museum of London

The Trustees of the National Maritime Museum

The Board of Trustees of the National Museums and Galleries on Merseyside

The Trustees of the Natural History Museum

The Board of Trustees of the Science Museum

The Board of Trustees of the Victoria and Albert Museum.

(2) Any body to which this section applies may transfer from their collection any human remains which they reasonably believe to be remains of a person who died less than one thousand years before the day on which this section comes into force if it appears to them to be appropriate to do so for any reason, whether or not relating to their other functions.

- (3) If, in relation to any human remains in their collection, it appears to a body to which this section applies –
- (a) that the human remains are mixed or bound up with something other than human remains, and
 - (b) that it is undesirable, or impracticable, to separate them,

the power conferred by subsection (2) includes power to transfer the thing with which the human remains are mixed or bound up.

- (4) The power conferred by subsection (2) does not affect any trust or condition subject to which a body to which this section applies holds anything in relation to which the power is exercisable.
- (5) The power conferred by subsection (2) is an additional power.

*Guidance for the Care of Human Remains in Museums (United Kingdom): Extracts*¹⁴⁵

Part 1: Legal and Ethical framework

1.2 Ethical framework

Background

These guidelines are meant as a starting point for museums. It is expected that museums will wish to develop their own ideas on ethics and how these can be used as principles to guide actual actions. However, it is hoped that consistency across the sector will be developed.

The ethical issues raised by human remains in museums are complex. Although there has been widespread debate in the UK about the issues raised by human tissue from the living and recently dead, and some consensus reached in the form of the new Human Tissue Act 2004, there has been less analysis of the issues associated with older human remains, particularly of the moral questions raised (although this is looked at in detail for Christian burials in CofE/EH).¹⁴⁶ Consensus on these issues, if it does emerge, is therefore only likely to come with time and experience. This has made the development of this ethical framework particularly challenging.

¹⁴⁵ Department of Culture Media and Sport, London, 2005) 23–29. The full text is available from the Department's website http://www.culture.gov.uk/reference_library/publications/3720.aspx

¹⁴⁶ Church of England and English Heritage (2005) *Guidance for Best Practice for Treatment of Human Remains Excavated from Christian Burial Grounds in England* (Church of England/English Heritage, no place of publication given 2005) 5. Full text available at http://www.helm.org.uk/upload/pdf/Guidance_for_best_practice_for_treatment_of_human_remains_excavated_from_Christian_burial_grounds_in_England.pdf

The ethical framework, set out below, is in two parts. The first sets out the procedural principles that should be demonstrated in handling human remains in making decisions concerning their care, or in dealing with claims. The second sets out the ethical principles that museums may use to guide and inform decision-making concerning the handling and care of human remains, and in claims relating to them.

The framework builds on the work of the DCMS 2003¹⁴⁷ report, and draws on other more recent developments, including the UNESCO draft Declaration on Universal Norms in Bioethics, the Human Tissue Act 2004 and statements in Hansard during the passage of that Act.

Consent and consultation: The Human Tissue Act makes consent the principle governing the retention and use of human tissue, and it should be noted that the Act is addressed primarily at the UK medical context. The consent regime in the Act only applies for tissue and remains up to 100 years old and the consent in question is that of a restricted list of individuals specified in the Act. For older remains, however, the principle of consent becomes more problematic for reasons that are both ethical and practical. Additionally, UK legislation does not recognize the concept of group rights; human rights are only exercisable by the individual. Against this background, this guidance adopts consultation as the principle governing the treatment and use of human remains in museums. It is important for museums to be willing to consider the views of all those with interests, but no one view will have automatic pre-eminence. Religious and other institutions may also have a particular locus in relation to older remains from burial grounds in their care.

Purpose

The procedural and ethical principles in this framework underpin the more detailed guidance in the rest of this document – setting them out here is designed to help clarify the basis on which that guidance has been developed. It is also intended to supplement that guidance by providing the tools to help:

- guide museums in good decision-making about human remains
- foster an ethical approach to the care and handling of remains
- encourage active reflection on the impacts of their decisions
- encourage good communication between museums, individuals and communities and the wider public.

147 Report of the Working Group on Human Remains, available at http://www.culture.gov.uk/reference_library/publications/4553.aspx

Procedural responsibilities

These responsibilities are meant to apply corporately, i.e. to be discharged by the museum and by all the individuals representing it.

1. Rigour – act rationally with appropriate knowledge, skill and care and justify your decisions.
2. Honesty and integrity – be worthy of trust by others; declare conflicts of interest; show honesty in communicating knowledge with all interested parties; act in a principled manner.
3. Sensitivity and cultural understanding – show sensitivity and compassion for the feelings of individuals; show understanding of different religious, spiritual and cultural perspectives.
4. Respect for persons and communities – show respect for individuals and communities; minimize any adverse affect on people and communities; respect privacy and confidentiality.
5. Responsible communication, openness and transparency – listen, inform and communicate openly and honestly.
6. Fairness – act fairly; give due weight to the interests of all parties; act consistently.

Ethical principles

These ethical principles are designed to guide museums' thinking and actions in decision-making, but cannot in themselves determine the outcome in any particular case. The principles will frequently come into conflict with each other; where they do, the museum will need to determine the appropriate balance and may need to seek expert advice.

1. Non-maleficence – doing no harm.

Non-maleficence would require you to avoid doing harm wherever possible. This could include avoiding harm to an individual, a community or the general public. For example, not taking an action that would cause distress to a particular community.

2. Respect for diversity of belief – respect for diverse religious, spiritual and cultural beliefs and attitudes to remains; tolerance

Respect for diversity of belief demonstrates humility and modesty regarding one's own opinions, and shows respect for individuals, cultures, groups and communities. The principle requires decision-makers to give consideration to the cultural and historical backgrounds, beliefs and values relevant to all parties

concerned. For example, it would require a museum to recognize and respect that a community may place a particular cultural value on human remains that is not shared by others.

4. Respect for the value of science – respect for the scientific value of human remains and for the benefits that scientific inquiry may produce for humanity.

This principle holds that individuals and communities (past, present and future) benefit both personally and indirectly, through the benefit to their loved ones, descendants and communities, from the fruits of science.

4. Solidarity – furthering humanity through cooperation and consensus in relation to human remains

The principle of solidarity recognizes that we all have a shared humanity and an interest in furthering common goals and tolerating differences that respect fundamental human rights. Mutual respect, understanding and cooperation promote solidarity by fostering goodwill and a recognition of our shared humanity. This principle emphasizes the importance of rising above our differences to find common ground, cooperation and consensus. It would be reflected, for example, by seeking to find a consensus in relation to competing claims over human remains that all parties can accept.

5. Beneficence – doing good, providing benefits to individuals, communities or the public in general

Beneficence would dictate that your actions have good outcomes wherever possible. This could include advancing knowledge that is of benefit to humanity (for example, by using human remains for scientific research) or respecting the wishes of an individual (for example, by returning the remains of their relative for burial).

Part 3: Claims for the Return of Human Remains

3.1 Introduction

‘The express recognition that the concerns of various ethnic groups, as well as those of science, are legitimate and to be respected will permit acceptable agreements to be reached and honoured’ (From the Vermillion Accord, World Archaeological Congress, 1989).

This part of the document provides a framework for handling claims for the return of human remains held in museums. It is primarily drafted in terms of claims for the return of human remains of overseas origin, as this is currently where the vast majority of such claims are being made, but in principle should be viewed as an

overarching set of guidelines for claims regardless of their origin. It should be considered in reference to the other parts of the document, particularly the legal and ethical guidance in Part 1. This guidance only deals with human remains, not with any associated objects, although it is recognized that occasionally artefacts or non-human remains are physically bound-up with remains in such a way as to make them as one. It is also the case that in some cases claims for return will include a request for all records and archives associated with remains.

It is unquestioned that human remains had in the past, and continue to have, a key role in museum research and practice. They have the potential to make major contributions to the furtherance of knowledge, something of value for all humanity.

There is also no question that some human remains in museum collections were acquired in ways that would be deemed unacceptable. In many of these cases, individuals and communities have been left deeply distressed and wish to see the return of such remains or to gain some control over their future.

Requests concerning the appropriate care or return of particular human remains should be resolved by individual museums on a case-by-case basis. This will involve the consideration of possession; the cultural and religious values of the interested individuals or communities and the strength of their relationship to the remains in question; the cultural, spiritual and religious significance of the remains; and the scientific, educational and historical importance of the material. Also to be taken into account are the quality of treatment of the remains, both now and in the past in their current location and their care if returned.

In some cases, the arguments for return will override any other consideration. In others, there will be no strong argument; for other cases, the right decision may seem less clear and be more finely balanced. This guidance aims to help museums distinguish between such claims, through an appropriate process for assessment, and to come to decisions that all sides can accept. In all instances, there will be a process for museums to go through in order to make a decision. Ultimate responsibility for the decision as to whether material should be retained or released will lie with the appropriate authorities within each museum or institution.

3.2 Background

Requests for the return of human remains

Requests should be dealt with as an open and constructive dialogue between the museum and the claimants. However, as the current guardians of the remains, the museum will have the responsibility of making the decision over their future and this will make the process one-sided. It is hoped that, through time and a continuing open

and constructive dialogue between museums and claimant groups, the process will become more equal. In the meantime museums should do everything in their power, through policies of openness, consultation and transparency of action to try and make negotiations as equitable as possible.

In some cases, if a museum authority wishes to return remains which are not deemed of particular scientific value, and a clear and uncontested group exists that is claiming them, a return can be dealt with rapidly. However, the process for return should always be clearly and openly recorded and communicated.

Initial contact from claimants is often not a request for return, but a request for information relating to whether remains exist and their condition and management. A willingness by museums to engage in a dialogue can lead to beneficial outcomes for both parties, even if no human remains exist in the museum or if no return takes place. Benefits might include sharing knowledge, good future relationships, and potential research opportunities.

Reasons for requests being made

It is accepted that members of a family or wider community might wish to exert rights as to where human remains that relate to them are located and how they are treated. This is a subject for which generalizations are almost impossible. Precedent shows that claims can come from genealogical descendants, cultural community and nations. They can be made for religious or spiritual reasons, from the desire to lay ancestors to rest on ancestral land, on the basis of the infringement of human rights, or to correct perceived past injustices. Requests might also, for a variety of reasons, come from other museums or institutions.

Context for responding to a request

The museum should prepare clear guidance for the public domain, that can be easily referred to and will explain and justify actions. This will include the criteria by which a claim will be assessed, the time span a request will take to be considered, the position of individuals within an organization who will take responsibility for decision-making and communication and who will be consulted externally. It will also state who will be responsible for bearing the museum costs of processing a claim, although this would normally be the museum. The question of costs should not prevent the speedy resolution of a claim for return, or be used as an excuse to refuse a request for return.

This guidance should be made public before any cases for return are dealt with. Museums may wish to form advisory panels of experts to provide support in dealing with claims.

3.3 Procedural guidance

Once a request has been received and is under consideration for particular remains, thought should be given to whether research, teaching or display using the remains should continue or if this should be suspended pending the resolution of the claim.

This section provides a model process for handling claims for return. It deals with the practical steps that should help ensure the process is fair and well managed (procedures 3.3.1–3.3.6). Also set out is guidance on the criteria museums may wish to consider in coming to a decision (criteria A–L).

3.3.1 Proposal

Receiving a request

It would be normal to expect a request to be received in a formal way and to be accompanied with as much supporting information as possible. A first principle for dealing with return is for museums to openly engage and enter into constructive dialogue with anyone making a claim.

Identify Post-Holder

A post-holder should be identified within the museum as the person who will take responsibility for dealing with the request and serve as the point of contact for the claimants. This person should have appropriate skills and training for the role.

Acknowledge

The claim should be formally acknowledged and the process for handling it described to the claimant.

Clarify Nature and Scope of Request

In order to consider the claim, the museum will need to clarify any issues that are pertinent to its decision and not apparent from the original request. This may include:

- the identity of the claimant(s) and any intermediary/representative
- the connection between the claimant(s) and the deceased and the basis for the claim
- the specific remains being claimed (the claimant may need the museum's assistance in identifying these)
- the claimant(s) wishes for the future of the remains
- any information the claimant has regarding other potential claimants.

Consultation and communication with the claimant and others may be necessary at this stage to clarify some or all of the issues above. Expert advice, including from the national government of the country from which the claimant originates, may also be necessary.

3.3.2 Evidence gathering

The next stage in the process is to gather together a dossier or report. This will draw upon the evidence in the original claim, and would normally involve the gathering of new evidence concerning the request. It is suggested that the following criteria could be used as headings to prepare the report and consider evidence:

A. The status of those making the request and continuity with remains

Genealogical Descendants: If individuals can demonstrate a direct and close genealogical link to the human remains, their wishes would generally be given very strong weight. However, consideration should be given as to whether they are the only people in this category and if they are not, whether there was any risk of harm to others in this category if the request being made were granted.

There may be exceptional cases where remains would not be returned to genealogical descendants. However, it is expected that in the majority of cases they would be, or that consent would be required from the descendants for any further use by a museum.

In practice, individuals who died more than 100 years ago may have many descendants from more than one community, so genealogical descent alone may not be the only criteria considered. In such cases, the museum will need to assess the range of potential claimants and gauge how the interests of these individuals might be balanced with any other relevant considerations. The ethical principles will help to guide museums through these cases. The principles of avoiding harm (to the particular individuals concerned) and solidarity (seeking cooperation and consensus) are likely to be particularly important here.

Cultural community of origin: The concept of a community can be a difficult one to define. The assumption is that human society is characterized by the creation of communities that individuals feel a part of and which take on a collective set of values, often identified by particular cultural behaviour. It is often far less easy to identify which particular cultural community, or part of a community, has the greatest authority in any particular instance.

When considering claims based on cultural links, museums will need to take care to verify that the group they are dealing with is the only potential claimant, or

that, if it is not, the other potential claimants support them. For overseas claims, where there may be doubt on this, advice should generally be sought from the national government concerned. It might also be normal to look for precedents for how a community has acted in the past.

For a community to be recognized and their claim considered it would generally be expected that continuity of belief, customs or language could be demonstrated between the claimants and the community from which the remains originate.

Cultures evolve and change through time but these changes can normally be recorded and demonstrated. The relationship between the location of the claimant community and the origin of the remains might also be a consideration.

It would be unusual to accept a claim for return from a group who did not either occupy the land from which the remains came, practice the same religious beliefs, share the same culture or language, or could not demonstrate why this was no longer the case.

A museum will need to be assured that a sufficient link does exist and that the group they are dealing with has sufficient authority to make a community claim.

A clear demonstration of a continuity of association between the claimant and the remains will be of great importance in dealing with any claim.

The Country of Origin: In some cases a nation may make a claim for remains, either on behalf of a particular community or for all of its nationals. Such a claim would be considered along similar lines to claims based on cultural community.

B. The cultural, spiritual and religious significance of the remains

Where claims are made it would be expected, but not essential, for the claimant group to show that human remains and their treatment have a cultural, religious or spiritual significance to their community.

The claim may be being made purely on cultural, spiritual or religious grounds. The claimant group may show that remains were removed without the permission of their community, or at least outside its laws and normal practices. Further the claimant may show that the correct 'laying to rest' of remains is of religious or spiritual importance.

The remains might also be of a particular cultural significance to a community, for example as being from an important family or representing war dead, or victims of a particular event, such as a massacre.

Demonstration through some or all of the ways above, of strong continuous cultural, spiritual or religious significance of particular human remains, will add weight

to a claim. This is particularly so in cases where there is clearly a risk of harm to the individuals or communities concerned, for example, where the continued holding of the remains by a museum perpetuates a strong feeling of grief amongst claimants.

C. The age of remains

The vast majority of claims that have been made for return have concerned the remains of overseas people who died within the last 100–300 years. This corresponds most closely to the period when expansion took place by European powers with its subsequent effect on indigenous peoples – a period that does not go back further than 500 years. It is also the period in which it is more likely for a close genealogical link to be made between the living and the dead.

Archaeological and historical study has shown that it is very difficult to demonstrate clear genealogical, cultural or ethnic continuity far into the past, although there are exceptions to this. For these reasons it is considered that claims are unlikely to be successful for any remains over 300 years old, and are unlikely to be considered for remains over 500 years old, except where a very close and continuous geographical, religious, spiritual and cultural link can be demonstrated. Some cultures put more emphasis on association with land that has a cultural, spiritual or religious importance and less on relative age. In such cases, the chronological age of the remains may be less significant.

D. How the remains were originally removed and acquired

There are many cases of human remains being removed and studied without dispute. There are other instances, particularly during the nineteenth and early twentieth century, of remains being removed against the will of individuals, families and communities.

E. The status of the remains within the museum/legal status of institution

The museum should be sure of the exact legal status of the remains within their collections and that they have the right to make decisions over their fate.

The museum should identify the remains being claimed and then ascertain why they are being held and how they have been, and are likely to be, used:

1. Are the remains fully documented and the information about them publicly available?
2. Do they have continued, reasonably foreseeable, research potential?
3. Do they form part of a documented access strategy?

4. Are they curated according to the very highest standards?
5. Are they curated in such a way as their long-term preservation is assured?
6. Can the long-term security of the remains be guaranteed within the museum?

F. The scientific, educational and historical value of the remains to the museum and the public

Many human remains have undoubted potential to further the knowledge and understanding of humanity through research, study and display. In considering a request for return of human remains, a museum should carefully assess their value and reasonably foreseeable potential for research, teaching and display and should ensure that specialists with appropriate knowledge and experience have assessed this.

If the remains do have value for research, teaching and display, a museum should decide whether this can override other factors, particularly such as the wishes and feelings of genealogical descendants or cultural communities.

G. How the remains have been used in the past

In considering the future of remains, consideration may be given to what use they had been put in the past.

Evidence of extensive previous research use would normally support an argument for scientific value.

H. The future of the remains if returned

The care of remains, if returned, also requires consideration. Some requests might require reburial or removal from the public arena, whereas some claimants may be prepared to keep the remains in such a way that future research, teaching or even display is possible.¹⁴⁸

I. Records of the remains

Whether a record of the remains exists, or can be made before return, might be a factor in making a decision.

¹⁴⁸ See 'Restitution and Repatriation: Guidelines for Good Practice' UK Museums and Galleries Commission 2000 in Part 2 which foresees the possible burial or ritual destruction of such remains or material after return. See also the discussion in the case of the Remains of Seventeen Tasmanian Aboriginals in Part 5.

J. Other options

There may be more than two options when a claim is made. Museums should explore further alternatives if this helps in reaching a consensus. For example, it may be possible that remains would stay in the museum, but a claimant group would gain a level of control over their future use.

K. Policy of the country of origin

Some nation States have developed domestic legislation or policy to govern claims for the return of remains. Museums would normally expect to be aware of any policies of the national government from which a claim originated. It is worth considering how a claim would be resolved if made in the country from which the claimants originate, as well as the expectations of the claimants based on the practice in their country of origin.

L. Precedent

Claims will generally be dealt with on a case-by-case basis. However, it would be expected that a museum would review past cases of claims made to it, or claims of a similar kind made to other museums and their outcomes, as well as giving some thought to the impact of any decision on future claims.

3.3.3 Synthesis and analysis

Once all this evidence has been gathered, the museum will prepare a synthesis of its findings and consider the options and actions available. A full, open and ongoing, dialogue should take place with the claimants, using the relevant criteria and evidence gathered.

This is the critical stage in the process. The museum will weigh up the evidence gathered and use ethical and legal guidance to consider the different criteria. The final decision made will result from synthesis and analysis of the evidence gathered. There should be an emphasis on transparency in undertaking such analysis.

3.3.4 Advice

An institution may wish to take external expert advice that it does not hold in-house. This may come from a pre-arranged advisory panel or need to be specifically commissioned for a particular case.

3.3.5 Decide case

A full written report of all the facts, factors and evidence should be prepared and presented to the governing body to form the basis of their decision.

Decisions made on a claim will be reached by weighing up the criteria outlined above. The decision will lie with the governing body of the museum, not with any one individual.

3.3.6 Action

Once the decision has been made, the reasons for it should be documented and archived along with the preparatory report and all correspondence related to the case.

The museum's governing body should formally ratify the decision and the process should be fully recorded and archived.

Claimants should be informed of the decision and its reasons made clear to them. They should be allowed time to respond. It is possible that further discussions would continue. Cases should not be considered in terms of either/or, but in finding a consensus as to the most appropriate future for the remains. If a request for return is declined this should not preclude future dialogue or communication between parties.

A museum may have put a process in place for parties to appeal against a decision. If so this will need to be publicly stated and advertised before any proceedings begin. Any process would ideally be undertaken by people different from, and not directly associated with, those involved in the first decision.

The museum should also put in place a practical procedure for implementing a decision to cover such items as timescale and costs. Museums should ensure they learn from the process of dealing with claims and build any lessons into their systems for the future.

The Return of Inakayal to Patagonia¹⁴⁹

M.L. Endere

Inakayal: the first case of return in Argentina (1989-1994)

THE CHIEF INAKAYAL (in Mapuche¹⁵⁰ ‘who follows other off-spring’) was born in Tecka, Chubut province, in c.1833.¹⁵¹ He controlled important lands in the Patagonia region, where he used to give hospitality to famous naturalists and travellers such as Guillermo Cox, George Muster and Dr. Francisco Moreno. In October 1884, when ‘the conquest of the desert’ was over, chiefs Inakayal and Foyel went to negotiate with Commander Lasciar but they and their people were taken prisoner and their camps destroyed. They were transferred to the prison of El Tigre Island, in Buenos Aires province. After eighteen months, Moreno, Director of La Plata Museum, obtained permission from the government to give accommodation to Inakayal, Foyel and their families and servants in the museum. Some of them started to work as dependants¹⁵² although Inakayal never accepted his new status.

While in the museum, Inakayal was studied by Ten Kate who described his personality as being always ‘reserved, distrustful and resentful.’ According to this researcher, Inakayal was ‘unable to show his feelings and thoughts unless he was drunk,’ and was ‘dirty and without care of himself.’¹⁵³ Ten Kate¹⁵⁴ also remarked how ‘when he became furious he used to call the Argentines ‘gringos’ (foreigners)’ and wrote ‘once he said “I chief, son of this land, white thieves killed my brothers, stole my horses and the land where I was born, they made me prisoner and then unhappy.” In this moment his face showed the greatest sadness.’

Moreno gained permission from the government for Foyel to return to Patagonia and be given land. But Inakayal was not allowed to return home and died in La Plata Museum on 24 September, 1888. His lands were later sold by the government. Clemente Onelli described how Inakayal sensed his death beforehand. According to Onelli,¹⁵⁵ Inakayal, helped by two of his men, went out of the front

149 Excerpts from ‘The Reburial Issue in Argentina: A Growing Conflict’ in C. Ffórdé, J. Hubert and P. Turnbull, (eds) *The Dead and their Possessions: Repatriation in Principle, Policy and Practice* (Routledge, London, 2002) 266, 271.

150 Editor’s note: Mapuche is an Araucanian language spoken by more than 500,000 indigenous people in Chile and Argentina.

151 M. Vignati ‘Iconografía Aborigen. Los caciques Saihueque, Inakayal, Foyel y sus allegados’ (Aboriginal iconography. Chiefs Saihueque, Inakayal, Foyel and their Relatives) 2 *Revista del Museo de La Plata* (1942) 13.

152 G. Politis ‘El Regreso de Inakayal’ (The Return of Inakayal) 3 *Museo* (1994) 1, 46–48.

153 H. Ten Kate ‘Matériaux pour servir à l’anthropologie des indiens de la République Argentine’ (Useful Sources for the Anthropology of the Indians in the Republic of Argentina) 12 *Revista del Museo de La Plata* (1904) 43.

154 *Ibid.* 11.

155 C. Onelli ‘La Evolución en el patriotismo. El Libro (The Development of Patriotism) *Organo de la Asociación Nacional del Profesorado* III (1908) 551.

doors of the museum and performed his last ritual, ‘he bared his golden torso, and waved his arm towards the sun and then towards the south and he spoke unknown words.’ That night he died. Vignati¹⁵⁶ estimated he was around 55 years old, although Onelli¹⁵⁷ remarked that ‘he looked like an ancient man, who seldom abandoned his chair.’ He was not buried. His bones, brain, scalp and death mask became part of the museum’s collection.¹⁵⁸

The Claiming of Inakayal

The return of Inakayal’s remains, as well as the bodies of other Patagonian chiefs housed by La Plata Museum was a desire of many indigenous organizations and leaders (e.g. the Centro Indígena Mapuche-Tehuelche). In 1990 the National Senator Hipólito Solari Yrigoyen presented draft legislation requesting the return of Inakayal’s remains to his homeland, Tecka, with the support of a considerable number of indigenous organizations from around Argentina. However, while agreeing with the draft legislation, some of these organizations did not share the reasons given by Senator Yrigoyen to justify it.

In his draft proposal, Senator Yrigoyen had listed the following justifications for the new legislation. That Inakayal had helped in the exploration of Patagonia; protected scientific travellers such as Musters in 1869, Guerrico in 1872 and Moreno in 1875, when the latter was persecuted by chief Saihueque; had the Argentine flag in his camp, as recognition of the national government; was in favour of progress because he taught his people how to farm; was unfairly taken prisoner; and that it was a matter of justice and respect for human dignity to recognize the right of indigenous communities to keep their lands and the human remains of their ancestors.

Various indigenous organizations disagreed with the Senator’s justifications, noting instead that Inakayal’s remains, along with those of other chiefs whose territory was invaded and dispossessed, should be buried in their own land – including those of chief Saihueque (Asociación Indoamericana of Argentina (Aindara), the Centro Cultural Tinkunaku, and the Movimiento Nuestras Raíces); that indigenous nations predated the Argentinian State and that Argentinian history began 20,000 years ago, not in 1810 with emancipation from Spain (Centro Cultural Tinkunaku); that Inakayal had never resigned his right to the land in spite of flying the Argentine flag (Centro Cultural Tinkunaku); that the colours of the Argentinian flag are also the colours of the old Mapuche flag (Gran Parlamento Indígena Nacional); that it was a matter of

156 N. 151 above 23.

157 N. 155 above 571.

158 Politis, n. 123 above at 46; see also R. Lehmann-Nitsche *Catálogo de la Sección Antropológica del Museo de La Plata* (Coni, Buenos Aires, 1910) 85.

human rights to return all indigenous human remains (Aindara, Movimiento Nuestras Raíces); that Inakayal should be considered a national hero (Aindara).¹⁵⁹

In May 1991, the Senator's draft legislation became law N° 23,940 after being approved by the National Congress. According to its terms, the national government should transfer the mortal remains of Inakayal from The La Plata Museum to the town of Tecka where they should be buried after receiving military honours. However, the necessary decree (N° 2391) was not signed until November 1993. Several claims made by the Senator and Congress to the Home Office, as well as a lawsuit filed for failure to comply with Law 23,940, were necessary to force the governmental authorities to respect the decision of Congress. Three months before the decree was passed, the Superior Council of La Plata University had unanimously approved the restitution of the mortal remains of Inakayal, changing its prior criteria.¹⁶⁰ The Director of La Plata Museum declared that 'the Museum had refused the returning of Inakayal in the past because there was no guarantee of the destination of his remains.'¹⁶¹ It was Senator Solari Yrigoyen's view that the La Plata University authorities 'were forced to change their mind because they became conscious of their legal responsibility.'¹⁶²

The Return to Tecka

On April 19, 1994, 'The Day of The Aborigine,' the remains of Inakayal were returned to his homeland in a National Air Force aeroplane, accompanied by national and provincial authorities as well as Dr. Gustavo Politis of the La Plata Museum. Before leaving La Plata the remains of Inakayal were delivered by the museum authorities in an official commemoration.

At the Esquel Airport, Inakayal received military honours from the Argentine army, the same army that had deceived and captured Inakayal a century before. However, this was welcomed by the indigenous people as 'it meant that his hierarchy of chief was finally recognized' (Rosa Chiquichano).¹⁶³

The remains of Inakayal were carried by indigenous descendants, while the Machis (indigenous women with particular religious roles) started the funerary rituals called *rogativas*. Then the procession went to the town of Tecka. From there, the urn was carried by foot to the mausoleum, while seeds of wheat and water were thrown

159 Letters sent to Senator Solari Yrigoyen by Gran Parlamento Indígena Nacional, 01/06/90; Aindara –Asociación Indoamericana of Argentina, 15/06/90; Centro Cultural Tinkunaku, 26/05/90 and Movimiento Nuestras Raíces, 03/07/90, (copies provided by the addressee).

160 See L. Miotti 'Inakayal. Un largo camino a Tecka' (Inakayal. A long road to Tecka) *Boletín de la Secretaría de Extensión Universitaria* (UNLP, 1994) 2.

161 Newspaper *Clarín*, 16 April 1994.

162 S. Yrigoyen, pers. comm.

163 Rosa Chiquichano is the great-granddaughter of Nahuelquir Chiquichano, one of the last Tehuelche chiefs. She is studying law and has participated in many indigenous organizations.



Indigenous descendants of the Patagonian chief Inakayal, who died in 1888 at La Plata Museum in Argentina, carry his remains during their return to his homeland for reburial in 1994. The Argentine National Army accorded him military honours.
© Courtesy of Dr. Gustavo Politis

as part of the mortuary ritual. Each stage of the ceremony had been previously agreed upon with the indigenous people. The remains of Inakayal were deposited in the mausoleum, the Argentine flag was placed over the urn and it was covered in stones in the style of an indigenous *chenque* (Araucanian tomb).

The descendants did not reject the national symbol of the Argentine flag. On the contrary, it was explained that,¹⁶⁴

part of the honour to a chief is to be buried with the Argentine flag. This flag is something very significant for our community, it symbolizes the land, it means this land. We are the real Argentine people, because we are the descendants of those who were related to this territory.¹⁶⁵

The entire ceremony was followed by a great number of indigenous descendants. The local authorities estimated that there were over 2,500 people at Esquel airport¹⁶⁶ and many of these accompanied the procession by horse up to Tecka. Each school-hostel of the province that had indigenous pupils sent a delegation to Tecka.

The indigenous descendant Casiano Calauquir, explained the importance of the return of Inakayal and their feelings that day: ‘we were very happy. The chief

164 Osorio Pisco, pers. comm.

165 Rosa Chiquichano, pers. comm.

166 Osorio Pisco, Secretary of Government of Tecka, pers. comm.

Inakayal was highly respected. Never before had so many indigenous people come together as when his remains were returned.¹⁶⁷ 'For the indigenous people it was as if Inakayal had died this same day, they were feeling the same emotion.'

The return of Inakayal was widely covered by the national press. The main newspapers¹⁶⁸ presented the news as a historic reparation for the unfair treatment given to Inakayal in the past. The local paper of La Plata also focused on the debate that Inakayal's case produced in the La Plata Museum alongside the opinion of the local people. Some scientists were worried about the loss of 'valuable pieces' from the museum, and the damage to the cultural and scientific heritage that these kinds of claims might produce. The people surveyed in the streets held the opposite view and considered that the remains of the indigenous chiefs should be returned to their descendants.¹⁶⁹

After the Return of Inakayal

For the local indigenous people the mausoleum is considered a sacred place, where they go to leave a stone or wild flowers. 'Each time I pass by the place, I leave a stone, as a sign of respect to the chief.'¹⁷⁰

The indigenous people of Colonia de Quichaura, 70 km from Tecka, remarked that 'the return of Inakayal meant that the colony started to be taken into account ... since he came everything became better.'¹⁷¹ During interviews carried out by the author in July 1998, members of the local community remarked on the importance of the rituals made during Inakayal's funeral. The number of indigenous people who participated in the 'camaruco' celebration¹⁷² were not only demonstrating to the authorities the indigenous presence in the region, but also reinforcing their own traditions.

Casiano Calauquir, an old man from the community, noted:

we should perform a second 'camaruco' to Inakayal, we can do it whenever we want. Today the people are daring to make 'camarucos' but before (during the military government) they were prohibited ... we had to ask for permission from the Gendarmería.¹⁷³

167 pers. comm.

168 E.g. *Clarín*, *La Nación*, 12.

169 Newspaper *El Día*, 15 April 1994.

170 Rosa Chiquichano, pers. comm. The English traveller J. Musters (1871) *Vida entre los Patagones* (Solar Hachette, Buenos Aires, 1979) 254 described the same tradition among the Tehuelches in 1869. He remarked that they used to add a stone when they passed near a tomb of a hero or a distinguished chief closely related with the hierarchy of the person.

171 Dalmacio Catrilo, President, pers. comm.

172 See J. Radovich and A. Balazote 'El pueblo Mapuche en la actualidad' (The Mapuche People in the Present), in A. Balazote and J. Radovich (eds) 'La Problemática Indígena' *Estudios Antropológicos sobre Pueblos Indígenas in Argentina* (Centro Editor de América Latina, 1992) 159, 177.

173 Casiano Calauquir, pers. comm. A 'camaruco' is an important traditional ceremony among the Mapuche-Tehuelche people.

Rosa Chiquichano considered that:

the return of Inakayal was an acknowledgement of his personality and an act of justice, although, unfortunately, it is an isolated case. The indigenous people do not know of the existence of the human remains of other chiefs in museums. Our parents did not tell us many things, they did not teach us the traditions as a way to protect us against discrimination.¹⁷⁴

The Return of Saartjie Baartman to South Africa¹⁷⁵

SAARTJIE BAARTMAN was born in South Africa in 1789, a woman of Khoisan ('Hottentot') origin. These people were speakers of a complex 'click' language, disparaged by early European explorers as 'Hottentot,' a primitive form of communication. They were known for their small stature, the average height of an adult being about 1.5 m. Captured during a raid in 1807 in which her remaining family was killed, she was taken to Capetown and became a servant. In 1810, then about 20 years old, she was smuggled aboard ship and taken to London, where she was exhibited as the 'Hottentot Venus,' a kind of curiosity. Saartjie Baartman's pretty face with its high cheekbones, typical tiny stature (130.8 cms, 4 feet 6½ inches), solid frame and protruding buttocks attracted interest. In September 1810 scientists, naturalists and fashionable members of high society were offered a private 'viewing' and in October she began public performances at which she danced, sang and played the ramkie, an African musical instrument somewhat like a guitar.

Despite the efforts of anti-slavery adherents to free her from this life of exhibition and performance through litigation, the court held that she was apparently consenting and the lawsuit failed. Regardless of promises and a retrospective contract that she would return to Africa within six years with her earnings, her manager absconded and returned to Africa, apparently with the takings.

In 1814 she was taken by her new manager to Paris where the same style of life was pursued. Her conditions became very much worse (at one stage up to twelve hours per day performance) but still relatively successful, until she suffered several serious illnesses. The *Musée de l'histoire naturel* (Museum of Natural History) took a particular interest in her, wishing to investigate possible physical anomalies reputed to be among Khoisan women. They arranged for her to attend for three days

¹⁷⁴ Rosa Chiquichano, pers. comm.

¹⁷⁵ Summary by Editor. Sources: Extract from the Report of the Working Group on n Human Remains, UK Department of Culture Media and Sport 2003, para. 217, available from DCMS Website: www.dcms/culture/gov/uk consulted 2 April 2008; R. Holmes, *The Hottentot Venus: the Life and Death of Saartjie Baartman* (Bloomsbury, London, 2007).

‘examination.’ Despite her protests she was used as a model and was painted virtually nude by several scientists.

On her death in 1815, the leading scientists of the *Musée de l’histoire naturel* arranged to receive her body, which was dissected, and the body parts preserved. Some of these were exhibited in the Museum for over a century. They were retired from display during the 1970s.

In 1994 South Africa achieved its transition from the apartheid regime to democracy. The same year the president of South Africa, Nelson Mandela raised the question of return of her remains with the French President M. Mitterrand during his State visit to Africa. There was considerable controversy aroused by this request.

However in March 2002, legislation in France directed the release of the remains of Saartjie Baartman from the Museum of Natural History and their return to South Africa. The enactment is a rare example of a cross-border return mandated by statute. It concerns a single and identified individual who was alive when she left her land of origin and who died in poverty and degradation overseas.

Act relating to the return by France of the remains of Saartjie Baartman to South Africa. This Act will enter into force on 7 March 2002.

As from the date of entry into force of this Act, the surviving remains of the person known as Saartjie Baartman will cease to form part of the public collections of the National Museum of Natural History. The administrative authority has a time limit of two months, starting from the date of entry into force, within which to deliver the remains to the Republic of South Africa.¹⁷⁶

Saartjie Baartman was buried after a Khoisan ritual cleansing and dressing and in the area from which she came in a ceremony seen to be of national significance.

176 Editor’s note: Legislation translated from the French by the United Kingdom Department of Culture Media and Sport.

The Tattooed Maori Head (*toi moko*) in the City of Rouen Museum

IN OCTOBER 2007, the mayor of the French city of Rouen agreed to return to New Zealand a preserved tattooed head (*toi moko*) of a Maori warrior. The head had been given by an individual, in circumstances not yet clarified, to Rouen's Museum of Natural History, Ethnography and Prehistory of the city in 1875.

A *toi moko* had been offered at auction in London in 1988 and was returned after successful legal action by the Chief of a Maori tribe and subsequent negotiation.¹⁷⁷ The Museum of New Zealand (Te Papa Tongarewa) has a programme of repatriation for the remains of Maori overseas and has succeeded in retrieving one from the National Museum of Ethnography in Leiden in the Netherlands in 2005, nine from the University of Aberdeen and three from Glasgow Museums (both returns from Scotland in 2007). Since 2003 there have been altogether thirty-one returns of Maori remains to New Zealand.

Just before the planned handover ceremony in Rouen, the French Minister for Culture, Christine Albanel, suspended the return as a breach of administrative process and laws on national heritage on the basis that the collection of the Rouen museum, like those of all public museums in France, was protected by specific laws designed to prevent the dispersal of the national heritage. She directed the prefect of Rouen, the local representative of the central government, to file suit at the Rouen administrative court to stop the proceedings.

On 27 December 2007 the Administrative Tribunal of Rouen held that the provision of the French Civil Code (Article 16(1)) that 'the human body, its elements and its products, cannot be the objet of proprietary rights,' a provision relied on by the Rouen Municipal Council in passing its Resolution for repatriation of the *toi moko*, was not to be interpreted in such a way as to negate the provisions of the Heritage Code 2002 (reflecting earlier legislation) that the collections of French Museums are inalienable. Consequently it annulled the Council's Resolution and the physical return to Te papa.¹⁷⁸

The City of Rouen has appealed against this decision.

177 P.J. O'Keefe 'Maoris Claim Head' 1 *International Journal of Cultural Property* (1992) 393.

178 A full text in English of this decision can be found at M. Bel, M. Berger and R.K. Paterson, 'Case Note, Administrative Tribunal of Rouen, Decision No. 702737, 27 December 2007 (Maori Head case)' 15 *International Journal of Cultural Property* (2008) 223.

International Symposium ‘From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums’ 22–23 February 2008: Summary¹⁷⁹

AS A RESULT OF THE CONTROVERSY emerging from the case of the Maori tattooed head in Rouen, an International Seminar was held at the *Musée du quai Branly* from 22 to 23 February 2008. The meeting brought together experts from fifteen countries and over diverse disciplines: history, politics, law, museology, sociology, anthropology, archaeology, medicine and science as well as representatives of the Executive and Parliamentary arms of French government.

The summary of discussion below paraphrases some of the points made during the discussion. As can be seen, the summary echoes many and divergent voices. It cannot do justice to the richness of all the discussion, the significance of the examples given and, above all, to the clarifications, definitions and nuances which refine the debate. Only consultation of the full text can do so. It is presently available on the internet and papers issuing from the proceedings will be published by Ghrevida in 2009.

Opening the conference the Minister for Culture, Mme Christine Albanel, made reference to the case of the tattooed Maori head and the difficulties the case had raised.

The first round table focused on the issue of repatriating human remains: the reasons, the persons affected and the conditions applied to such repatriation. Some governments, such as Australia and New Zealand, have active programmes for repatriation of human remains of indigenous peoples to those countries, following on decades of work by their museums. There are ethical pressures of widely accepted human rights thinking, or simply of fundamental decency, or the logic of decolonization. There are arguments for retention by scientists, for the tracing of human history and medical research – but if this is so, how is it that vast amounts of human remains have been simply stored, not used and very often not even inventoried? The continuing influence of the ancient dead in some contemporary cultures, the need for communication and for the sharing of control, the responsibility of scientists and the responsibility of living indigenous persons to the dead to seek out, bring home and provide for their ultimate resting-place, and the difficulty of some museums in dealing with these claims were all discussed.

‘Is there any place today for human remains inside museums?’ was the question addressed by the second round table. What is their function in these collections? The

179 http://www.quaibrany.fr/fileadmin/user_upload/pdf/Original_Version_Symposium_Human_Remains.pdf. Summary prepared by the Editor.

great European museums evolved from the movement of the European Enlightenment – the idea of pursuing knowledge without limits, particularly those imposed by the Church, thus enabling research into human bodies, among many other things. However, Continental museums, whose collections for the most part were based on royal assemblages and became State property, differed from the British Museum where the collection was to be held for ‘public benefit and utility’ and allowed the trustees of the museum to exercise judgment. But what is the ‘public interest’ and who is the ‘public’? Human remains and associated artefacts document human behaviour, recalling that some artefacts incorporate parts of the body such as teeth or bone. Where restitution is followed by destruction, the decision cannot be retracted. The evidence of how a society functioned thousands of years ago may depend entirely on the skeletal remains and the kind of questions that people ask of them at different times. Yet for some indigenous people the modelled remains of persons remain personages and are the subject of a continuing tradition of worship.

Display raises different questions to storing in reserves; exhibition should accord with the wishes of the source community. One participant recalled the origins of the museums of ethnology in the work of doctors concerned with the origins of races. In their time they raised ethical issues as to consent and used political arguments to support their case, but a lot of documentation has been lost and inventorization is a priority. Most remains were collected in colonial times – should we continue to respect the scientific views of those times? The collections were made in a certain frame of mind of that time; we are now in the post-colonial frame of mind and in fifty years time there will be another. Skeleton collections provide invaluable comparative information, but they are quickly collected and then become a burden and it is not clear what to keep for the future. Remains give evidence of populations, morphology, anatomy and today also internal information by x-ray, scans, DNA and future, yet unknown, techniques will tell us even more. Certain exhibitions of the nineteenth century were really ‘human zoos’ designed to show the inferiority of the colonized: today we should construct museums which are dialogues between living cultures. Restitution was said to be often the hypocritical result of a bad conscience of colonial exploitation: it does not stretch to the return of the land and its resources.

While some restitutions should be made, there should be a cut-off date beyond which remains no longer concern a present population, but concern all humanity. Decisions to return have to be made jointly. Restitution subject to conditions which do not allow for traditional use is supremely frustrating for the recipients. Sacred objects incorporating human remains must not be sold and are kept as part of the living tradition of a community, so they should be returned, but the records relating to them must be kept for the museum as part of general knowledge. A distinction was made between a skeleton, which is an abstraction, and a face with flesh, which remains a person. There is a fundamental contradiction between the European idea

that knowledge is universal and the view that it should be restricted to certain groups. Perhaps there should be a collection managed by the United Nations or UNESCO where knowledge of the human being would be available to all, not dispersed among individual communities. Collected with a scientific purpose, such collections also show the brotherhood of humans, their evolution and their shared heritage, so they also have a moral teaching against racism.

The third round table looked into the applicable ethics and law. Changing attitudes to the human body mean that national law may be outdated and inappropriate for organ donation, burial of foetuses, autopsies, biopiracy and the status of human remains as ancestors or sacred. The body may be regarded as an individual's own property, or as the individual self. Attitudes to the body differ greatly and respect for the dead also: such as disposal by burial, cremation or other rituals altogether. Bodies are often disposed of in two stages: a funeral ritual and a later deposit which may not show respect for the remains – does the museum fit into this category, along with ossuaries and the clearing and reuse of cemeteries? Texts and judicial decisions in international law were discussed along with French national law.¹⁸⁰ The advantage and effects of specific legislation on repatriation of human remains, as in the case of Saartjie Baartman, were also considered. Another point made was the need to distinguish law intended to apply to living or newly dead human beings as opposed to human remains, body parts or religious relics. The question was posed whether it was appropriate to enter human remains into collections where they become inalienable.¹⁸¹ The ICOM Code of Ethics was discussed and the likely affront to human dignity by the exhibition of human remains. Important solutions to restitution claims are negotiation, mediation and numerous other non-juristic solutions. Non-legal professional standards can evolve much more quickly than law.

The political context of museums was discussed and the role of the museum as eternal rather than swayed by changing tastes and mores, but it may be important for European museums to contribute to the recognition of indigenous peoples. Terms such as 'eternal' and 'universal' have a quasi-religious tone inappropriate for inter-cultural relations. Cultural interests co-exist with scientific interests. There is also diversity of views within all communities, including indigenous ones.

In the final round table the question posed was how to reach mutual understanding: all are working, in one way or another, for cultural pluralism and a dialogue between cultures and should concentrate on commonalities, not confrontations. There are two aspects of international law and international relations to consider: the heritage

180 On French national law see the paper of Marie Cornu in Part 4.

181 The French Minister for Culture recently accepted the Recommendations of a Report on alienability (*Reflexion sur la Possibilité pour les opérateurs publics d'aliéner des oeuvres de leurs collections*) 20 January 2008 by Jacques Rigaud which recommended maintenance of this rule. The text of the Report can be found at <http://www.culture.gouv.fr/culture/actualites/conferen/albanel/raprigaud08.pdf> accessed 15 September 2008.

of indigenous peoples and the protection of the cultural heritage. Are 'human remains' included among the international treaties which might apply? Then there is soft law, such as the United Nations Declaration on the Rights of Indigenous Peoples 2007¹⁸² and the ILA Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material 2006.¹⁸³ One view was that within the international community there is no unified approach and it would be difficult to draft an international treaty on the subject. Therefore mediation is preferable to legal processes. Another view expressed was that the ICOM Code is very widely regarded as obligatory and could be the basis for an international Convention. The French national museums are not owners of their collections – the owner is the State – but are *affectataires* (controlling authorities) and the State is the negotiator at the international level. Te Papa Museum has moved from a position of 'ownership' to mutual trust – a new international ideology. Its process consists of research, asserting not a 'claim' but an interest, mutual respect of different approaches, attitudes, priorities and legal frameworks of museums, spiritual acknowledgment, facilitating a journey resulting in sincerity and gratitude of the recipients and the responsibility of museums. The *Musée de L'Homme's* whole history has been to reject any moral or philosophical framework and insist on the place of man in nature. The Native American Graves Protection and Repatriation Act (NAGPRA) has facilitated a process of consultation greatly benefiting museums and Native American tribes. Museums need to reevaluate inventories of human remains in view of updated standards of appropriateness.

Who is the proper representative of an indigenous people? Various criteria for return were suggested: the fundamental significance of the object for its community or origin, its illegal acquisition, unequal negotiations, insufficient understanding of the transaction, and non-destruction after restitution. Restitution of human remains is part of the general issue of collaboration, circulation of exhibitions, exchanges and access of communities to their cultural heritage. One expert felt an expectation that indigenous people will at some stage come to an understanding of the value of science, even if they do not now, rather than that the scientists will come to an understanding of the indigenous perspective. If there is to be negotiation, then the view that scientific rigour lies above all will have to be dispensed with. Another expert insisted on the French social contract that religion and science be kept absolutely separate.

Closing the conference, the Director of the *Musées de France* said she was proposing to the Minister for Culture the establishment of a permanent working group to consider the development of ways of mediation and to consider questions of conservation and exhibition of human remains in the collections. Each request for restitution should be examined with the best available knowledge to establish how it came to be taken into the collection, taking into account current ethics and the history and information relating to it.

182 Certain excerpts will be found in the section on 'sacred objects' above.

183 Text available in Part 1.

Archives

From Nazi Plunder to Russian Restitution¹⁸⁴

P. K. Grimsted

The International Framework for the Restitution of Archives

THE INTERNATIONAL LEGAL BASIS and precedents for the restitution of displaced unique official records of State and private agencies are even stronger than is the case for art. Reinforcing the Hague Conventions of 1907 and 1954, in 1976, UNESCO adopted the position that ‘Military and colonial occupation do not confer any special right to retain archives acquired by virtue of that occupation.’¹⁸⁵ The United Nations, the European Union, and the International Council on Archives (ICA) have issued a whole series of resolutions, but more than half a century after the massive displacement of archives during and after the Second World War, the international situation is still not regulated. That is to say that, despite a long tradition of international precedents for archival transfers, there is still no viable international convention, statutory regulations, or even workable guidelines for the matter of archival claims or devolution.

Of particular importance in this regard were the major efforts of the United Nations in bringing together legal opinion and preparation of a convention to deal with archives among other official matters, particularly in connection with the succession of States. The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1978 was adopted at the conclusion of a lengthy United Nations conference in Vienna (1st March – 8th April 1978) by experts from ninety nations.¹⁸⁶ Following the conclusion of the Vienna Convention in 1978, an ICA advisory paper found many details in the archive section to be unworkable, and, in a

184 Condensed (with minor revisions) from article of same title in P.K. Grimsted, E.J. Hoogewoud and E. Ketelaar (eds) *Returned from Russia: Nazi Archival Plunder in Western Europe and Recent Restitution Issues* (Institute of Art and Law, Crickadarn, Wales UK 2007) 117.

185 UNESCO, Report of the Director-General on the Study on the Possibility of Transferring Documents from Archives Constituted within the Territory of Other Countries or Relating to their History, within the Framework of Bilateral Agreement, Nairobi, 1976 (Unesco Doc. 19C/94) § 3.1.1 reproduced in P.K. Grimsted *Trophies of War and Empire* (Harvard Ukrainian Research Institute; State Committee on Archives of Ukraine; State Service for the Control of the Transmission of Cultural Treasures Across the Borders of Ukraine. – Cambridge, MA, 2001) Appendix I and in Reference Dossier on Archival Claims, H. Bastien (ed.) (Council of Europe, Strasbourg) 1997 <http://www.ica.org/en/node/39083>

186 Vienna Convention on Succession of States in Respect to State Property, Archives and Debts, Vienna, 1 Mar. – 8 Apr. 1978 (A/Conf 117/14); the text of pt III, Articles 19–31, devoted specifically to archives, is reproduced in Grimsted, cited n.2, Appendix III.

statement first published only twenty years later, concluded that it ‘does not provide an adequate basis for dealing with succession of States in respect of archives,’ and suggested improvements in the wording of various paragraphs.¹⁸⁷ In the following two decades through 2005, the Convention has not been ratified by the requisite number of countries, and hence has never taken effect. The fact that the Convention exists, however, has prevented any new formulation or amendments.

With the collapse of the Soviet Union came the news of the extensive quantity of archives from almost every country in Europe captured by the Soviets at the end of the Second World War, most of which were still held in the hitherto top-secret ‘Special Archive.’ Many of the archives were ‘twice plundered’ or ‘twice saved,’ as some may explain their capture, having first been seized by German agencies during the war.¹⁸⁸ During the early 1990s, the International Council on Archives (ICA) followed the situation in Moscow closely and a Paris colloquium in 1992 was devoted to the newly opened Russian archives. For its annual meeting in Thessalonica in October 1994, attended by the heads of national archives throughout the world, the ICA set the topic of displaced archives for the International Conference of the Round Table on Archives (CITRA). At the conclusion of the meeting, CITRA passed a resolution reaffirming ‘accepted archival principles, that archives are inalienable and imprescriptible and should not be regarded as ‘trophies’ or objects of exchange.’ The resolution was passed unanimously, except for Russian abstention and two others.¹⁸⁹ Several of the reports in that CITRA meeting provided cogent summaries of ICA efforts in recent decades to deal with the problem of displaced archives. Discussion of related problems of wartime displaced archives continued in the 1995 CITRA meeting in Washington DC.

The European Community was following the problem at the same time, particularly after the May 1994 moratorium by the Russian Duma on further archival restitution to France despite a bilateral diplomatic agreement signed in November 1992. After the Thessalonica CITRA, European archival leaders most affected by the displaced archives in Moscow met in Koblenz at the end of 1994. The aim was to introduce a multilateral approach that would facilitate bilateral negotiations, which as was already apparent, better appealed to Russian archival leaders. However, such initiatives were not achieved. The International Council on Archives continued efforts to make archival restitution a cause célèbre, participating in hearings under the Council of Europe (CoE) and preparation of a Dossier on Archival Claims bringing together

187 Professional Advice on the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Part III, State Archives (Arts. 19 to 31) (Paris: ICA, 1983) (document CE/83/12) in Grimsted, *Trophies of War and Empire*, cited n.185 Appendix IIIb; and in Reference Dossier on Archival Claims, cited n.2.

188 See the Grimsted introductory chapters ‘From Nazi Plunder to Russian Restitution,’ in *Returned from Russia*, and Grimsted, ‘Twice Plundered or ‘Twice Saved’? Identifying Russia’s ‘Trophy’ Archives and the Loot of the Reichssicherheitshauptamt,’ 15 *Holocaust and Genocide Studies* (2001) 191–244.

189 Resolutions of the XXX International Conference of the Round Table on Archives (CITRA), Thessalonica, Oct. 1994. See Grimsted, cited n. 2, pp. 83–136, with the text in Appendix VI, and in *Reference Dossier on Archival Claims*, cited n. 2.

earlier related documents on the issue.¹⁹⁰ When Russia joined the Council of Europe in January 1996, as one of the conditions imposed (along with human rights and others), Russia agreed 'to settle rapidly all issues related to the return of cultural property claimed by Council of Europe Member States, in particular the archives transferred to Moscow in 1945.'¹⁹¹

Meanwhile, on the international front, since the ICA/CoE Dossier on Archival Claims (1996), there have been no significant new instruments of international law or guidelines for restitution claims that could alleviate the situation for captured archives still displaced as a result of the Second World War, or of the succession of States. Twenty years after the abortive Vienna Convention of 1983, a panel at the International Congress on Archives in Vienna in August 2004 was devoted to the issue of displaced archives, with emphasis on those involving eastern Europe, with the head archivists of Russia and Poland participating.¹⁹² While there was significant discussion of the issues and active reactions from many countries or national interest groups, it was apparent that within the new more diffused ICA structure, and within the current political context, there was little impetus for a concentrated effort to address the issues of international legal regulation of the issue. Given the international political milieu, matters of archival restitution continue to be negotiated bilaterally and usually linked to high-level political and diplomatic expediency and State visits.

Bilateral negotiations have replaced international regulation, and there appears to be little hope for any ideal comprehensive resolution of the problem of displaced archives by international statute law or even more detailed guidelines for claims. Nor is there hope today for the establishment of an international advisory committee, similar to the UNESCO Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in the Case of Illicit Appropriation. ICA Secretary-General Emeritus Charles Kecskeméti, based on experience over several decades, incisively commented on that issue in 2000:

In spite of the urgency, there is little chance, for the time being, that such a body is created at the decision-making intergovernmental – or even the consultative, non-governmental level. Governments prefer to handle sensitive issues separately, case per case through as many bilateral negotiations as necessary. A number of countries requesting restitution, perhaps all of them, also detain archives claimed by other countries. They might not be ready to follow the same principles in both directions. The preservation of a free

190 Discussion and texts of many of the documents are included in Grimsted, *Trophies of War and Empire* cited n. 2, pp. 83–136; with documentary appendices, and in *Reference Dossier on Archival Claims*, cited n. 2.

191 Council of Europe Parliamentary Assembly Opinion No. 193 (1996) – 'On Russia's Request for Membership of the Council of Europe,' adopted by the Assembly 25 Jan. 1996, when Russia was admitted to membership on its basis.

192 The panel was entitled 'Legal and Political Aspects of the Problem of Displaced Archives,' in the Series *Archives and Society – Legal Issues*, 25 Aug. 2004. The presentations by Vladimir P. Kozlov (Chief, Rosarkhiv), Daria Nalęz (General Director, Polish State Archives) and Władysław Stępnik (Deputy Director), Elena Danielson (Director, Archives of the Hoover Institution), and Patricia Kennedy Grimsted, are available on the ICA congress website: <http://www.wien2004.ica.org/fo/speakers.php>

hand in this matter also corresponds to the wishes of diplomats, who highly appreciate the ability to integrate token restitution into their protocols for visiting dignitaries. Good relations, then, can be showcased at no cost by a strong, symbolic gesture.¹⁹³

New Russian Law

Within the Russian Federation itself, it took ten years after the revelations about displaced cultural treasures to develop a legal basis and procedures for processing restitution claims. Now Russia is the only country to have enacted such a law, thus appearing to be a law unto itself. As many analysts have noted, the resulting law puts the emphasis on nationalization rather than restitution of cultural property ‘displaced to the Russian Federation as a result of the Second World War.’ The 1995 Duma prohibition on further restitution of cultural treasures brought to Russia as a result of the Second World War was predicated on the belief that restitution could not proceed before Russia adopted a law regulating cultural treasures displaced to the Russian Federation. Yet other countries, including Ukraine, have managed major examples of restitution of displaced cultural property without needing such a law.

President Boris Yeltsin claimed the law was unconstitutional. But before that issue could be determined, Yeltsin was forced to sign the law in April 1998, a year after it was passed by the Russian parliament, a second time over his veto. Only after the President signed it into law could the Constitutional Court consider it, as the President was insisting it should. The Constitutional Court took more than a year to deliberate. The basic text of the law was upheld in the July 1999 ruling, but the Court pointed out a number of legal irregularities. Those were resolved in a revised version providing a number of refinements that President Vladimir Putin signed into law in May 2000.

The law still provides for the potential nationalization of cultural treasures displaced to the territory of the Russian Federation, and not otherwise falling under the relatively limited and highly controlled provisions for restitution. The revised law reinforces the prohibition of restitution of cultural property to Germany, but provides for the potential restitution under specified conditions to countries that fought against the Nazi regime and to those victimized by the Nazis. Under the law, the return of cultural treasures can be handled only on a country-to-country basis, and requires exchange or other forms of compensation to Russia. Specified conditions for restitution of cultural property found in Russia provide for financial charges by the Russian side, including storage, appraisal and processing fees. There is some equivocation with respect to displaced cultural treasures seized from victims of repression

193 C. Kecskemeti, Foreword to Grimsted, cited n. 2 pp. xi–xii.

within territories officially incorporated into the Reich, because there too there were many victims of the Nazi regime and the Holocaust. Presumably some such issues could come before the courts, as the new law does also leave open a judicial claims procedure. However, to date there have been few initiatives and little legal experience in Russia in that respect.

Following the enactment of the initial new law in 1998, bilateral negotiations proceeded with several different countries, but certainly there were no signs of speed. Restitution of European cultural treasures was not high on the Russian political agenda, although interested European countries kept the pressure on, especially for archives.

With the new 31 March 2005 'Decree,' it is not clear to what extent repositories will (or will even be obliged to) describe as trophies all cultural valuables that are duly already registered as State property. Many books and archival materials seized by Soviet authorities after the war – many of them with clearly displayed stamps or other markings of ownership – were in fact integrated into and registered as part of the permanent holdings of State libraries and archives. Claims in such cases are nonetheless anticipated by the Ministry of Culture – as the instructions explain, 'in case of the approved confirmation of concrete pretensions on the part of a foreign State or citizen proprietor, they will be excluded from their now-assigned status in the State fonds¹⁹⁴ as having been incorrectly registered.' Now with the release from secret depositories, many more trophy items are now eligible for registration and public description, but holding repositories are short of the qualified staff needed to describe and duly register the trophies of foreign origin.

Archival Restitution – Hopes, Progress and Fallout

Archives are not dealt with separately in the Russian law on displaced cultural valuables, nor in the Interagency Commission on restitution issues. Professor Mark Boguslavskii's recent monograph *Cultural Valuables in an International Forum: Legal Aspects*¹⁹⁵ represents the only Russian commentary to date of some legal aspects of recent Russian cultural restitution issues. He has long been a critic of the Russian 1998/2000 law as formulated and has often publicly advocated revision. Yet he falls short of singling out archives as having a different legal status from books and art. As a senior Russian professor of law with considerable international experience in the field going back to the Soviet era, Boguslavskii has summarized major legal elements in the series of archival returns to Western Europe since 1991. He includes books and archives in a common chapter, regrettably concluding that they have 'much in common,' even suggesting that 'as opposed to paintings and sculpture ... old books

194 Editor's note: 'Fonds': A French, Russian, and now international, term for the records or papers of a particular individual, institution or organization.

195 *Kul'turnye tsennosti v mezhdunarodnom oborote. Pravovye aspekty* (Jurist, Moscow, 2005).

and archival documents convey simply a symbolic character,' and 'given modern technology ... both can be reproduced electronically.' Nevertheless his concluding words in that chapter suggesting that 'negotiations for the return of archives have a special important significance' demonstrates his understanding of the Western point of view, but at the same time he shows considerable understanding of, if not many elements of sympathy for, Russian viewpoints on cultural restitution issues.¹⁹⁶

Most Western archivists would argue much more strongly, as the ICA backed by UNESCO has for decades, that displaced archives as unique official records of State and legal records of non-government institutions, stand out as having a priority legal imperative to be returned to their countries of provenance. UNESCO has recognized archives as sources for the 'Memory of the World,' and many international resolutions, including almost yearly ones of the United Nations, have called for their return. Fortunately, post-1991 Russian archivists have recognized that situation, and more archives displaced to the Soviet Union as a result of the Second World War have been returned from Russia than is the case of other categories of cultural valuables such as books and art.¹⁹⁷

The Korean archives (The Oe-kyujanggak Books)

*Tae-jin Yi and Choong-Hyun Paik*¹⁹⁸

THE KYUJANGGAK IN THE REPUBLIC OF KOREA was first established in 1776 to serve multiple purposes as the royal library and the centre for academic research, as well as the centre for the research and analysis of royal policies. In its function as a library, it contained countless books and many ancient manuscripts as well as other priceless cultural artefacts. The Kyujanggak Archives bore the responsibility of storing the royal protocols for royal inspection. In 1781, in order to store various documents and holdings, the Oe-kyujanggak was established as a branch of the Kyujanggak main library institute on Kanghwa Island, which at that time was considered to be the safest place in respect of national security.

196 M. Boguslavskii, *Kul'turnye tseennosti v mezhdunarodnom oborot. Pravovye aspekty [Cultural Valuables in an International Forum: Legal Aspects]*, see esp. Ch. 10 on recent archival returns, 327.

197 Editor's note: Other chapters in the volume *Returned from Russia* describe the return of archives under the terms of the 1998/2000 Russian law to France, Belgium, the Netherlands, Luxembourg, and to The Rothschild Archive (London). Earlier returns since the collapse of the Soviet Union, under the provisions of the law as later adopted, include the archives of the Grand Principality of Liechtenstein (1996), and some records of British expeditionary forces that had been earlier captured by the Germans (1998). Return of fifty-one archival fonds of Austrian provenance was approved by a Russian Government decree in November 2005, and that first major batch of Austrian archives was scheduled to return home in the summer of 2008.

198 This contribution is a summary of articles in *The Oe-Kyujanggak Books: What are the Problems?* Seoul National University, Kyujanggak, Republic of Korea, 1999.

In the late nineteenth century, concerned at the activities of foreign missionaries, the Korean government forbade their entry to the country and made all missionary activities punishable by death. Nonetheless certain French missionaries entered and continued their activities. In 1866, nine of them were executed and France undertook military action in retaliation. Naval forces advanced up to the Han River in a show of force, taking control of Kanghwa Island. They plundered the silver bullion, books and manuscripts of the Oe-kyujanggak, and then burned the edifice to the ground, along with the Kanghwa Palace, and other outlying structures – over 4,000 books were destroyed together with the buildings that contained them.

Until 1976 it was believed that all these precious archives had been destroyed in the blaze. However in that year a Korean scholar working in the French National Library found over 170 of them, uncatalogued and apparently unrecognized, among the Chinese holdings of the Library. In October 1991, the Kyujanggak of Seoul National University requested the return from the French National Library of the royal protocol manuscripts consisting of 191 works composed of 297 volumes, as well as an investigation into the whereabouts of small books, scrolls, and other missing ancient Korean books and manuscripts. The Korean Ministry of Foreign Affairs passed on this formal request to the French government.

In 1991, the French government response was initially positive to the official request by the Korean Ministry of Foreign Affairs for the return of these manuscripts. In September 1993, during the Korean-French Summit Talks, President Mitterand promised a tentative ‘loan in perpetuity and exchange,’ and as a token of good faith, presented the first volume of the two-volume set of the Royal protocol on construction of Lady Park’s tomb to the Korean President. At the time the French government was negotiating a contract for the French high-speed train in Korea, which was successful.

However the French National Library was not in agreement, insisting that in return for an exclusive loan in perpetuity of the Oe-kyujanggak holdings, the Korean government should provide France with equally precious cultural artefacts. Korean scholars have argued that such conditions would admit the legitimacy of the French ownership of the Oe-kyujanggak books and manuscripts. From the Korean point of view, all the other archives were destroyed by the French arson, and this is the only way of reconstituting very significant, centuries old, historical records. Korea also felt that justice demanded their return since they were not simply pillaged through superior force, but were pillaged during a ‘punitive raid’ in which many buildings and structures that contained thousands of irreplaceable historical books and documents were burned down. The fact that the books in question are not only highly valued as cultural artefacts, but more importantly as national symbols, also greatly contributed to Korea’s decision to request their return.

Formal negotiations have been continuing since 1992 and a new session of negotiations opened late in February 2006.¹⁹⁹

The Korean case has not been brought to the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, although the Committee would have jurisdiction and diplomatic negotiations have been going on without success for seventeen years.

Seoul National University is now responsible for the holdings of the Kyujanggak Royal Library which dates back to 1776 when King Jeongjo, the twenty-second king of the prosperous Joseon Dynasty, constructed its prototype in the gardens at the rear of Changdeokgung Palace. It gradually increased the size and scope of its archives, surviving such national tribulations as the French ‘punitive raid,’ Japanese colonial rule and the Korean War. A large-scale project to create a database for Kyujanggak’s archives began in 1999.



Protocols of the wedding rites of King Yeongjo and Queen Jeongsun.
© Korean Cultural Heritage Administration, Bibliothèque Nationale, Paris

¹⁹⁹ For the legal position in French national law affecting these materials, see article by M. Cornu in Part 5.

Part 4

Legal Issues

Editor's Preliminary Note

THE LAW relating to the return of cultural property is very complex and has developed quite rapidly.

A number of traditional rules of law have obstructed the return of cultural property. These have included rules limiting the time within which a lawsuit for return can be taken ('limitation' or 'prescription' rules), the protection of a *bona fide* (good faith) purchaser and the different rules applying in many systems to public and private ownership.

In addition, these rules vary between national legal systems, thus facilitating the laundering of stolen or illegally exported cultural property. The rules as to theft are recognized and generally implemented in all national legal systems; rules as to illegal export are not in all cases. Rules as to property and ownership are regarded as crucial principles in some legal systems, but their very appropriateness to cultural heritage has been questioned.¹

How does a judge decide which rules should apply where there is more than one national legal system involved? This question may be regulated according to the rules of private international law ('conflict of laws,' resolved in court actions) or through public international law (from State to State through diplomatic procedures). Within private international law, each national system has its own rules as to which national law to apply (most often *the lex rei sitae* [law of the State where the last legal

1 M. Frigo 'Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in international law?' 854 *International Review of the Red Cross* (2004) 367; L.V. Prott and P.J. O'Keefe 'Cultural Heritage or Cultural Property?' 1 *International Journal of Cultural Property* (1992) 307.

transaction took place] – though this view has been challenged)² – different limitation periods, different rules as to the protection of the good faith purchaser, different interpretations of and presumptions as to ‘good faith’ and different ways of protecting heritage items. The interplay of all these factors has traditionally created uncertainty and hindered the return of cultural property. One lawyer was driven to make the following assessment:

Can we live with the current fragmented structure for restitution, or do we need a universal rule, at least for cultural objects? ... This survey of the existing jungle, filled with exotic fruit waiting to be picked by clever advisers for clients with cultural objects of doubtful origin, should make it clear that the *status quo* (‘current situation’) is totally out of tune with proclaimed high standards of morals and efficiency. This part of the law, if it really wishes to rid itself of the stigma of hypocrisy and play its part in the protection of the cultural heritage, has to reorganize and reform itself³

Since 1970 (the adoption of the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*), there has been an extraordinary effort to coordinate and harmonize the rules to maximize the protection of cultural property and deal with its return where wrongfully taken. There is now a very large corpus of writing on these subjects. A database of monographs, articles and cases⁴ lists almost 10,000 items.

The following items cannot hope to cover all this ground in this Compendium. They are simply designed to describe in short compass some of the major problems and innovations in this field. They also give some of the flavour of discussion between lawyers, who are likely to need to continue to work for many more years to solve all the problems outlined. For more detailed information the *Heritage Law Bibliography* should be consulted.

2 Most significantly by V. Fuentes Camacho *El Tráfico ilícito de bienes culturales* (Ediciones Beramar, Madrid, 1993) where he argues for applying the law of the State of origin. M. Reuter in a book review gives a summary in English 7 *International Journal of Cultural Property* (1998) 286.

3 M.H. Carl ‘Claims for Looted Cultural Assets: Is There a Need for Specialized Rules of Evidence?’ in International Bureau of the Permanent Court of Arbitration (ed.) *Resolution of Cultural Property Disputes* (7 Peace Palace Papers) (PCIA, The Hague, 2004) 185, 191.

4 Canadian Heritage Information Network, Reference Library, Heritage Law Bibliography <http://www.chin.gc.ca/English/index.html>

Getting it Back⁵

R. Crewdson

THE BRITISH LAW OF TITLE as it relates to stolen items gives the original owner far greater rights than the law on the Continent – but problems still exist.

Approached by a happy owner whose stolen work of art has reappeared in some distant place, the expert, not without a touch of cynicism, will be heard to remark, ‘Now, my dear sir, your troubles are really beginning.’

This sad reflection on the problem of recovery is the consequence of the almost total lack of harmony which exists, nationally and internationally, between the various persons who may have an interest in stolen works of art. Leaving aside the criminals who will have been responsible for the theft in the first place, interested parties will include the original owner, the police, insurers, dealers and auctioneers, purchasers ‘in good faith,’ and the legislature and judiciary in the countries through which the stolen property travels.

Where stolen property has not crossed frontiers and has been rediscovered in the same jurisdiction, the original owner still has to deal with the police, who will usually wish to hold on to the stolen items for an interminable length of time, during which adverse claims may be set up by other contenders or ‘pretenders’ claiming title. A more serious difficulty will probably arise (if a claim has been made) in relation to the contract of insurance which is unlikely to contain any conditions whereby the return of recovered property to the original owner can be arranged, if this is what the owner desires. The policy simply provides for payment of the insured sum in certain circumstances (theft being one of the most obvious) at which point all rights in the stolen object itself are ‘subrogated’ or transferred to the insurers. While insurers are usually ready to negotiate, the decision whether or not recovered property shall be reconsigned to the salerooms or offered back to the original owner at full market value is a unilateral one in which the insured person has no legal right to participate.



Nigerian terracotta clay figure recovered by Nigeria from the Canadian Conservation Institute (CCI). The antiquities were impounded from smugglers by the CBA (Canadian Border Services Agency). © Reproduced with the permission of the Canadian Conservation Institute of the Department of Canadian Heritage, 2009

For English owners there is the additional risk that stolen property that has not been surreptitiously exported to European countries, where the law of title prefers *bona fide* purchasers, will nevertheless become alienated in the same way through the notorious law of 'market overt.' This medieval relic was designed to give a dispossessed owner the chance to rummage through the local market once a theft had been detected (usually within a few hours) in order to recover stolen property before daybreak when the markets officially opened for business, failing which title would pass to a *bona fide* purchaser doing business during daylight hours. The survival of the law of market overt in the contemporary world is unreasonable beyond belief.⁶

Remember, before we go international, that English law is supposed to favour the original owner in a case of theft. *Nemo dare potest quod non habet* is the old adage 'If you don't have a good title, you can't give one to anyone else.' But we have seen how the intervention of the police, the insurers and the market stall can play havoc with original owners' rights, and with the Latin. Looking across the English Channel, we shall find the position a great deal worse.

In the first place the basic commercial principle that *bona fide* purchasers must be protected overrides the interest of original owners in most Civil Law countries. It is true that in some countries stolen property can be recovered from *bona fide* purchasers within a limited period. In Switzerland this period is five years from the theft; in West Germany, ten years from the *bona fide* purchase; in France, three years from the theft; in Japan the period is two years from the theft; by contrast in New York (a common law jurisdiction) the owner has three years from discovery of the theft in which to make a claim. No right of recovery exists in Italy in respect of works which are not *extra commercium* (i.e. public property). In some other countries the purchaser is immune so long as he buys through a dealer. The 'good faith' test is very rarely a stringent one.

Second, there is, particularly in Mediterranean countries, a quasi-paternalistic attitude towards works of art which may have merit in protecting whatever may be defined as the 'national heritage,' but which operates in a quite blinkered fashion in relation to anything else. Consider the 1982 Italian case of the *Republic of Ecuador v. Danusso*. Here the State of Ecuador, the 'owners,' got its national heritage property back, but only, one suspects, because its claim was made on the same basis as would have applied if the situation had been reversed and the Republic of Italy was making the claim. Danusso was being sued in civil proceedings for the recovery of a large collection of Ecuadorean artefacts that he claimed to have purchased *bona fide* from sellers in Ecuador. The Court had to decide whether to give effect to Ecuadorean laws relating to the preservation of its national art treasure or whether Italian law should apply. The Court decided that where goods had been displaced from one

6 Editor's note: this rule was abolished in England by the Sale of Goods Amendment Act in 1994 and does not exist in other Common Law jurisdictions.

country to another, the question of title remained to be decided according to the law that had previously applied to the goods (i.e. the law of Ecuador). As the art objects in question were all subject to the law that preserved the national treasure of Ecuador, this of course meant that Danusso had no title under Ecuador law and lost the case. It is, however, interesting to speculate whether the Italian Court would have come to the same conclusion if, instead of the State of Ecuador, the plaintiff had been a private citizen from the same country. Two years previously there arose the case of *Winkworth v. Christie's*. A collection of Japanese works of art had been stolen in this country and subsequently passed through the hands of an Italian antique dealer. The items were bought in *bona fide* and sent to Christie's for sale by auction. Here the crux of the matter was whether English or Italian law should apply, and the English High Court decided that the latter applied, notwithstanding the general statement of Italian law which the Judge (Mr Justice Slade) obviously thought operated unfairly against the plaintiff; but in giving judgment for the defendants he added this caveat (warning):

This decision must however be subject to one proviso. I have heard no evidence as to the content of Italian law. Though the plaintiffs Counsel has not sought to submit that either of these things is likely to occur, it is theoretically possible that the trial judge, on hearing such evidence, could form the view that the particular content of the relevant Italian law was such that the public policy of this country required him to disregard any rights asserted by the second defendant [the Italian claimant] by reference to such law. Alternatively, it is theoretically possible that the evidence as to Italian law would show that the Italian Court would itself apply English law, on the particular facts of the present case, for the purpose of determining the rights of the second defendant vis-à-vis the plaintiff and vice versa. In this event I suppose it would be open to the plaintiff to argue that English law should, in the final result, be applied by the English Court by virtue of the doctrine of *renvoi*.⁷ By this judgment I do not intend to deprive the plaintiff of the right to argue either of these two points at the trial.⁸

Regrettably, the case was settled out of court, and the *Winkworth* case is therefore now an authority for a line of argument which was not actually approved by the judge and which could have usefully been tested further against the background of the *Danusso* case. If Italian Courts were prepared to apply the *Danusso* judgment to cases involving private individuals from other countries whose stolen property has turned up in Italy, this would be a great step forward in neutralizing the iniquitous effects of Article 1153 of the Civil Code which gives complete immunity to a good faith purchaser.

7 Editor's note: where a judge is required by his own national law to apply the law of another State (such as the State of the last transaction), he must apply the whole of that law, including a rule that would return the jurisdiction to his own State. In that case he will apply his own national law. This is known as the rule of *renvoi* (retransmission) and is designed to promote the application of the same rules wherever the case is litigated so as to prevent 'forum shopping.'

8 *Winkworth v Christie* (1980) 1 *All England Reports* 1121 at 1136.

Paternalism and the protection syndrome are rife. Laws are made and remade to accommodate them. This must be the concern of honest owners of artworks, for example, in cases where an object is stolen and fortuitously returns to its country of origin. Supposing for example a third-century BC Greek statuette is stolen from an owner in Paris, taken back to Greece and dishonestly offered for sale to one or more Greek museums. Quite apart from the principles relating to stolen property discussed above, even if the owner traces the property in good time and does all that the Greek law requires of him, what chance does that innocent French owner have of recovering the statuette? Is it not more likely that the acquiring museum will allege that there is some supervening national cultural right which does not recognize that the statuette could ever have been legally exported in the first place and demands that the private collector in France be dispossessed in favour of the national custodian of Greek treasure and heritage? Some compensation may be payable, based on the embargoed market value in Greece, but that will be all.

If this all appears to add up to something akin to the law of the jungle, the astonishing fact is that so many collectors are prepared to face the risks of non-recovery, even when the stolen work of art has been rediscovered. It raises the question, which has probably never been properly researched, of the extent to which a private collector actually feels a sense of irreplaceable loss in relation to stolen works of art. Can an insurance payment offer adequate compensation? To what extent does the collector use the insurance proceeds to replace what has been stolen? If so used, is there usually a 'second-best' feeling in relation to the replacement? If the opportunity to recover the original piece arises, what proportion of dispossessed owners will go to the trouble of exploiting the opportunity, and at what personal cost?

These questions need to be asked and answered, because there has never been a more favourable time, thanks to modern technology, for introducing systems designed to prevent the remarketing of stolen art works. However, legal systems and insurers will still need to be influenced in order to give the new system the opportunity to produce the desired result, which is to secure the recovery of unique objects that have been stolen, and their return to the original owner at the least possible expense and in the shortest possible time.

Stolen Art: The Ubiquitous Question of Good Faith⁹

M-A. Renold

AMONG THE DIFFICULT ISSUES that arise in cases dealing with the restitution of stolen or illegally exported cultural objects, good or bad faith plays a significant role. Quite a number of cases have turned on this issue, and this article deals with some of the more important decisions. It often transpires (at least under civil law) that the issue of good faith is fundamental in the resolution of title disputes, particularly those relating to Nazi-looted art or art stolen under other circumstances.

1. The Significance of Good (and Bad) Faith in Comparative Law

There have been a number of comparative law studies on the issue of the acquisition of stolen property in good or bad faith, which have commenced with the thorough research carried out by Professor Gerte Reichelt in the late 1980s at the request of the International Institute for the Unification of Private Law ("UNIDROIT").¹⁰

It is, however, one of those fields where one sees a relatively clear distinction between the systems of common law and civil law. In most civil law countries,¹¹ the balance between the interests of the original owner and those of the subsequent purchaser (assuming he is in good faith), is often struck in favour of the good faith purchaser, meaning that a stolen object – in our case a stolen cultural object – can be acquired by a good faith purchaser. Depending on the legal system, there are different additional conditions of proof and of time, as well as the circumstances in which the sale took place. Simply stated, the possibility exists for a good faith purchaser to acquire title to a stolen object.

The common law systems,¹² however, tend to follow the principle of the *nemo dat quod non habet* rule – that no one can transfer title to stolen property. This is clearly expressed in English and American case law.

9 This text is an extract from 'Stolen Art: The Ubiquitous Question of Good Faith' in *Resolution of Cultural Property Disputes* (2004) 251-263, reproduced with permission of Kluwer Law International and the International Bureau of the Permanent Court of Arbitration.

10 See R. Reichelt 'La protection internationale des biens culturels,' 1985 *Uniform Law Review* 43 1; 'La protection internationale des biens culturels – deuxième étude' 1998 *Uniform Law Review* 53.

11 Editor's note: These are generally countries whose law is based on a Code greatly influenced by Roman Law and includes all European countries and many others whose legal system is modelled on one or several of them.

12 Editor's note: These are generally countries whose law is derived from the English legal system and includes many countries formerly members of the British Empire.

There are, in both systems, exceptions which make them not seem as opposed as what might appear from a superficial comparison, but clearly the emphasis is different in civil law and in common law countries.

2. Defining Good (and Bad) Faith

Defining ‘good faith’ is a relatively difficult task, but some legislators have tried. One example is the *Swiss Civil Code*, which states that good faith can only be claimed if it is compatible ‘with the attention that the person claiming good faith should have shown in the given circumstances’ (Art. 3). This, however, is relatively vague and has had to be defined by case law. I will review some national and international efforts to define good faith.

Swiss case law is quite rich on this topic. In 1996, the Swiss Supreme Court had to decide on the possible good faith acquisition of a gun collection that had been stolen from its first owner, near Geneva.¹³ In its decision, the Supreme Court stated that particularly high standards of diligence should be applied to purchasers in sectors of the market where goods of doubtful origin can surface. In previous decisions, the Supreme Court had applied this high standard to sectors such as the trade in second-hand luxury cars, but in this decision it applied the high standard to the general field of second-hand goods, including antiquities. In this case, as the purchaser had not sought information on the provenance of the collection in any serious manner, the court had no difficulty in deciding that he could not be considered in good faith and could therefore not have acquired ownership of the stolen collection.

This case, however, was followed by another one two years later relating to a manuscript of the Marquis de Sade, *Les 120 Journées de Sodome*, which was stolen in France from its owner and acquired by a collector in Switzerland.¹⁴ Though some of the elements of the transaction might have been regarded as suspicious, the Supreme Court refused to consider that the purchaser was not in good faith, and this was mainly because the price paid was relatively high. The court refused to take into account the fact that this manuscript was a national treasure in France and could not have been exported legally from France – a fact that the purchaser, a renowned collector, certainly would have known. So, here we see that although there appears to be a trend towards higher standards in most civil law countries, including Switzerland, there have been some setbacks and this manuscript decision is clearly one example.

Interestingly, legislators are imposing higher standards of care in special laws relating to cultural property. This is the case in Switzerland, where Article 16 of the

13 *Insurance X v. A.M.*, ATF 122 III p. 1, La Semaine judiciaire (1996) 383 (Switzerland) 5 March, 1996

14 *N de N v N et al.*, La Semaine judiciaire (1999) 1, 28 May, 1998 (Switzerland).

recently adopted International Transfer of Cultural Goods Act of 20 June, 2003¹⁵ (Article 3) imposes such standards not only on the actual purchaser of cultural property, but also on the trade as a whole. This section of the Swiss statute states that an art dealer or an auctioneer cannot enter into any transaction regarding cultural property if he has any doubt as to its provenance, so the burden lies not only on the purchaser's shoulders, but also on those of the dealer. This is an interesting evolution that can also be observed in the different branches of the art community which have adopted codes of ethics that, again, place a burden on those in the art trade to check the provenance of the objects with which they are dealing, such as the Guidelines of the Conférence internationale des négociants en œuvres d'art (CINOA), adopted 1987 and revised 1998.¹⁶

I will briefly turn to *French case law* and I have selected two very different precedents: a very old decision (1885), and a more recent decision (2001).

The 1885 decision¹⁷ concerned the acquisition in France by the Baron Pichon of a silver vessel, a 'ciborium' used in the Spanish church of Burgos, a *res extra commercium* (object excluded from trade) in Spain which could therefore not be sold. One of the issues was whether the Baron was in good faith; the court had no difficulty in accepting his good faith. The fact that he paid a low price due to an alleged controversy about the ciborium's authenticity and that he had undertaken no research as to provenance were held to be of no significance regarding his good faith.

That decision was taken in 1885, and standards have evolved since then. The 2001 decision, regarding the purchase of a Franz Hals painting by an American art dealer, clearly shows this.¹⁸ The dealer was convicted for having purchased at auction in 1989 the portrait of Pastor Adrianus Tegularius, painted by Franz Hals in the early seventeenth century, part of the famous French Schloss collection which was looted by the Nazis in 1943.

What is interesting from the good faith point of view is that the court refused to accept the dealer's plea of good faith. The court considered that a reputable and specialized dealer, such as he was, must perform a due diligence research on the provenance of the painting. In this case, although the catalogue of the auction at which he purchased the painting did not expressly raise any provenance issue, had he researched the catalogues of the previous sales the dealer would have found express references to the fact that this painting had been 'stolen by the Nazis.'

15 Editor's note: the official text of the Act can be found (in French, German or Italian) at the following link: [gases://www.ch.ch/jf/rs/c444_1.html](http://www.ch.ch/jf/rs/c444_1.html)

16 Consider also the UNESCO International Code of Ethics for Dealers in Cultural Property 1999.

17 *Due de Frias c. Baron Pichon*, Tribunal Civil de la Seine, 17 April, 1885, *Clunet* 1886, 599.

18 *Demartini c. Williams*, Tribunal de Grande Instance de Nanterre, 6 July, 2001 (unpublished decision). For a commentary on this decision, see L. Anglade 'The Portrait of Pastor Adrianus Tegularius by Franz Hals – A Landmark Criminal Decision on Looted Art is Finally Handed Down by French Court' 8 *Art Antiquity and Law* (2003) 77; T. Giovannini 'The Holocaust and Looted Art' 7 *Art Antiquity and Law* (2003) 263, 272–73; see also 6 *Art-Law Centre News*, March 2002, 15.

So, here again, one sees an evolution. In 1885, an amateur was not expected to carry out any research on the silver vessel that he acquired. By 2001, an art dealer was obliged to research the provenance of the painting he acquired in order for him to be considered in good faith.

This trend towards stricter standards is also apparent if one looks at international conventions. Good faith is mentioned in several conventions, including the ‘mother’ convention in the field, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. Its Article 7(b)(ii) states in very general terms that the good faith purchaser should be compensated when he is requested to return stolen or illegally exported cultural property.

This provision was given much more flesh in the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995 (‘UNIDROIT Convention’). Two articles of this Convention relate to good faith (Articles 4 and 6). It is worth restating the principle of the UNIDROIT Convention set forth in Article 3(1), that a stolen cultural object must be returned, whether or not the subsequent purchaser was in good faith. So we can note that, in this instance, the Convention has followed the common law principle. However, good faith (or due diligence, as it is called in the Convention) plays an important role in that the restitution of a stolen cultural object, or the return of an illegally exported object, implies payment of fair and reasonable compensation to the *bona fide* purchaser. Most importantly, due diligence is defined in Article 4(4) of the Convention, which lists the elements to be taken into account to determine whether due diligence was exercised: *inter alia*, the circumstances of the acquisition, the character of the parties, the price paid, the consultation of any reasonably accessible register or any other relevant information. On the issue of illicit export, Article 6(2) of the UNIDROIT Convention also lists the presence or absence of an export certificate as an important factor in determining whether or not the purchaser was in good faith.

So, here again we see the standards as to good faith becoming more strict. Of course, the 1995 UNIDROIT Convention is not universal law, but as of today, seventeen states have ratified it¹⁹ – among them several European states, including Italy, Spain and Portugal. Although France is considering ratifying the Convention, most of the ‘art market’ countries, such as the United States, the United Kingdom, Japan, Germany and Switzerland are not currently considering ratification. Nevertheless, the Convention has an indirect influence on the standards adopted by the courts.²⁰

19 As at 1 October 2008, there are twenty-nine States Parties.

20 See *L. v. Chambre d'accusation du canton de Genève*, ATF 123II 134. *La Semaine judiciaire* (1997) 529, 1 April 1997 (Switzerland) for an interesting example of such an interaction. In this decision the Swiss Supreme Court took the view that it should take international public interest and policy into consideration as expressed by the 1970 UNESCO and the 1995 UNIDROIT Conventions – though neither were at the time ratified by Switzerland. Editor's note: excerpts of this decision are translated and reproduced later in this Part.

3. The Legal Consequences of Good (or Bad) Faith

Good faith in the 1995 UNIDROIT Convention faith has an effect on the compensation due to the purchaser and not on his title. This results from Articles 4(1) and 6(1) of the Convention.

Now what is the effect of bad faith? Clearly, no state accepts that title can be transferred to a bad faith purchaser, which means that even in civil law countries, title to stolen property cannot be transferred to a bad faith purchaser and a claim against him will only be subject to the general statute of limitations rules. One point worth mentioning is that in certain states, such as Switzerland, claims against the bad faith purchaser are subject to no limitation at all. This is why, in the cases linked to art looted by the Nazis, the issue will be one of trying to determine that the present possessor is not in good faith because, in such a case, there will be no limitation on the dispossessed owner's claim.

4. The Burden of Proof

One important question regarding good faith is that of the burden of proof. In most jurisdictions where good faith is of legal significance, such good faith is presumed. For example, Article 2268 of the French Civil Code provides that good faith is always presumed and that the person who alleges bad faith must prove it. A similar principle can be found in several other civil law jurisdictions, such as Germany and Switzerland.

However, as was seen earlier, the standards for accepting good faith are becoming stricter and stricter, although courts are still insisting that good faith is presumed. Some commentators are starting to question, in fields such as stolen art, whether the presumption of good faith is really of any significance any more.²¹ And recent Conventions and cases show that the presumption of good faith is losing ground.

Article 4(1) of the 1995 UNIDROIT Convention, after much debate at the different levels of the governmental experts and the diplomatic conference, takes the position, specifically with regard to stolen cultural objects, that the presumption of good faith is to be abandoned. The Convention states that it is the current possessor who must establish that he or she followed the due diligence standards set out in Article 4(4) of the Convention.

To conclude, one can say that, from a comparative law point of view, in those countries where good faith is a legal condition to the acquisition of title, the standards are becoming higher and that the 'sacrosanct' principle of the presumption of good faith is losing its ... sanctity.

21 See P. Lalive 'La convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995); *Revue suisse de droit international et européen* (1997) 13, 38, 30.

Possession and Ownership of Stolen or Otherwise Lost Works of Art²²

A. Müller-Katzenburg

CASES OF ART THEFT are almost as old as art itself.²³ In our century, organized theft of art and other forms of illegal traffic in cultural property have, however, reached an unprecedented level whose consequences, also in respect of legal regulation, have received more and more attention in recent years. There are varied reasons for this which involve, among other things, the boom in the international art trade and the accompanying price trend on the art market, the expiration of statutory periods of limitation since the Second World War, as well as the opening of the Eastern Bloc and the consequent reappearance of art objects, long considered to be missing or lost.

Statute of Limitations

The question of limitation of actions is dealt with very differently in the various jurisdictions. In Switzerland, for example, the ownership claim for restitution does not become statute-barred at all.²⁴ In Germany, on the other hand, according to the prevailing legal opinion, the ownership claim for restitution is subject, in the case of movable property, to the general period of limitation of thirty years pursuant to section 195 of the German *Civil Code* (*Bürgerliches Gesetzbuch*, BGB). According to section 198 of the German Civil Code the period starts to run from the time the claim arises, thus, in the case of a claim for restitution of stolen property, from the date of the theft. This is different in various jurisdictions of the United States, which have flexible periods of limitations which are relatively short,²⁵ but which generally do not start to run until the owner discovers or, by exercise of reasonable diligence, should have discovered, the whereabouts of his work of art, including the identity and

22 This text is an edited extract from the article of the same title published in 5 *Art Antiquity and Law* (2000) 105. Author's update: Since the publication of this article several provisions have changed, particularly in German and Swiss legislation.

23 For an overview on the historical development of the law on the protection of cultural property, including numerous examples of art theft and sources of more detailed commentary, see A. Müller-Katzenburg, *Internationale Standards im Kulturgüterverkehr und ihre Bedeutung für das Sach und Kollisionsrecht* [International Standards in Transactions Involving Cultural Property and their Impact on Property Law and Conflict of Laws] (Duncker & Humblot, Berlin, 1996) 30 ff.

24 Cf. decision of the Swiss *Bundesgericht* (Federal Court) of 15 February 1922, BGE (Decisions of the Federal Court) 48 II, 38, 46 f.; see also *Zürcher Kommentar-Homberger*, (Zurich Commentary on the Swiss Civil Code) (1938), Article 936 No. 4 and *Berner Kommentar-Stark*, ZGB, 2nd edn (1984), Article 936 no. 16, each with further citations.

25 In those States which are particularly important for the art trade, (New York and California), the period of limitation is three years, cf. NY Civil Practice Law & Rules § 214 (3) and Cal. Civil Procedure Code s. 338.

location of its current possessor.²⁶ Therefore, it can happen that a claim for restitution of a stolen, or otherwise lost, work of art can still be successfully brought before a court in the United States although thirty, forty or even more years have passed since the theft or loss of the object.²⁷

An important recent decision on the law concerning the statute of limitations, which, in the opinion of many, could have far-reaching consequences for the art trade, is the 1998 decision of the English High Court, in the case of *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance SA*.²⁸ The case concerned a small painting, dating back to the beginning of the seventeenth century, (between 1603 and 1608), by the Dutch mannerist Joachim Wtewael. The painting was taken from Gotha to the Soviet Union at the end of the Second World War and later returned to the West, where it was to be sold in April 1992 at auction by Sotheby's on behalf of a company registered in Panama. In a civil action filed by the City of Gotha and later joined by the Federal Republic of Germany, the London court decided in the end that the Wtewael painting was to be turned over to the Federal Republic of Germany as the owner.

In this case, the defendants had pleaded the statute of limitations. However, the English judge, applying German law, which, according to the *situs* rule,²⁹ was decisive for the question of ownership, reached the conclusion that the restitution claim of the Federal Republic, as the owner, was not yet statute-barred because, according to the norm of section 221 BGB, unfortunately often overlooked,³⁰ the period of limitation with regard to the painting, had begun to run anew upon the fraudulent appropriation of the painting in January 1987.³¹ According to section 221 BGB, the period of limitation which runs during the time of possession of the predecessor in right benefits the legal successor only if he has come into possession of the property by means of succession in title, that is, by derivative acquisition.

Another interesting fact about the case, an almost delicate one, is that, of all parties, the Federal Republic as plaintiff argued among other things that, if the court found the claim for restitution was already statute-barred under German law, German law should not be applied because it violates English public policy.

26 The so-called 'discovery rule.' For more detail see Müller-Katzenburg n.1, 170 ff., 339 ff. and, more recently, L. Kaye 'The Statute of Limitations in Art Recovery Cases: An Overview' 1 *IFAR Journal* (1998) 22 ff.

27 Cf., e.g. *US v. Here*, 334 F Supp. 111 (SDNY 1971), which concerned the ownership rights in a painting by El Greco which disappeared in Spain at the beginning of the Spanish Civil War in 1936 and did not reappear until 1971 in the United States.

28 Unreported, 9 September 1998, Q.B.D., Case No. 1993 C. 3428 and Case No. 1997 G 185. The full text of the decision can be found in N.E. Palmer *Museums and the Holocaust*, Appendix IV (Institute of Art and Law, Leicester, 2000).

29 The *lex rei sitae* or *lex situs* is the law of the place where the last legal transaction took place.

30 As it was in the decision of the Munich Regional Court concerning a painting of Paul Klee, in which the period in which the painting in dispute was located in Switzerland where an *in rem* claim for restitution does not become statute-barred, and should therefore not have been counted against the time of possession under s. 221 BGB; Landgericht München I, 8 December 1993, *Praxis des Internationalen Privat- und Verfahrensrechts* 1995, 43 and the comments of the editors.

31 *City of Gotha* n.28, 88.

The High Court, (having held that the claim was not time-barred under German law), went on to consider this public policy argument. Judge Moses concluded that English law prevents the application of a foreign limitation period where this foreign limitation period would violate English public policy.

It does seem to me possible to identify ... a public policy in England that time is not to run either in favour of the thief nor in favour of any transferee who is not a purchaser in good faith. The law favours the true owner of property which has been stolen, however long the period which has elapsed since the original theft ... To permit a party which admits it has not acted in good faith to retain the advantage of lapse of time during which the plaintiffs had no knowledge of the whereabouts of the painting and no possibility of recovering it, is, in my judgment, contrary to public policy³²

It is submitted that the time has now come for a reconsideration of the prevailing opinion relating to the time bar for claims for restitution under section 985 BGB: this view is supported by the carefully drafted dicta in the Gotha case and the explicit admission of the Federal Republic that the German statute of limitations, depending how it is interpreted, violates important principles of other 'civilized' jurisdictions. Even as far back as the legislative debate preceding the passage of the German *Civil Code* in 1896, the question of claims based on *in rem* rights (rights of property good against everyone) becoming statute-barred was contentious. As the legislative records show, there was;

A repeated reference to the apparent relative relationship which can arise if the *in rem* right becomes invalid vis-a-vis the party which brought about and maintains the same offensive condition; the property, as long as it is held by the thief protected by the bar to restitution under the statute of limitations, is devoid of substance, but it regains full validity if it is lost by the thief.³³

Indeed, still today, it is viewed as grotesque³⁴ that the right of ownership as such does not become statute-barred, but the ownership claim for restitution does, so that, once it becomes statute-barred, a *jus nudum*, a right devoid of content, develops. This could induce the owner to take his property from the possessor by force. The realization of the possessory claim for return to possession would then establish a new possession

32 Id., 97; the court continues: 'To allow Cobert to succeed, when, on its own admission it knew or suspected that the painting might be stolen or that there was something wrong with the transaction or acted in a manner in which an honest man would not, does touch the conscious of the court.'

33 B. Mugdan (ed.) *Die gesamten Materialien zum BGB*, Vol. I. (Einführung zum BGB [Introduction to the BGB] and Allgemeiner Teil [General Division]), Berlin 1899 771 ff.

34 K. Müller *Sachenrecht*, (Carl Heymanns, Cologne, 4th edn 1997), No. 455, who, for that reason, opposes the prevailing opinion and pleads for the incapacity of the claim for restitution to become statute-barred; see also W. Henckel 'Vorbeugender Rechtsschutz im Zivilrecht' [Preventive Legal protection in Civil Law], *Archiv für zivilistische Praxis* (1974) 174, 97, 130, as well as J. von Staudinger and K.-H. Gursky *Kommentar zum Bürgerlichen Gesetzbuch 1* (Commentary on the Civil Code) (de Gruyter, Berlin, 3rd edn 1993), s. 985 BGB No. 70.

of the possessor and, according to generally accepted principles, permit a new period of limitation to start to run.

In the legislative debate on the German *Civil Code*, it was thus decided to reserve the question 'whether it is called for or appears to be reasonable to limit the case of a *dominium sine re* (ownership without possession), which is possible according to the draft legislation, for the debate on property law.'³⁵ However, this later debate apparently never took place.

There is, in any case, another argument against a bar under the statute of limitations to the claim for restitution against the thief or an acquirer in bad faith. It is acknowledged that a party may not plead the statute of limitations where he has, by his own conduct, prevented the plaintiff from bringing his action within the limitation period. This is viewed as an abuse of the law.³⁶ This is the case where, for example, the debtor by his actions has kept the creditor from filing a lawsuit. An unintended hindrance can be sufficient.

Thus, in my view, the plea of abuse of law must be effective against both the thief and a bad-faith acquirer, especially since the latter will hardly reveal his possession and the owner is thereby put in a position where it is impossible to assert his claim for restitution. Otherwise, especially with regard to the assets involved in the art trade, the legal institution of the statute of limitations offers an additional incentive for abuse because, where a valuable object is concerned, even a thirty-year 'storage period' can pay off financially.

Conclusions

A reasonable balancing of interests between protection of the owner and protection of the transaction must be created. However, the special nature of the objects involved should not be overlooked: works of art (apart from multiples and reprints) are unique and thus irreplaceable. Thus, in the interest of all of us, they require special protection. However, the actual and financial possibilities for protection of valuable works of art against, above all, theft and looting, are limited. An effective means for lasting improvement of this protection is to rob the illegal art trade of its lucrative nature. To this end, national and international property law offer suitable starting points.

³⁵ See the records regarding the *Allgemeiner Teil* n.11, 772.

³⁶ But see, e.g. *Münchener Kommentar zum BGB* – von Feldmann, 3rd edn (1993), s. 194 No. 11.

Limitation of Actions in Art and Antiquity Claims³⁷

R. Redmond-Cooper

Editor's Note

The passage below explains the English law relating to cultural objects where foreign law is involved. The philosophy behind the rules of limitation is also discussed. A 'chattel' means any property rights other than land, and so includes artworks, antiquities and all other cultural objects.

Time Limitations on Legal Claims

WHERE THE CLAIM for the return of a chattel stolen abroad is governed not by English law, but by some other legal system, regard must be had for the provisions of the *Foreign Limitation Period Act 1984* (section 4(5)(a)). The Act came into force on 1 October 1985 and applies to all actions and proceedings commenced after that date. The fact that the claimant's cause of action accrued prior to that date will not generally be relevant.

Where the court has to take into account the law of another country when determining any matter, by section 1(1)(a) of the Act: 'the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceeding.' Where the matter is one in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account, the English court must apply the shorter of the two limitation periods (section 1(2)). A foreign limitation period is now to be regarded as a substantive matter rather than a procedural one, and it is irrelevant that under the proper [applicable] law the limitation period would be regarded as procedural.

However, English procedural rules continue to determine the question of when proceedings have been commenced for the purpose of stopping the running of time (section 1(3)). The English court is required to exercise any discretion conferred by the law of another country, in so far as is practicable, in the manner in which it would be exercised by the courts of that other country (section 1(4)).

37 This text is an extract from the article of the same title published in 5 *Art Antiquity and Law* (2000) 185.

Application of Foreign Limitation Period: *City of Gotha Case*

The Act will apply wherever an English court is required to apply foreign law to proceedings before it, and is met with an argument that the action is time barred. There has been little case law to date, but one significant decision of Judge Moses in the High Court demonstrates the application of several of the Act's provisions. *City of Gotha and Federal Republic of Germany v. Cobert Finance SA*³⁸ concerned a claim for the return of a painting which had disappeared at the end of the Second World War from a collection in the City of Gotha, had been taken to the Soviet Union during the first half of 1946 (probably by members of the 'official' Soviet trophy brigade), and re-emerged at a Sotheby's sale in 1992. In the meantime the painting had been smuggled from Moscow in the mid-1980s by a Mrs Dikeni, and then acquired by Mina Breslov in 1988, consigned by her to Sotheby's in November of that year, and bought by Cobert, a Panamanian corporation, in March 1989. The City of Gotha and the Federal Republic of Germany claimed the return of the painting from Cobert. The two main issues that arose for decision were (1) did the claimants have title to the work; and (2) if so, was their claim time-barred?

After a detailed consideration of the parties' conflicting accounts as to how and when the painting had gone from Germany to Moscow and back to West Berlin, Judge Moses, held that, the painting had been wrongly removed from Germany under the jurisdiction of the Soviet Military Administration in January 1946, and that the effect of various police orders and a law expropriating Nazi property had been to vest title to the painting in the claimants.

On the question of whether the action was time-barred, it was necessary to consider section 1 of the 1984 Act, which, as stated above, provides that where proceedings before an English court are governed by a foreign legal system, that system's law as regards limitation of actions will also apply, to the exclusion of the English law relating to limitations. The judge held that the German law as to limitations applied in this case and, following expert evidence as to German law, he further held that the applicable limitation period in relation to recovery of goods was thirty years, with time running irrespective of whether the claimant was aware of the existence of the claim or the identity of the defendant, and that time started to run, under German law, from the date when the painting was transferred into the possession of the person who misappropriated it. This did not occur until 1987, and therefore the claim was not time-barred.

38 9 September, 1998, generally unreported but the full transcript of the decision is available in N.E. Palmer, *Museums and the Holocaust* (Institute of Art and Law, Leicester, 2000). See the case notes by A. Mair in 3 *Art Antiquity and Law* (1998) 413, and P. Lomas and S. Orton 4 *Art Antiquity and Law* (1999) 159.

Public Policy

If the application of a foreign limitation period would conflict with public policy, it may be excluded (section 2(1)). An example of a public policy issue (although there are other potential grounds of conflict) which may lead a court to disapply the foreign limitation period is found in section 2(2) where ‘undue hardship to a person who is, or might be made, a party to the action or proceedings.’³⁹

It has consistently been emphasized that public policy should be invoked for the purposes of disapplying a foreign limitation period only in exceptional circumstances, and that too ready a resort to the public policy exception would frustrate our system of private international law, which exists to fulfil foreign rights not destroy them. It has been said that foreign law should be disappplied only where it is contrary to a ‘fundamental principle of justice’:⁴⁰ this is not so only where the foreign limitation period is shorter than that provided for in English law. In the case of *City of Gotha*, the judge (having held that the action was not time-barred under German law) went on to consider whether, if the action had been time-barred, the German limitation period should have been disappplied on the grounds of public policy. The judge identified a public policy in England that time is not to run either in favour of the thief nor in favour of any transferee who is not a purchaser in good faith: if the German law as to limitation were not disappplied, the result would be to favour a purchaser with no title to the painting who did not even contend that it or its predecessors purchased the painting in good faith. To permit a party which admitted it had not acted in good faith to retain the advantage of lapse of time during which the plaintiffs had no knowledge of the whereabouts of the painting and no possibility of recovering it would be contrary to the public policy expressed in section 4 of the 1980 Act (see above).

Rationale of the Limitation Period in Chattel Claims

The usual justification for the existence of limitation periods (protecting the defendant from stale claims, expediting proceedings in the interests of justice) apply equally in the context of chattel claims. However, a further factor also applies here: public policy and the interests of commercial certainty require that the legal situation correspond with the ostensible situation – a person who possesses goods and appears to be the owner should in fact be treated as such after the expiry of a certain period of time. The interests of a secure marketplace should not be discounted when considering questions of ownership of lost or stolen goods – an innocent third party may deal with the goods in reliance upon the apparent state of affairs.

39 Editor: For a very different approach in The Netherlands, see J. Blom ‘Laying Claim to Long-Lost Art: The Huge Read of the Netherlands and the Question of Limitation Periods’ 9 *International Journal of Cultural Property* (2000) 138.

40 Law Commission Report No. 114, at 4.43 and 4.44.

However, the undoubted interests of the marketplace are, in the view of many, matched or even outweighed by the special nature of the commodity at issue. Works of art and antiquities are generally unique in nature, unlike most chattels their monetary value will usually increase rather than fall over a six-year period, and, again unlike most chattels, their owners are likely to have an emotional as well as a financial attachment to them.


A further difficulty which arises in this context is that (unlike most legal actions where the limitation may be pleaded) in the case of an action brought by a dispossessed owner, there is rarely a notionally innocent claimant suing a wrongdoer defendant: each party is, in most cases, effectively a victim of a third party who has disappeared from the scene. Some commentators argue that the parties are not in fact equally deserving victims of the third party thief, since the buyer chooses to enter into the transaction in the knowledge that the art and antiquities market is a particularly insecure one in that a proportion of the goods offered for sale are likely to have been stolen. The buyer, it is argued, could have avoided becoming a victim by the simple expedient of not entering into a transaction where he was unable to satisfy himself of the full history of the object at issue. However, in practice, despite the best endeavours of both the police and the International Art and Antiques Loss Register, in many instances the theft of an object is not effectively registered, with the result that a potential buyer may discover nothing untoward in his attempts to trace the provenance of an object.



Marble head of a young Greek athlete (third century BC). Returned to Lebanon by the Federal Office for Culture at the request of a Swiss antiquities dealer in 2009 after discovery of its theft from Lebanon in 1981. © Benno Widmer, Deputy Head, Cultural Property Transfer, Federal Office of Culture in Switzerland

A Disturbing International Convention: the *UNIDROIT Convention on Cultural Objects*⁴¹

P. Lalive

 ONE MUST UNDERSTAND the difficulties involved in adopting an international convention such as the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (Rome, 24 June 1995). Nicolas Valticos, a clear-minded observer, without illusions but equally without futile scepticism, expressed surprise at the resistance that emerged, motivated by nationalism, regional or sectoral self-interest, as well as intellectual conservatism, to any attempt at mutual international assistance based, like the UNIDROIT Convention, on awareness of the common dangers – in this case, the escalation in looting of cultural property – and of the need for increased solidarity at the global level.

The latest Convention is an especially instructive example of this. As a detailed analysis is beyond the allotted length of this tribute, I shall merely give a few examples that illustrate the extraordinary degree of incomprehension generated in certain ill-informed quarters in the art trade by an international convention which, when all is said, is more innocuous than many in the field of mutual international assistance – and I say this without wishing to downplay the very real progress that it can achieve, especially on the psychological level, in improving the attitude of the actors in the art trade and, most of all, of potential buyers of items of cultural property of uncertain provenance.

Let us begin by recalling, in broad terms, what this is about. The object of the UNIDROIT Convention is to find a remedy, admittedly partial but more effective than all the others so far attempted, to an ever-growing scourge, that of trafficking in stolen or – the two mostly go together – illegally exported cultural property, in particular clandestine archaeological digs, which by their very nature involve the destruction of information which is irreparably lost to the science and culture of numerous countries and of humanity in its entirety.

This scourge, this continuing scandal, which has assumed unprecedented economic, political and cultural proportions, is essentially international, since in the majority of cases theft is followed by the crossing of one or more national borders. This serves the dual purpose of making police investigations more complicated and, above all, making it easier to liquidate or ‘launder’ the proceeds of the theft, through one or more resales involving all manner of receivers and other intermediaries, so that the item can finally enter the legal market and end up in the hands of a purchaser whom local law,

41 This is a strongly condensed version of the original article in *Mélanges en l'Honneur de Nicolas Valticos* (Pedone, Paris, 1999) 177.

the *lex rei sitae*, deems to be 'in good faith.' In practice, the law of the last transaction is the law that applies, according to an almost universal rule of private international law.

One conclusion may clearly be drawn from the analyses of Jean Chatelain and all of the other practical or scientific studies: it is above all the resale abroad of the stolen object and the diversity of laws and national legislative policies on the acquisition of movable property *a non domino* (from a person who is not the owner) that facilitate trafficking. The ease of communications, the relaxation of customs controls, and the steady enlargement of the art market also play their part.

Resale of the stolen object is thus the root of the problem. An international convention was needed that laid down a minimum regime for the acquisition of stolen or illegally exported goods: not the current general law applicable to all movable property of whatever nature, but a regime specifically adapted to art objects and other cultural property.

The analyses of specialists and observers, lawyers or otherwise, are in line here with plain common sense: in the case of an art object of unknown provenance, a higher degree of care and greater precaution should be expected – both as to the origin of the property and as to the offeror's right to sell it – whether it is an ordinary object, a bicycle, a second-hand camera or a cargo of potatoes. For some time now, the courts, in Switzerland for example, have applied this elementary principle by examining the circumstances in which the stolen object was acquired. Thus, since 1917 at least, the Swiss federal courts have applied the general presumption of good faith, pursuant to the paragraph of Article 3 of the Swiss Civil Code of 10 December 1907 which provides that 'no-one may plead good faith if to do so would be incompatible with the degree of attention the circumstances required of him,' and this may have inspired the drafters of the UNIDROIT Convention.

The foregoing suffices to explain the fundamental provision of the UNIDROIT Convention, Article 3(1), which states, in line with the common law tradition, that the 'possessor of a cultural object which has been stolen shall return it.' Remarkably, from the very first phase of UNIDROIT's work, in which Jean Chatelain participated, this solution emerged as the only one possible, and the only one that could curb the appetite of an ever-growing illegal market. It is tempered by the right of the possessor who 'neither knew nor ought reasonably to have known that the object was stolen' to 'fair and reasonable compensation' (which is unobjectionable) provided, moreover, that it 'can prove that it exercised due diligence when acquiring the object,' a notion developed in a specific provision, Article 4 (4).

In fact, the wording does little more than embody a very widespread judicial practice and a very simple idea: in the case of cultural property, the circumstances, both objective and subjective, in which it is acquired, are not the same as for the purchase of a bicycle or a camera of uncertain provenance.

Leaving aside that observation, one essential fact remains: a political choice must be made, as stated by the head of the Paris central office for the suppression of theft of art works and objects, the *Office central pour la répression du vol d'œuvres et objets d'art* or OCRVOOA.

A good example of this is the campaign by one James F Fitzpatrick (e.g. in 'The Misguided Quest: the clear case against UNIDROIT,' in the *Journal of Financial Crime*, July 1996, p. 54), a strange diatribe full of errors, which drew criticism from an outstanding expert on the question, R. Crewdson, a professional art market lawyer, that he was not attacking 'the UNIDROIT Convention but a monster of his own imagining.' In the same vein, L.A. Lemmens, the Secretary-General of The European Fine Arts Fair (TEFAF), saw fit to write: 'a dealer at a fair in any UNIDROIT country could be bankrupt by accusations from any visitor claiming that the dealer is handling stolen goods. Under UNIDROIT regulations, such accusations can lead swiftly to confiscation of paintings and objects even if his innocence is proved,' XXI *Art Newsletter* No. 15, 19 March 1996, 2. Likewise, the second Basel Antiques Fair was marked by the inclusion of 'a scathing preface' on the UNIDROIT Convention in its catalogue (*Le Monde*, 29 October 1996) and the inception of 'fierce lobbying ... to ensure that the Convention is not ratified by Parliament'!

This phenomenon is all the more curious because those countries and circles with the greatest wealth in terms of art objects (hence the most vulnerable to the staggering rise in thefts) might have been expected to applaud the strengthening of legal protection for the dispossessed owner. Such reinforcement, which can only be achieved through international collaboration, is even more keenly awaited since, as matters now stand, the likelihood of recovering an item of stolen cultural property is, according to the specialists, only 12 to 20 per cent.

It is very striking to see how often the opponents of the Convention skirt the issue of the protection of the owner, public or private, whose goods have been stolen, to focus almost exclusively on the fate, which they find appalling, of the buyer of cultural property of dubious provenance, who is required to show that he has indeed taken reasonably necessary precautions in order to obtain fair compensation when returning the stolen item. How else can such one-way concern be explained, other than by the fact that these critics always see themselves, maybe subconsciously, as having to be in the shoes of the buyer wanting to increase his collection, and never those of the owner who is the victim of a theft?

It is certainly not easy openly to defend the present confused state of the law, which is not only anachronistic but also shocking, a '*status quo*' which, in the unanimous opinion of observers with even the slightest knowledge of the facts and the true legal position, encourages the resale and laundering of stolen cultural property.

There is never any attempt at an overall weighing up of the certain advantages of the UNIDROIT Convention and its disadvantages, which are minimal or even non-existent in positive law as it currently stands, which – and this cannot be repeated often enough – is unpredictable, unfair to the owners of stolen goods, conducive to organized crime and damaging to the cultural, especially archaeological, heritage of very many countries, which is also, as we know, in large measure the heritage of humanity. Whether through obvious bias or involuntary blindness, some commentators have even claimed that the UNIDROIT Convention is ‘unenforceable,’ maintaining either that the national courts of the Contracting States lack jurisdiction, or that there will be damaging consequences for art collectors and dealers. These are gratuitous statements which, moreover, betray a singular lack of understanding of the scope of international conventions, in particular regard to international mutual assistance (in that the final and binding decision always rests with the country to which the request is made).


While the UNIDROIT Convention is basically very simple, both in terms of its structure and its principles, it still relates, as we have seen, to a particularly complex area, that of conflict of laws, involving comparative civil law on sale and transfer of ownership, the application of foreign public law and the traditional systems of international mutual legal assistance. It follows that an adequate knowledge of these areas of the law is an absolute precondition for any understanding of the Convention and, therefore, for any informed criticism.

In practice, in addition to the museums themselves, which have, with a few exceptions, supported the ICOM principles that are known to underpin the UNIDROIT Convention, many collectors and professionals, better informed today, understand that they have little to fear but a great deal to gain from the principles of the UNIDROIT Convention and from those contained in Council Directive 93/7 EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State – an instrument ‘broadly inspired by the work of UNIDROIT,’ which is in force in all countries surrounding Switzerland.

To conclude, ‘States in search of a new legal order’ was the title chosen by one specialist journal, the *Journal des Arts*, in June 1995 to announce the Diplomatic Conference of UNIDROIT in Rome. People often do not know that this search was initiated not by Third World countries that are the ‘source’ of involuntary exports but by European States themselves, namely Italy, Greece and France, which have lost much of their cultural heritage through theft and illegal exports to foreign countries in which recovery claims were impossible under the local law. One Geneva humanist, Professor Olivier Reverdin, noting that the mobility of works of art was an essential precondition for the ‘dialogue of civilizations’ and that too much of this mobility was ‘the result of conquest, looting, theft and trafficking,’ stressed several years ago that it was ‘essential, for the moral and spiritual life of civilizations and of all humanity, that the current confusion be replaced by legal order.’

The Concepts of Original Heritage and Adoptive Heritage in French Legislation⁴²

M. Cornu

 OUR LINKS with what we call our national heritage are complex. In reality, there is little explicit reference to them in our laws, which more often than not refer to framework concepts. The historical or artistic interest of an item of cultural property – assessment of which legislators delegate to the regulatory authorities – is what will determine the specific protection enjoyed by the property and its availability or otherwise. Our national treasures are bound to their location and may not leave the national territory permanently. The Heritage Code defines various categories of national treasures: works and objects in public collections; collections in French national museums; cultural property listed as historical monuments; and historical archives. Furthermore, this heritage, which we believe to be and say is our own, can have diverse origins. Like a number of other States, France has an open concept of its heritage, which includes adoptive heritage.

However, the questions remain as to why some property should be included in the public heritage and why the value that we attach to it does not include claims by other parties, if other ties exist.

Criteria for national heritage of major interest and methods of identification

There are several ways of identifying national heritage. Methods may be formal – the fact of being public property – or *de facto* – taking into account the links between our community and these elements of heritage.

Formal identification: classification based on public ownership

As in other legal systems, the links between cultural heritage and ownership in French law are very close. Heritage is defined in French law largely in reference to ownership. This point is authoritatively illustrated in the definition of heritage that was introduced very recently into the Heritage Code, an instrument adopted in February 2004 that codified all legislation on the protection of cultural property. Article 1 states

⁴² Updated English version of a paper presented in French to the Meeting of Experts, Seoul, 2002. First published in English in *International Expert Meeting on the Return of Cultural Property and the Fight against its Illicit Trafficking*, ed. Korean National Commission for UNESCO (Seoul, 2002); current translation from the French by UNESCO.

the following: 'In the present Code, the term 'heritage' applies to all property, immovable or movable, under public or private ownership, which is of historical, artistic, archaeological, aesthetic, scientific or technical interest.' Of the property that makes up our heritage, we will focus on the most important cultural property, national treasures, which, as part of the national heritage, are inalienable.

Cultural property that is classed by legislators as national treasures may be owned privately or publicly. However, the bulk of movable heritage is held in public collections.

Under French law, movable objects and works and other cultural property in public collections come under the regime governing the public domain, a special type of ownership that puts them in an altogether specific situation and ensures very effective protection. This approach, which has long been recognized in case law, is now consolidated by the new General Code on Ownership by Public Persons,⁴³ which introduced a tighter legal definition in relation to cultural property. More specifically, Act No. 2002-5 of 4 January 2002 on French national museums also expressly recalls this point, stating that 'property in the collections of French national museums belonging to a public person is part of the public domain and, as such, is inalienable.' The status of public collections means that they cannot be circulated physically (i.e. geographically) or legally. The three main effects are that they are inalienable, imprescriptible and indefeasible.⁴⁴

As in many other States, public ownership remains the supreme protection in our legislation, the idea being that public persons are the natural custodians of the artistic and historical heritage. Some authors have described higher-value public heritage not so much by reference to dismembered property of the *Ancien Régime* (pre-Revolution period) as to underscore the pre-eminence of the State. Public ownership of cultural property is considered more legitimate than any other form. This idea is firmly anchored in our legal system, even though the role of private institutions such as foundations or associations in this area is now beginning to be recognized. And the legitimacy of public ownership of course reinforces the sense that it is indisputable, which is clearly open to debate. It is as if the fact of belonging to the public domain conferred a more 'noble' status on public national treasures and placed them in a dominant position in relation to other national treasures. It is essential to understand how this process works.

The reasons for inclusion in the public domain are to be found in certain texts, particularly in the case of mechanisms that constitute injunctions or incentives to enrich public heritage, that is to say when the owner is ousted on grounds of cultural interest. Understandably, expropriation must be for the public good, and this lies in the high value of the property. The right to claim archaeological objects or maritime

43 *Code général de la propriété des personnes publiques* 21 April 2006.

44 Editor's note: 'Inalienable' means that ownership cannot be transferred. 'Imprescriptible' means that ownership cannot be acquired merely by adverse possession, 'good faith' acquisition or other rights such as a lien or mortgage. 'Indefeasible' means that rights to the object cannot be lost by the State.

cultural property may be exercised only in the case of major items. Similarly, the right to pre-emption, whereby the State can replace the purchaser of cultural property in the event of public sale, is possible for cultural property of great importance only.⁴⁵ Furthermore, sections of the General Tax Code on donations in lieu of tax payment or donation of works of art considerably limit the State's ability to acquire property by these means since the works must be of very high artistic and historical value and, even more restrictively, must serve to fill a gap in public collections.

There is little doubt that entry into the public heritage mostly concerns items of major interest. Once they have entered public collections, they acquire the status of national treasures. Their presence in a public collection implies that they are part of the national heritage. However, at no point does the law define 'national treasures.' This silence means that there is no point in looking any further into the reasons behind the term, or indeed into what we expect our heritage to comprise. Ownership is the basis of protection: public collection equals national treasure. Legally, the equation is flawless. However, even if we cannot strictly speaking detect a fault in the reasoning, the basic rationale behind conferral of national heritage status on certain items is to some extent sidestepped.

A wander through our museums leaves little doubt about the value of the objects that they contain. The reality of our collections does seem to preclude any questioning or lessen the need for it. It is not illogical to consider that the works' value alone motivates their inclusion in the public domain. However, when conflicts arise as a result of claims, it is the strength and nature of the ties that bind us to our heritage that are in debate.

***De facto* identification: classification based on cultural links**

Although the issue of cultural links to property goes beyond the legal sphere, it is not a non-legal issue either. Lawyers must ask themselves a range of questions. Firstly, how can the link be expressed in legal terms? What criteria are and are not pertinent in identifying the link?

National heritage: an open concept

(a) A universal concept

Most collections compiled by States also include objects that have been displaced as a result of a variety of circumstances. The notion of national heritage includes more than just items produced by nationals or on national territory: other criteria come into play.

⁴⁵ In the case of minor items, the public owner acts as an ordinary buyer and participates in auctions.

Time spent on the territory or the fact of the object being part of the national, artistic or religious history of the host country are all legitimate criteria for associating it with national heritage. In reality, it is the value that we attach to such property that determines its national heritage status and attests to special links. By choosing to ensure its preservation, we have dedicated a part of ourselves to it. National heritage in this sense is also partly adoptive heritage. The safekeeping of cultural property of various origins creates a bond of filiation that strengthens with time; and here it is not only the duration of possession that must be considered but, more specifically, the sense of belonging that arises from prolonged possession. Aside from the historical reasons for the presence of the *Mona Lisa* in the Louvre,⁴⁶ a whole swathe of the painting's history is there, to the point that it has ended up being at one with the place in which it is housed. In this sense, its national heritage status lies not only in this legal bond of ownership, an external criterion, but also in the emotional weight of the cultural property and the feeling that it is part of our history and therefore of our heritage. Many States recognize the universal concept of heritage, which is an open concept that postulates a rejection of the nationality criterion in determining what may count as heritage.

(b) Ruling out the criterion of nationality

Considerations of nationality are irrelevant in accepting a work under the French system. Several factors have led to the nationality of works being ruled out as a pertinent criterion for attachment. Many artists do not produce works that are commissioned by the State and do not represent the nation in their artistic production. Quentin Byrne-Sutton, noting the difficulty in determining a predominant link between an artist's work and a State and referring to the artist's themes, artistic influences and movements in turn, argues that Picasso's work is not geographically or intellectually the fruit of a nation, but represents the universal and personal vision of an artist who has been nurtured by a wide variety of influences.⁴⁷ Although, in accordance with copyright principles, a work of art carries the stamp of the author's personality (and also, to some extent, that of those who inspired the work), it in no way embodies its legal identity.

French case law has confirmed this analysis on several occasions, finding that the nationality of a work has no bearing on its protection under French law (as can be seen in the rulings on a van Gogh painting,⁴⁸ Italian drawings and a Chinese jar).⁴⁹

46 Its painter, Leonardo da Vinci, lived for a long time in France under the protection of Francis I.

47 Byrne-Sutton skilfully illustrates the absurdity of the nationality criterion in order to promote the idea of free movement of works of art. This will not be discussed here. Q. Byrne-Sutton 'Une position en faveur d'une libre circulation des œuvres d'art' [A position in favour of the free movement of works of art], in F. Furet (ed.) *Patrimoine, temps, espace: Patrimoine en place, patrimoine déplacé* [Heritage, time, space: Heritage in place, heritage out of place] (Paris, Fayard, Editions. du patrimoine, 1997) 338.

48 Conseil d'Etat, 31 July 1992, D. 1994.17. Note: D. Thomas.

49 Conseil d'Etat, 7 October 1987, D. 1988, 269. Note: Laveissière, J. *Actualité Juridique de Droit Administratif* (AJDA) 1987, 20 December 1987.

The courts therefore favour other criteria for determining the legitimacy of specific protection that overrides ordinary law. Recently, the European Court of Human Rights also recognized this principle in the case of *Beyeler v. Italy*.⁵⁰ The owner of a van Gogh painting, over which the Italian State had exercised its right of pre-emption, complained to the Strasbourg judges that he had suffered a violation of his right to respect for his property. The issue of the work's nationality had been discussed, the owner contesting the protection measure on the ground that the argument of protection of Italian heritage was not justifiable since the artist was foreign. However, the European Court of Human Rights dismissed the objection, recognizing that 'in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it was legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture.' The European Court probably did not want to enter into a discussion on original heritage, perhaps in order to prevent claims based on collective rights, a new generation of human rights.

It should be noted, however, that the purpose of most cases regarding settlement of this issue has not been to overturn State claims. The conflict has arisen between owners wanting to export their works and the State acting out of concern for the protection of heritage. The nationality criterion is invoked in support of the free market, thereby undermining heritage-protection policies that are mainly based on criteria of cultural value. And it is to settle this issue that the Court of Justice of the European Communities has weighed up the requirements of general interest and their impact on individual rights. Adopting a restrictive concept of heritage also puts cultural interest at risk. Although the link with the nation or territory can positively influence a decision on protection, it is not the only criterion. The word 'national,' which is frequently used in heritage vocabulary (e.g. national museum, national treasure, national antiquities, national heritage), has another meaning. It refers to the idea of national competence or national sovereignty, but it does not reflect the degree of attachment to the nation.

However, this debate on a work's nationality takes a different turn when the conflict is between two spheres of public interest, two States invoking their right over the same heritage. If one can readily subscribe to the idea of a universal concept of property under the protection of domestic legislation that is not centred exclusively on original cultural property, one may arguably question whether the sense of belonging or ownership in relation to national treasures is always well founded. Conversely, the links between certain items of heritage and their country of origin cannot be ignored. It is clearly a question of special cultural links. The various kinds of links must be explored in order to understand how they could potentially affect a decision regarding attachment.

50 CEDH, 5 janvier 2000, arrêt *Beyeler c/Italie*, *Actualité Juridique de Droit Administratif* (AJDA), 20 juin 2000, 543, note J.-F. Flauss.

Recognizing special links

(a) *Creation and collective heritage*

Although it can be argued that, by nature, the area of creation is not subject to the nationality criterion, in some scenarios it can be useful in determining the legitimate custodian. The areas of creation and heritage, which are frequently separated, are very closely linked in some communities. These links are sometimes such that they call for specific protection. Because the cultural property is produced or generated by a given community, it is of particular importance. For example, Aboriginal creation is considered to constitute collective heritage and not an individual act free from any social claim, as in other societies. It could be argued that uprooting this property from its original context, its natural environment, not only deprives it of a fundamental dimension but further depletes the resources that nurture the community. In reality, from this perspective, it is not so much the issue of nationality that is at stake, but that of provenance.

Some international instruments seem to recognize the primacy of these links. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 describes the following categories of property that make up the cultural heritage of each State:

Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; [...] cultural property found within the national territory (Article 4(a) and (b)).

In a 1991 resolution, the Institute of International Law held that the “country of origin” of a work of art means the country with which the property concerned is most closely linked from the cultural point of view.⁵¹ The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 applies a particular set of rules in the case of certain categories of property, in which a form of recognition of original heritage can be perceived. This is the case for sacred or communally important cultural objects belonging to and used by a tribal or indigenous community in a contracting State as part of that community’s traditional or ritual use. The UNIDROIT Convention also contains special provisions concerning the return of illegally exported objects. Article 7 provides that the rules on return do not apply where the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person. However, the next paragraph states that they do apply in the case of cultural objects belonging to a collective heritage and intended for

51 81 *Revue critique de droit international privé* [Critical review of private international law] (1992) 204.

traditional or ritual usage in a community. Although there is a reference to the right of ownership, it alone is not sufficient: there is also a condition that the owner community must use this collective property. However, the scope of these rules is offset by two factors: on the one hand, by the situations in which the rules are invoked, and, on the other, by the comprehensive concept of the notion of original heritage, which is shared by many States and is recognized in international texts.

The usefulness of the rules emerges when two countries are contesting an item of heritage. They help in weighing up the interests involved, favouring the State that holds the closest links to the heritage concerned. However, the rules have limited scope. On the one hand, a special link will be taken into consideration when the State which is holding the contested property cannot claim lawful possession, either because the work has been stolen, or because it has been acquired illicitly or exported illegally. On the other, the text only applies to the future, meaning that this solution cannot resolve situations from the past to which the rules of prescription apply.

(b) Historical links

The historical criterion is another possible criterion for attachment. It dominates all French legislation on heritage protection. Historical monuments are the central notion in a basic instrument, the *Historical Monuments Act* of 31 December 1913. Reference to history is a constant in all legal provisions on cultural heritage. It has even been written that the artistic or aesthetic aspect of a work is frequently assessed against the yardstick of its interest from the point of view of the history of art, architecture and so on. The records of the *Commission des monuments historiques* (Commission on Historical Monuments), which is consulted by the Minister for Culture for advice on heritage protection, are eloquent on this point. Decisions on listing are frequently made on the basis of both artistic and historical interest; for example, one case before the judges discussed whether the listing of a painting by Ingres was justified, noting the qualities of both the painting and its subject: the Duke of Orleans and the role that he had played in the history of France.⁵²

Another example of historical ties that may raise the question of special links is that of archives, and more specifically public archives, the mass of documents received or produced in the exercise of human activity. Archives occupy a particular place within cultural property. They follow the history of peoples; they are the tracks left by peoples, the peoples' collective memory. They constitute a collective heritage which conceivably should remain on the territory in which they were compiled; that herit-

52 Historical importance is also mentioned in international instruments. The 1970 Convention cites, among the categories of cultural property, 'property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance.' The UNIDROIT Convention deplores illicit trafficking and the potentially irreplaceable losses historically and scientifically. However, once again, this link would be considered only in the case of illicit possession, theft or illegal export.

age is an indispensable accessory to that territory. In fact, more than the principle of territoriality, the emphasis today seems to be on respecting the principle of provenance, which is closer to the principle of *respect des fonds*.⁵³ In this sense, archives are not exactly cultural property like any other, primarily because their function is not purely that of heritage; they are also an instrument of administrative management, and at the same time a necessity for justifying the rights of legal entities and individuals. This concept is set out in the French *Archives Act* (No. 79–81) of 3 January 1971. As Hervé Bastien quite rightly recalls, ‘archives are not produced primarily for historians’ delectation; before being used as historical sources, they are first necessary for the purposes of memory.’

Although the consideration of a link to our history – whether national, local or international history – is important in establishing protection, the criterion of historical interest cannot be restricted to this link.⁵⁴ It has been assessed objectively in many cases.

(c) *The theory of context*

Keeping cultural property *in situ* can be justified in various ways, either because of physical attachment or because of intellectual links with the property’s host environment.

The immovable nature of a heritage property would seem naturally to ascribe it to its place of origin. However, there are many examples of displacement, whether in the case of entire buildings (for example, the Romanesque and Gothic religious buildings originally situated on Spanish and French territories and entirely reconstructed in New York, exhibited today at the Cloisters Museum in Fort Tryon Park) or decorative fragments removed from them. We naturally think of the adventures of the Parthenon frieze, which is still making history. There was also a case concerning frescoes that were removed from a Romanesque chapel and exported to Switzerland, which had a happy ending: the Swiss Abbege foundation, which had part of the frescoes, decided to replace them *in situ*, a voluntary move that was not imposed (there

53 The principle of not separating documents of the same administrative provenance in places where the principle of territoriality sometimes leads to questionable sharing. H. Bastien ‘Fortune et infortune des archives par delà des frontières’ [Fortune and misfortune of archives beyond frontiers], in *Patrimoine, temps, espace: Patrimoine en place, patrimoine déplacé* cited n. 47 above.

54 On taking account of this special link, and on interpretation of the notion of national treasure under Article 30 of the European Union Treaty, the Commission’s definition proposal can be cited. In terms of property considered to constitute national treasures, the Commission suggested including, among others, ‘objects linked so closely to the history or life of the country that its departure would constitute a significant loss for the country.’ In general, the term ‘national’ cannot be interpreted in a restrictive sense, as requiring a specific link of affiliation to the State claiming ownership or custody. This definition proposal was never adopted, the Member States denying Community authorities any competence to define this notion. ‘Proposition de communication interprétative concernant les conditions de circulation dans la communauté des biens ayant une valeur artistique, historique ou archéologique’ [draft Commission interpretative communication on conditions for circulating within the Community property of artistic, historical or archaeological value], November 1989.

had been a long judicial saga beforehand).⁵⁵ Contemporary international legal instruments place particular emphasis on such dismantling of artistic or historical monuments and of archaeological sites.

More specifically, the links that an item of cultural property has with its surrounding environment are of several types. The link is physical if the property is immovable and fixed. However, the link between a work and a place is not necessarily or only physical. There is sometimes a form of intellectual solidarity between a heritage property and its context, which is the result of various circumstances.

The issue of respect for the intellectual environment of a work and hence the proximity link (quite simply the place in which the work was created or in which it is situated) is primarily one of cultural policy. Museums and heritage institutions have difficulty agreeing on this issue and there has not yet been any legal venture onto this ground (or if there has, only timidly), the preference being to leave to the professionals the question of whether the interpretation stands that a work's aesthetic and historical value and its importance require that it should be kept in the same place, or whether, conversely, it would be preferable for it to be held in an ad hoc institution (for example, a museum). The debate is far from over.⁵⁶ A draft law on the protection of heritage, however, suggests a new interpretation, seeking to preserve groups of movable and immovable property, and creates the possibility of listing 'groups comprising property that is immovable by nature, property that is immovable by virtue of its intended purpose and movable objects attached to it by virtue of the historical, artistic, scientific or technical links that make these groups exceptionally coherent.' However, the bill adopted at its first reading by the National Assembly in 2001 was never considered by the Senate. By identifying these close links between a property and its environment in national legislation: it can be argued that such protection would render all the more visible and tangible the need to preserve this unity.

There are many reasons for attachment to national heritage, which clash with other links in the case of displaced heritage. Ways and means of resolving these conflicts of cultural interest are examined below.

55 E. De Roux 'Le retour miraculeux du Christ de Casenoves après quarante ans d'errance' ['The Miraculous Return of the Cazenoves Christ after 40 years of Wandering'] *Le Monde* 3 September 1997, 26.

56 As attested by, for example, the proceedings of the conference of the *Institut national du patrimoine* (National Heritage School), *Patrimoine, temps, espace: Patrimoine en place, patrimoine déplacé* cite n. 47 above.

Conflicts of interest regarding heritage and means of resolving them

In the event of a conflict of interest regarding heritage, it may be settled in various ways, some being more practicable than others with the passage of time. Disputes may be settled by adversarial proceedings or by consensus.

Settling disputes by adversarial proceedings

Several series of incidents have brought into question the link between ownership and national heritage, particularly when possession has been secured illicitly.⁵⁷ On this issue, the French system is on the side of the purchaser in good faith, whose rights of ownership are consolidated by the fact of possession. Under Article 2276 of the *Civil Code*, 'in the case of movable property, possession is tantamount to ownership,' a method of acquisition that applies to private and public owners. In order to result in ownership, however, possession must have several qualities, without which it has no effect. Possession must be continuous (without interruption), peaceful (not the result of violence), unequivocal (possession must not be precarious; for example, a deposit or loan) and public. In the case of the Korean royal archives, it had been argued that possession was not public, since the archives were held in reserves. However, since a decree had declared their entry into the collections, possession was indeed public.

Under these conditions and as long as the possessor is in good faith, acquisition is immediate, except in the event of loss or theft. In this case, the owner has a pre-established period of three years to claim the property. Beyond that, there is still the possibility of demonstrating that the purchaser did not act in good faith, for which the time limit for action is thirty years. The burden of proof is on the owner, it being understood that good faith (the fact of believing that one is the owner) is judged from the moment that possession began. The courts generally consider the extent to which the possessor has been vigilant, which is variously evaluated according to his or her capacities and competence. If the possessor has neglected to make inquiries despite having doubts as to the legality of the transaction (for example, in the case of a low price, a clandestine or hurried sale or publicity over the theft), his or her good faith may be called into question. Public buyers are not immune from claims based on the absence of good faith if they have not been sufficiently vigilant over the provenance of the work. Judges questioned the acquisition by a museum of a painting by Klimt, produced just after the Second World War, on the ground that the institution should have made inquiries after the work's origin.⁵⁸ Conversely, on the subject

57 Cases of despoliation during the Second World War will not be covered here. A special text adopted following the war provided for the restitution of property to victims of despoliation under conditions separate from ordinary law.

58 Assessment of good faith in this case is not dissimilar from the way in which the UNIDROIT Convention considers the behaviour of the possessor or holder of the object.

of a painting acquired by the State for the paintings department of the Louvre, the judges noted that

far from acting negligently or irresponsibly, the French museums management took appropriate precautions by requiring an attestation from the notary public responsible for settling the estate of the person specified as the owner of the painting, of whom the seller claimed to be the heiress, and in view of the precise corroborating information about the owner's identity that was obtained from other legal professionals such as the seller's lawyers, who had been deceived in the same way as the notary public had been, and from Christie's catalogue.⁵⁹

It seems that vigilance on the part of public institutions, particularly museum professionals, is currently increasing, and is strongly encouraged by bodies such as the International Council of Museums (ICOM).⁶⁰

In these various scenarios, it is not only the regime of public ownership that is undermined, but also, more radically, entry into the domain of public heritage.

In the scenario of illicit appropriation of property by a State on a territory other than that over which it has sovereignty, these rules provide protection in the face of a request for a claim.⁶¹ From this point of view, legal tools have evolved. Certain conventions that aim to combat the illicit import, export and transfer of property have come into being, some of them ratified by France. The question is what impact they have had on these situations and to what extent they might affect acquisition mechanisms linked to possession. However, in addressing this question, distinctions must be made according to the chronology of events. The twentieth century saw the beginnings of international law and principles regarding the restitution of cultural property, the most effective arm of which is the UNIDROIT Convention,⁶² a most welcome development. Before then, the two UNESCO Conventions of 1954⁶³ and 1970 addressed in various ways the issues of destruction, despoliation and illicit transfer. These acts are unanimously condemned today, but this has not always been the case. Wars have seen the seizure of cultural property and archives as trophies and the displacement of countless objects as spoils. Within this question of appropriation of foreign heritage, several scenarios must be distinguished. The solutions are different depending on whether the seizure is illicit at the moment that it is carried out.

59 Paris, 2 April 2001, *Gazette de Palais*, *Sommaires de jurisprudence* (Case-Law Summaries) September/October 2001, 1718; Note: H. Vray.

60 The ICOM Code of Professional Ethics contains several provisions in this regard. One of them is devoted to the acquisition of illicit objects.

61 All the more so as, in case of a dispute over the ownership of an object on the territory, the judge will apply French law in considering the true status of the property.

62 It is to be hoped that more States ratify this instrument. France is committed to this process, which has unfortunately been impeded by very strong resistance on the part of market professionals, who often use the argument of absence of good faith to criticize this essential tool for reform of the art market and that of cultural property in general.

63 The *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954 and its *Protocol* 1954.

A seizure which would be illicit today may have been considered lawful when it was carried out, in which case the subsequent appearance of instruments combating these activities do not offer a pertinent solution. Like most international instruments, international conventions on the restitution of cultural property are not retroactive and are intended to apply only to future situations. The overriding consideration is one of legal security, coupled with one of reality: it is hard to imagine a massive dismantling of public collections on an international scale in order to go back to the *status quo ante*. Indeed, are we in a position today to determine whether that *status quo* was itself illegal?

In the case of the Korean archives, questions were raised about whether the seizure was illicit. It is true that throughout history people have spoken out against pillage and the destruction of property, often both at the same time. In 1861, Victor Hugo eloquently denounced an expedition to China by the French and English armies and the destruction and pillage which they wreaked.⁶⁴ In the course of the nineteenth century, there were several landmark instances of restitution, in particular on the occasion of the Congress of Vienna in 1815. Even so, can we really invoke international customary law or a general principle of international law? It is unlikely that such an argument could hold under the law applicable in a period in which the legal arsenal was largely insufficient. Now that France has ratified the 1970 Convention, have solutions evolved, for example, with regard to certain items that had recently left their original territory illicitly and were then found on French territory? As regards restitutions based on the 1970 Convention, a number of requests have been unsuccessful for want of sufficient legal grounds. In fact, it is rare for decisions to refer to the 1970 Convention. A recent judgment by the administrative court of appeal in Paris shows the limits of domestic law as regards claims, despite ratification of the 1970 Convention.⁶⁵

The judges ordered the dismissal of the claim over the African statuettes in question since their seizure was effected on the basis of the Convention of Paris of 14 November 1970, ratified by France on 7 April 1997, on combating the illicit export of cultural property. The provisions of this Convention are not directly applicable in the domestic legal order of States Parties and do not create any direct obligation for nationals.

The claim of the Republic of Nigeria was based on Article 13 of the Convention, which invites States to take the measures necessary to prevent the acquisition of cultural property that is in violation of export legislation. The Convention text does need to be transposed into domestic law, but in fact there is nothing in the provisions of domestic law to prevent an acquisition even though its illegal nature was in this case beyond dispute. This decision was after confirmed in a judgment of an appeal

64 Letter from Victor Hugo to Captain Butler, Hauteville House, 25 November 1861.

65 Paris, 5 April 2004, Federal Republic of Nigeria/de Monbrison, *Jurisdata*, 2004.

in September 2006 by the Court of Cassation.⁶⁶ The rules on prescription provide protection where the property is held by a possessor of good faith. This explains the importance of this notion and its interpretation by the courts. In this sense, proof of illicit export alone, or even proof of inalienable public ownership by another State, is not sufficient.

Settling disputes by consensus

In seeking a consensual solution that takes account of the existence of special links, the legal framework can vary, either providing for the transfer of ownership of the property in question or using other methods such as loans, deposits or, again, shared use.

The issue of ownership

Taking property out of the public domain requires it to have been first taken out of use and removed from the public domain. This is technically possible. The recent museums Act addressed this issue of the public collections regime. During the discussions around adoption of the text, there was even some debate about the possibility of making public collections permanently inalienable and thereby preventing any possibility of removal. The legislators did not take this route in the end. Works in public collections fall into the public domain and are therefore inalienable, but as soon as they are removed, they cease to be inalienable. However, the Act of 4 January 2002⁶⁷ strengthened the guarantees on this point. Firstly, removal requires the consent of the National Scientific Commission, which comprises mainly professionals.⁶⁸ Furthermore, some property cannot be removed from public collections. The Act rules out any possibility of removal when the property has been acquired and incorporated into public collections with State funding. This restriction also applies in the case of gifts and legacies. There is therefore no possibility of voluntary return for cultural reasons in these acquisition scenarios. This is one of the reasons why there could be no restitution of the Maori head that entered the inventory of the Rouen museum in the form of a gift. The Ministry of Culture had filed legal proceedings in order to stop the action initiated by Rouen city council. The administrative tribunal in Rouen therefore called an end to its deliberations since they were not in compliance with the removal procedure. In fact, compliance with the procedure would have made no difference. As a gift, the head is purely and simply 'unremovable' under our legislation. The commune intended to take an ethical approach, stating in its arguments that 'this head is moreover sacred in the eyes of the Maori tribes: it will therefore be returned to its land of origin in order to receive a burial

66 Cour de cassation, 20 septembre 2006, *Semaine juridique*, édition générale, 11 octobre 2006, IV, 3005, 1917.

67 Act No. 2002-05 of 4 January 2002 on French national museums, *Journal Officiel* [Official Journal] of 5 January 2002.

68 Article 11 of the Act of 4 January 2002 and Article 16, paragraph 3, of Decree No. 2002-628 of 25 April 2002 adopted through application of Act No. 2002-05 of 4 January 2002 on French museums, *Journal Officiel* [Official Journal] of 28 April 2002.

in accordance with ancestral rites.’ A symbolic returning ceremony in the presence of Maori dignitaries and the Ambassador of New Zealand had been planned. Following this setback, a draft law on returning Maori heads – brought by the mayor of Rouen, who was also a member of parliament – was submitted to the Senate. It comprised one article only which stated the following: ‘As of the entry into force of the present Act, Maori heads held by French museums shall cease to be part of their collections.’⁶⁹ It can be argued that such claims receive a more favourable response since they concern mortal remains, having regard for the right to respect for the dead and the principle of dignity. The proposal for restitution would most probably not have been so welcome in the case of cultural property, such as a museum object.

There was already a precedent in France with an act adopted in 2002 that authorized the return of the mortal remains of a person from the Khoikhoi community (South Africa). The remains were held in the museum’s collections and were claimed by the South African State. This case sparked much debate and came up against strong misgivings, in particular among museum curators, who attached great importance to the rule of inalienability and were worried that the removal from the collections might constitute a precedent. This is one of the reasons why an Act was adopted.⁷⁰ An administrative decision to remove the remains from the public domain would have paved the way to restitution. However, given the context and the difficulty the administration was having in taking this decision, the legislative route was favoured. The act comprised one article only:

As of the date of entry into force of the present Act, the mortal remains of the person known as Saartjie Baartman shall cease to be part of the collections of the public establishment, the National Museum of Natural History. As of the same date, the administrative authority has two months in which to return the remains to the Republic of South Africa.⁷¹

Even though the main grounds were the principle of dignity and the specific status of human remains, memorial reasons were also involved. The introduction of the National Assembly report by Jean Le Garrec shows just how closely linked the two aspects were:

For several years, South Africa has hoped for the repatriation of the remains of Saartjie Baartman so that she can be honoured by her people. France has no reason to oppose this restitution, which, in reality, is of great symbolic and political significance for South Africa and for our country.

Saartjie Baartman’s life and death were bereft of human dignity. The return of her remains to her people, so that she can finally rest in peace in the land of

69 *Proposition de Loi visant à autoriser la restitution par la France des têtes maories* (Draft law aimed at authorizing the restitution of Maori heads by France), Sénat, n° 215, 22 February 2008.

70 Members of Parliament also cited the political nature of restitution as justification.

71 Act No. 2002–323 of 6 March 2002 on the return by France of the mortal remains of Saartjie Baartman to South Africa.

her ancestors, is long overdue. Our country must fulfil its duty to memory in this way, in particular in view of colonialism, and, despite the difficulties, must recognize the errors that tarnish this period of history, particularly as regards slavery, which constitutes a crime against humanity. In that regard, this draft law unquestionably enables the work of memory to progress in peace.⁷²

The concern for memory is also very much present in the case of the Maori head.

In other cases, when removal from the public domain is possible, other difficulties arise. Since attachment to the public domain is a product of the will of a public authority, it would be reasonable to assume that such a decision could be reversed. However, such action could be risky, particularly in terms of the consequences of removal for the work's value, as it constitutes disqualification since the property is no longer considered to be part of the national heritage. More generally, it is difficult to take the decision to abandon it after having adopted it. Other, very real risks exist, too: removal must remain absolutely exceptional and must not become a way of managing collections. It is feared in some quarters that such action would become commonplace, which would then undermine all efforts taken to preserve heritage.

However, it can be argued that in certain cases in which there is a clear, natural attachment, it should be possible to request an exception. Such legal action also exists in other States and has, for example, been conducive to the reconstitution of disassembled items on the sole basis of cultural or scientific criteria linked to the object's provenance. Giovanni Guzzo has cited the example of a sarcophagus acquired in good faith by Berlin museums: the superintendency had in its possession a fragment which the German museums decided to return. Other cases include that of the manuscripts of the Icelandic Sagas, founding documents which Denmark returned upon independence. The highly symbolic nature and the closeness of the link with the Icelandic people justified their having custody of them.

Alternative techniques

(a) Refraining from acquiring property

Preliminary precautions may help prevent conflict situations upstream. Opportunities may arise in France for acquiring property of great artistic value, which is likely to concern other States. The purely artistic or historical value will sometimes be set aside when other links are revealed. There has been a recent example in France of a sale by public auction of a painting of an historical American figure. The French museums could have exercised their right of pre-emption under Act No. 2000–642 of 10 July 2000. They did not do so, considering that it was more natural for the work to return

⁷² Report on behalf of the Commission on Cultural, Family and Social Affairs on the draft law, adopted by the Senate, on the return by France of the mortal remains of Saartjie Baartman to South Africa, by Jean Le Garrec, Member of Parliament.

to the United States. There is, therefore, a sort of natural obligation and recognition of a special link, in this case in an administrative practice. Once again, no sanctions apply when possession is lawful and the mode of acquisition cannot be challenged; here it was more a question of ethics.

(b) Lending and depositing works

Reluctance to transfer ownership explains why there has been recourse to techniques such as lending and deposits, including when such legal actions concern rather similar situations. This was the option taken in relation to Nok sculptures from Africa, for which arrangements were made for a deposit at a French museum. The institution is holding the objects on loan on a long-term basis, while the ownership of the other party is recognized.⁷³ In fact, in this case the loan has the effect of consolidating the objects' presence in the museum, and restitution is not planned.

The situation is somewhat different in the case of the Korean royal archives, since here it is a question of returning the archives to their State of origin. The main difficulty is that France does not intend to renounce ownership. A mediation process has been instituted and a solution suggested which might consist of a two-way loan (loaning the archives to Korea in exchange for equivalent objects loaned to France). Regarding French national treasures, Act No. 92-1477 of 31 December 1992 authorizes temporary removal from French territory in certain circumstances, including deposit in a public collection and participation in an exhibition or cultural event. The issue has not yet been resolved. Holding by the Korean State could be an alternative solution. However, the issue of ownership sometimes also involves symbolic value, particularly in the case of property that is very closely bound up with the history and building of States, as is the case with State archives such as parliamentary or governmental records. However that may be, these methods of circulation could certainly be used more often, as could, where appropriate, other models for the common use of shared heritage.

Our major institutions – such as museums, archives and libraries – as owners, depositories or holders in any capacity, hold works, objects and documents that formerly belonged to other nations and communities. Faced with potential claims on a variety of grounds, we can ourselves claim legal possession in certain scenarios, whether on grounds of legal possession at origin or when there is a time bar on any irregularity. Legislation has in some cases consolidated irregular situations. In the final analysis, if we accept the idea of common heritage, the markers or links that determine a property's location in a particular place are ultimately of little importance; what is essential is to preserve the most precious elements, whatever their provenance.

73 Originally, these pieces had been bought by the museum, but the fact that they had been circulated illicitly led the institution to this compromise.

From this perspective, only legal attachment based on ownership is relevant. Whoever has custody of a property would be justified in making it their own.⁷⁴ But must we always adhere strictly to the argument of legal authority? There are also initiatives for voluntary restitution, especially in cases where there is a sense of legitimacy (not in the legal sense but rather from a cultural or scientific point of view) in the property being on a particular territory, in the possession of a particular community, a sense that intensifies when dispossession occurred in circumstances that would be condemned today. Beyond purely technical legal discussions, addressing the issue of restitution is, in some cases, more a matter of politics than of law.

74 This approach has also been suggested in relation to European heritage. Some authors proposed the creation of a European right of pre-emption, which could be exercised equally by all States over heritage that was, so to speak, pooled. However, Member States expressed strong opposition, claiming their individual sovereignty over choices regarding heritage.

The Icelandic Sagas

An important decision on ownership and custody of culturally significant manuscripts was made by the Danish High Court in 1966.

FROM 1702 TO 1712 the Icelander Arne Magnussen, at that time the Danish Royal Commissioner of Lands with the task of making a property register, gathered together mediaeval manuscripts of the old Icelandic sagas, then in private hands, in order to preserve them. He returned with them to Denmark and only a very limited number of manuscripts remained in Iceland. By his will he left his collection to the University of Copenhagen, together with the rest of his estate, so that the manuscripts could be preserved, at a time when there was no prospect, in the then impoverished condition of Iceland, of adequately conserving them there. It had always been the intention of the original owners, and of Arne Magnussen himself, to preserve them for the Icelandic population. They were held by the Arne Magnussen Institute⁷⁵ of the University, supported by the Arne Magnussen Foundation. The institute had 2,572 manuscripts and a large number of legal documents. The oldest of the manuscripts dated from the twelfth and thirteenth centuries and the majority from the fourteenth to seventeenth centuries; they concerned a wide range of subjects including astronomy, philology, physics, geography, history, law, mythology, theology and aesthetics. A large proportion comprised Icelandic family sagas dealing with the Icelandic chieftains and their families in the period of about 930–1030 CE. The manuscripts to be surrendered comprised about 1,700 of the 2,572 held by the institute.

In 1961 Denmark and Iceland had negotiated, but not signed, a treaty that agreed to the transfer of the manuscripts to Iceland, and in 1965 a bill was introduced to approve a treaty along those lines. In 1965 the legislation was passed in both houses with a big majority.

Nonetheless the Arne Magnussen Institute (which held the manuscripts in the University of Copenhagen) challenged the legislation that approved these steps. The Foundation argued that this amounted to compulsory acquisition for which, according to the Danish Constitution, compensation was payable. It claimed to be an independent institution with the right of ownership over the manuscripts, documents and trust capital, saying that Section 73 of the Constitution only allowed for expropriation of property in the public interest and on payment of compensation. The Foundation argued that this meant ‘the Danish public interest,’ which did not include the ‘Icelandic public interest.’ The Minister of Education defending the action argued that, according to their origin and character, the manuscripts were a national treasure for the Icelandic people and constituted their only relic of the past. It was

⁷⁵ For more information see <http://randburg.com/is/am>

therefore understandable that the Icelandic side felt a strong desire for their return. By complying with the strong and legitimate wishes of a State closely associated with Denmark, the Danish public interest was obviously also enriched.

The Danish High Court had to consider whether the law fell within the constitutional rules as to expropriation of private property. The court held that the Arne Magnussen Foundation had a right protected by the Constitution, which forbade expropriation of property except where it was for public benefit and subject to compensation, but it also took the view that, in the particular circumstances of this case, there was no substantial loss for which compensation needed to be paid.

The court found that the return would solve an important issue in the relationship between Denmark and Iceland. Most importantly, the Court stated that:

The Foundation's rights over the effects are found to diverge to a pronounced degree from the property rights which, according to section 73 of the Constitution, are clearly protected from expropriation ... The objective at the establishment of the Foundation was not to serve individual interests, but solely to preserve the manuscripts with a view to their research and publication, an objective which may continue to be attained.

That objective could, the Court said, be reached irrespective of the division to be made between Denmark and Iceland. The court also attached significance to the fact that Arne Magnussen, while he was Private Secretary of Archives and Professor at Copenhagen University and as Royal Commissioner of Lands, had occupied a position which provided opportunities for coming into contact with people willing to hand over their manuscripts to him, and that the stipulations of the deed of foundation that Icelandic scholarship holders and scribes were to research and copy manuscripts indicate that the founders wished to take care of Icelandic interests as far as was possible.

In these 'quite unique circumstances' the Court held that section 73 of the Constitution did not apply to the action proposed in relation to the institute's collection.

The Supreme Court of Denmark upheld this decision on appeal in 1971. The *Codex Regius of the Poetic Edda* and the compendium *Flateyjarbók* (The book of the Island of Flatoe) – two of the most famous of all the Icelandic manuscripts – were handed over by the Danish Royal Library that same year, and nearly 2,000 other manuscripts were delivered in the following years up to 1997. These are now held in the Árni Magnússon Institute for Icelandic Studies, a research institute within the University of Iceland. The remainder are held in the Arnarnagnæan Collection in Copenhagen.⁷⁶

76 *Arne Magnussens Legat (Den arnamagnæanske Stiftelse) v. Undervisningsministeriet* (Arne Magnussen Institute v the Ministry of Education) in *Ugeskrift for Retvaesen* (UfR) (Law Reports) (1966)22; 1 UfR (1972) 99. See also E.K. Nielsen 'Denmark to Iceland. A Case without Precedence: Delivering back the Icelandic Manuscripts 1971–1977' 68th IFLA Council and General Conference 18–24 August 2002 <http://www.archive.ifla.org> accessed 10 October 2008.



Image of the tenth-century saga hero Egill Skallagrímsson as depicted in the seventeenth-century manuscript returned by Denmark to Iceland (Ref AM 426 fol.). © Árni Magnússon Institute for Icelandic Studies

The McClain/Schultz Doctrine: Another Step against Trade in Stolen Antiquities⁷⁷

P. Gerstenblith

IN FEBRUARY 2002, prominent New York antiquities dealer, Frederick Schultz was convicted under the United States *National Stolen Property Act* (NSPA) on one count of conspiring to deal in antiquities stolen from Egypt. Pretrial proceedings had focused on the basic legal issue of whether antiquities, whose ownership has been vested in a nation, are stolen property if the antiquities are excavated and removed from the country without permission. Soon after his conviction, Schultz appealed, based, to a large extent, on this question. On 25 June 2003, the Federal Court of Appeals for the Second Circuit, which includes New York City within its jurisdiction, affirmed the conviction, expending much of its written opinion on consideration of whether such antiquities are stolen property under the NSPA.⁷⁸

Frederick Schultz is a prominent antiquities dealer who, until shortly before his indictment, served as President of the National Association of Dealers in Ancient, Oriental and Primitive Art (NADAOPA).⁷⁹ Beginning in the early 1990s, Schultz and his British co-conspirator, Jonathan Tokeley-Parry,⁸⁰ conspired to remove and resell several antiquities from Egypt, including a stone sculptural head of the Eighteenth Dynasty Pharaoh Amenhotep III, a faience figure of a king kneeling at an altar, a pair of wall reliefs from the tomb of Hetepka in Saqqara, and a Sixth Dynasty statue of a striding figure.⁸¹ In 1983, Egypt had enacted Law 117, which, among other provisions, vested ownership of all antiquities discovered after that date in the Egyptian nation. This meant that any antiquities excavated after that date and removed without permission were stolen property under Egyptian law. Tokeley-Parry and Schultz therefore created a fake provenance for several of these items, placing them in a fictitious old collection of the 1920s, dubbed the ‘Thomas Alcock collection,’ and falsifying ‘aged’ labels.

Following his indictment in July 2001, Schultz moved to have the indictment dismissed based on two main arguments: that Egyptian Law 117 was merely an export control and not an ownership law and that United States law, including the NSPA, does not regard objects taken in violation of a foreign ownership law as stolen

77 13 *Culture without Context* (Newsletter of the Illicit Antiquities Research Centre, Cambridge UK, Autumn 2003) 5.

78 *United States v. Schultz*, 333 F2d 393 (2d Cir. 2003). The National Stolen Property Act is codified at 18 USC §§ 2314–15. Editor’s note: for the full text of legal abbreviations, see the List of Abbreviations.

79 The factual and legal background of the case is presented in P. Watson ‘The investigation of Frederick Schultz’ 10 *Culture Without Context* (2002) 21 and P. Gerstenblith ‘*United States v. Schultz*’ 10 *Culture Without Context* (2002) 27.

80 Tokeley-Parry was convicted and served three years in gaol. *R. v. Tokeley-Parry* [1999] *Criminal Law Reports* (UK) 578.

81 Watson, note 9 above, at 24.

property. The trial court rejected both these arguments⁸² and the case went to trial in February 2002. Schultz was convicted and sentenced in June 2002 to thirty-three months' imprisonment. He then appealed to the Second Circuit. Schultz's appeal was supported by two *amicus curiae* briefs⁸³ – one filed on behalf of NADAOPA, joined by the International Association of Professional Numismatists, the Art Dealers Association of America, the Antique Tribal Art Dealers Association, the Professional Numismatists Guild, and the American Society of Appraisers. The second brief in support of Schultz was filed by an *ad hoc* group, Citizens for a Balanced Policy with Regard to the Importation of Cultural Property, although authored by the NADAOPA's long-time attorney, James Fitzpatrick. An *amicus curiae* brief was submitted in support of the US Government's position by the Archaeological Institute of America, joined by the American Anthropological Association, the Society for American Archaeology, the Society for Historical Archaeology, and the United States Committee for the International Council on Monuments and Sites.

Although it was not an issue explicitly argued by Schultz in his appeal, the Second Circuit appellate court spent considerable time analysing Egyptian Law 117 to determine whether it was truly an ownership law, rather than an export control 'in disguise.' If the law were more appropriately viewed as an export control, the property could not be characterized as stolen and there would be question as to whether Schultz had violated an American law in conspiring to bring such objects into the United States. The court concluded that Law 117 is a true ownership law based on its clear language and extensive evidence of its internal enforcement presented during a hearing conducted by the trial court. It further stated that 'Law 117 is clear and unambiguous, and that the antiquities that were the subject of the conspiracy in this case were owned by the Egyptian government.'⁸⁴

The court then responded to a series of arguments presented by Schultz that amounted to the notion that these objects, even if owned by Egypt under Egyptian law, should not be considered owned by Egypt for purposes of United States law and enforcement of the NSPA. The court responded that the NSPA covers objects stolen in foreign countries as well as objects owned by foreign governments. It then proceeded to analyse three of Schultz's primary arguments as to why the NSPA did not apply to his conduct.

82 178 F. Supp. 2d 445 (S.D.N.Y. 2002) (Southern District of New York).

83 Editor's note: a brief by an *amicus curiae* ('friend of the court') provides arguments by persons or groups not directly involved in the litigation but with particular expertise to offer to the court.

84 333 F.3d at 402.

First, the court focused on the status of an earlier decision, *United States v. McClain*,⁸⁵ which affirmed the conviction of several dealers for conspiring to deal in antiquities stolen from Mexico. As in the case of Egypt, Mexico vests ownership of antiquities pursuant to a national ownership law. In *McClain*, the Fifth Circuit Court of Appeals struck a balance by clearly distinguishing between, on the one hand, illegal export and, on the other hand, application of the NSPA to protect a foreign nation that has clearly vested ownership of antiquities in the same way as it protects any other owner whose property has been stolen.

Second, the court addressed Schultz's argument that the prosecution under the NSPA was contrary to United States policy. Much of this argument rested on Schultz's contention that Egyptian Law 117 was an export control, rather than an ownership law. The court summarily rejected this argument, returning to its earlier analysis of Egyptian law and citing also the different penalties provided for smuggling and for theft or concealment of an antiquity.

Schultz's next argument was that enactment of the *Convention on Cultural Property Implementation Act (CPIA)*⁸⁶ was inconsistent with Congressional intent concerning the meaning of the NSPA. The CPIA provides a mechanism by which other nations that are party to the 1970 UNESCO Convention may request the United States to impose import restrictions on designated categories of archaeological and ethnological materials. The CPIA also prohibits the import into the United States of stolen cultural objects that have been documented as part of the inventory of a museum or other public institution. Schultz argued that the CPIA provides the only mechanism by which the United States deals with antiquities in the international arena and that, in particular, the notion of stolen archaeological objects should be restricted to those covered by the CPIA – that is, those that are stolen from a public institution.

In rejecting these arguments, the court cited the legislative history of the CPIA in which Congress stated that the CPIA 'affects neither existing remedies available in state or federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce.'⁸⁷ In response

85 545 F.2d 988 (5th Cir. 1977). The United States is divided into several federal circuits (or regions), each with an appellate court. The decisions of one appellate court are not directly binding on the courts in other circuits, although they often carry persuasive authority. While the *McClain* decision is over twenty-five years old, the Second Circuit had not directly addressed whether these legal principles were binding in its region. Much of the significance of the Schultz decision is that it is now clear that *McClain* doctrine applies in the New York area. Only the United States Supreme Court, which rejected Schultz's petition to review this decision, 147 L.Ed.2d 891 (2004), can bind all the federal courts in the United States. The Schultz court's references to *McClain* and an even earlier decision of the Ninth Circuit located in California, *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), indicate that the regions with the most active markets in antiquities are now clearly encompassed within the *McClain*/Schultz doctrine's interpretation of the National Stolen Property Act.

86 19 USC §§ 2601 et seq. The CPIA was the means by which the United States implemented the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970.

87 S. Rep. No. 97-564, at 22 (1982).

to Schultz's restrictive interpretation of 'stolen,' the court pointed out that the NSPA would surely apply equally to cultural objects stolen from a private home abroad, even though such objects are not covered by the stolen property provisions of the CPIA. Finally, the court emphasized that the CPIA and NSPA differ in that the CPIA is a civil, import law, while the NSPA is a criminal law. Even though both laws might, at times, pertain to the same conduct, such overlap is not inappropriate and is not a reason to limit the scope of the NSPA.⁸⁸

In a summary of its analysis, the court stated:

Although we recognize the concerns raised by Schultz and the *amici* about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it 'creates an insurmountable barrier to the lawful importation of cultural property into the United States.' Our holding does assuredly create a barrier to the importation of cultural property owned by a foreign government. We see no reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home. The *mens rea* [knowledge of wrongfulness] requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations.⁸⁹

The Schultz decision clarifies the law applicable in the New York region and sets a precedent that is likely to be persuasive to any American courts that confront these issues in the future. Future legal cases will likely move away from argumentation concerning the underlying legal principles and focus more on the factual circumstances of each case. These factual issues will include the specific conduct of the parties involved and the law of foreign nations.

Nations that want to protect their archaeological heritage need to be sure that their laws, particularly those that vest ownership of antiquities in the nation, are written clearly enough so as to give notice to Americans of the conduct that they prohibit and distinguish between ownership and export controls. Such laws will need to stand up to scrutiny in an American court and must be domestically enforced within any country that asserts national ownership. The Second Circuit's extensive discussion of Egyptian law underscores the importance of these points. Clarity and domestic enforcement will also have the advantage of directly diminishing the looting of sites by punishing and inhibiting the actual looters.

88 The court also rejected the notion that the definition of 'stolen' is restricted to the common law definition; rather, the NSPA reaches 'a broader class of crimes than those contemplated by the common law' 333 F.3d at 409–10.

89 333 F.3d at 410.

United Nations Declaration on the Rights of Indigenous Peoples 2007: Extracts⁹⁰

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

⁹⁰ Adopted by the United Nations General Assembly on 13 September 2007. Although such Declarations do not create reciprocal inter-State obligations, they are often the basis of important law-making in the future and have a strong moral force, especially where they have been adopted by a substantial majority of States (in this case 143 in favour, 4 against, 11 abstaining and 34 absent from the vote). Full text available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 38

States in consultation and cooperation with indigenous peoples shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 41

The organs and specialized agencies of the United Nations system and other inter-governmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Principles & Guidelines for the Protection of the Heritage of Indigenous People: Extracts⁹¹

Principles

4. International recognition and respect for indigenous peoples' own customs, rules and practices for the transmission of their heritage to future generations is essential to these peoples' enjoyment of human rights and human dignity.
5. Indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.
9. The free and informed consent of the traditional owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage.
10. Any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage must be revocable, and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application.

Guidelines

Definitions

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.
12. The heritage of indigenous peoples includes all movable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry, all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and

91 Elaborated by the Special Rapporteur, Mrs. Erica-Irene Dae, in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (E/CN.4/Sub.2/1995/26, GE. 95-12808 (E), 21 June 1995). Revised 2000, UN Doc. E/CN.4/Sub.2/2000/26. A revised text prepared in 2005 is available at http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/iyokota_draft.pdf

fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape, or audiotape.

13. Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.

Transmission of Heritage

14. Indigenous peoples' heritage should continue to be learned by the means customarily employed by its traditional owners for teaching, and each indigenous peoples' rules and practices for the transmission of heritage and sharing of its use should be incorporated in the national legal system.
15. In the event of a dispute over the custody or use of any element of an indigenous people's heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognized by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

Recovery and Restitution of Heritage

19. Governments, with the assistance of competent international organizations, should assist indigenous peoples and communities in recovering control and possession of their movable cultural property and other heritage.
20. In cooperation with indigenous peoples, UNESCO should establish a programme to mediate the recovery of movable cultural property from across international borders, at the request of the traditional owners of the property concerned.
21. Human remains and associated funeral objects must be returned to their descendants and territories in a culturally appropriate manner, as determined by the indigenous peoples concerned. Documentation may be retained, displayed or otherwise used only in such form and manner as may be agreed upon with the peoples concerned.
22. Movable cultural property should be returned wherever possible to its traditional owners, particularly if shown to be of significant cultural, religious or historical value to them. Movable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.

23. Under no circumstances should objects or any other elements of an indigenous peoples' heritage be publicly displayed, except in a manner deemed appropriate by the peoples concerned.
24. In the case of objects or other elements of heritage which were removed or recorded in the past, the traditional owners of which can no longer be identified precisely, the traditional owners are presumed to be the entire people associated with the territory from which these objects were removed or recordings were made.

Researchers and Scholarly Institutions

32. All researchers and scholarly institutions should take immediate steps to provide indigenous peoples and communities with comprehensive inventories of the cultural property, and documentation of indigenous peoples' heritage, which they may have in their custody.
33. Researchers and scholarly institutions should return all elements of indigenous peoples' heritage to the traditional owners upon demand, or obtain formal agreements with the traditional owners for the shared custody, use and interpretation of their heritage.
34. Researchers and scholarly institutions should decline any offers for the donation or sale of elements of indigenous peoples' heritage, without first contacting the peoples or communities directly concerned and ascertaining the wishes of the traditional owners.
58. In collaboration with indigenous peoples and Governments concerned, the United Nations should establish a trust fund with a mandate to act as a global agent for the recovery of compensation for the unconsented or inappropriate use of indigenous peoples' heritage, and to assist indigenous peoples in developing the institutional capacity to defend their own heritage.
60. The United Nations should consider the possibility of drafting a convention to establish international jurisdiction for the recovery of indigenous peoples' heritage across national frontiers, before the end of the International Decade of the World's Indigenous People.

Part 5

Procedures for Requests

Editor's Preliminary Note

WHILE PART 4 DEALT WITH LEGAL ISSUES, many claims are settled by other means. Indeed, legal procedures are often ill adapted to settle ethical, historical and emotional issues and to do justice to other background factors that are important in cultural heritage claims. There is also an extraordinary range in which such claims or requests are made: State to State, State to individual, individual to State, or to a community or to another individual. The individual or community may be working within his or her own State or may be seeking return from another State or from an individual or community or institution in another State.

This part of the book aims to give examples of how such claims have been dealt with and to assist claimants, including States, to decide whether to litigate in another State, to seek settlement by some other means such as negotiation, mediation, arbitration or good offices, or even to involve a regional organization. There are now so many case precedents that a new request can, through careful comparison, perhaps avoid pitfalls by choosing the most likely and most cost effective method of pursuing the claim.

Alternative Procedures

Litigation: The Best Remedy?¹

N. Palmer

Introduction

1. The Pursuit of Judicial Remedies

Litigation is not, of course, a remedy. One resorts to litigation to obtain a remedy. The choice of remedy will depend on the facts.

1.1 The Benefits

Pursuing legal remedies can of course yield valuable results. Unlike other forms of dispute resolution, litigation is not triggered by consent of the parties: the defendant has no choice. The process generates strong evidence-gathering powers in the form of orders for disclosure. The court may issue a range of interlocutory orders, such as the freezing order (formerly known as the Mareva injunction, by which an asset held by a party can be legally immobilized until the litigation is concluded and judgment obtained).² In appropriate cases proceedings can be stayed on grounds that another jurisdiction is the more appropriate. Compliance with a court order is mandatory and non-compliance is visited by sanctions. A judgment at law generally affords a decisive resolution of issues and a strong barrier against re-litigation. Through a network of international conventions, most judgments are portable across national boundaries, enabling a judgment pronounced in one State to be enforced in another.

Embarking on litigation does not, of course, necessarily bar recourse to other modes of resolution. The parties can agree during proceedings to adopt some other course. Recent years have seen numerous settlements of art-related claims, negotiated after the issue of legal proceedings. Some settlements are achieved with the assistance of a neutral third party and some are not. Some may be initiated and managed by the courts themselves.

1 Extracts (with minor revisions) from 'Litigation: The Best Remedy?' International Bureau of the Permanent Court of Arbitration (ed.) *Resolution of Cultural Property Disputes* (7 Peace Palace Papers) (PCIA, The Hague, 2004) 278.

2 Civil Procedure Rules, UK (1998), Part 31.

1.2 *The Burdens*

On occasions the legal system can miscarry. It is expensive to engage but not every litigant would agree that it delivers a Rolls Royce-style service. Judges can overlook issues, sometimes in cases where the defects of litigation are all too evident. Some might argue that modern attempts to make justice more efficient have proved detrimental to other interests such as a measured consideration of issues and a methodical development of law.

Litigation involves a renunciation of privacy and can give rise to public embarrassment. Such damage can take various forms. Litigation might indicate a gap between an industry's public stance and its technical legal position,³ or corrosive family differences; or hyperbole on the part of an over-enthusiastic trader; or damage to the credibility of witnesses. One result may be recrimination and the creation of rifts among members of the same side. Where litigation requires an elderly or disadvantaged person to negotiate the court process, or induces a public institution to take some 'technical' defence independent of the merits of the claim, the damage to the credibility of the defendant may far outweigh the benefits of success at law.

Unless closely monitored, litigation can also involve gambling large stakes for minimal returns. It can result in a Pyrrhic victory: for example, where a claimant establishes liability but fails to show loss, or fails to collect the damages awarded, or fails to recover its full costs. In a complex and uncharted area, litigants may come to regret having precipitated the creation by judgment of an uncomfortable precedent, or of troublesome judicial speculation, where uncertainty had hitherto left room for negotiation. And not every litigant would view with enthusiasm the laborious establishment of a new legal principle at a cost that subsidizes other potential parties too modestly endowed to venture on the exercise themselves.

Courts are limited in the remedies they can offer. Their decisions must be delivered according to legal doctrine, with little scope for the dilution or softening of strict law in favour of some general equity of approach. It is significant to compare in this respect the powers of arbitrators appointed under 'equity' or 'honourable engagement' clauses to frame their awards in terms other than those of strict black-letter law.⁴

Judgments rarely make friends of those who were formerly at odds. There is almost always a winner and a loser, and sometimes a party loses by winning. Judicial appeals for a sense of proportion or compromise often arrive too late to be effective. One might compare the virtues of mediation, which seeks to build future relationships rather than focus on past wrongs, and the influential advice obtainable in Eng-

3 For a possible example see *Kingdom of Spain v. Christie Manson & Woods Ltd.*, reported in [1986] 1 WLR 1120 (*Weekly Law Reports*, England).

4 This question is examined in N. Palmer 'Arbitration and the Applicable Law' in book cited n.1, 291, Part III.

land from the Spoliation Advisory Panel (which deals with Holocaust-related claims).⁵ The solution proposed by that panel (and adopted with the consent of the parties) in the claim concerning the picture by Jan Griffier the Elder, *View of Hampton Court Palace*, contained much that a court could not achieve. A commemorative plaque was exhibited in the Tate Gallery alongside the painting, honouring the need for recognition of the suffering of Holocaust victims and acknowledging the importance of such recognition alongside other responses. The picture remained in the Tate Gallery and an *ex gratia* payment was made to the claimant family.

One need only glance at the recent plethora of Holocaust-related claims to appreciate the ordeal of suing (and indeed the insensitivity of obliging claimants to sue). Of the two dozen or more recent returns of war-displaced cultural objects across the world, only a few have been made in direct response to a court order.⁶ All other recoveries are the result of agreement, legislation or unilateral decision by institutions, albeit prefaced in some cases by litigation or the threat of it.

In some cases, holding museums have had both the decency and the legal ability to make a prompt and favorable decision. That occurred with two claims made by English residents (refugees from Nazi Germany) upon objects held by German museums: that of Mrs. Gerta Silberberg of Leicester against the Prussian Cultural Foundation for van Gogh's *L'Olivette*,⁷ and that of the Granville family against the *Neue Pinakothek* in Munich for the return of a nineteenth-century work (Count Leopold von Kalckreuth's *The Three Stages of Life*) which was a wedding present from their grandparents to their parents and was described by them as a 'childhood icon.'⁸ The latter work was on loan to the Royal Academy at the time, and after its restoration to them the claimants allowed it to travel on to a pre-arranged exhibition in the United States.

These examples contrast starkly with proceedings in New York over Mrs. Leah Bondi's claim to the Egon Schiele work *Portrait of Wally*,⁹ or with the long-running claim in the Hungarian courts by Martha Nierenberg.¹⁰

5 See text below 3.5 *Government Appointed Advisory Panels*.

6 This statement was made in 2003. Numbers have of course since increased.

7 See N. Palmer *Museums and the Holocaust: Law, Principles and Practice* (Institute of Art and Law, Leicester, 2000) 17.

8 *Ibid.* 19.

9 59 688 N.Y.S. 2d 872 (1988) (Supreme Court of New York, Appellate Division); 177 Misc. 2d 985, 677 N.Y.S. 872 (New York County) (Supreme Court of New York, New York County); *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, People of the State of New York v. Museum of Modern Art*, New York, 93 N.Y. 2d. 729, 719 N.E. 2d 897, 697 N.Y.S. 2d 538 (1999) (Court of Appeals of New York); *United States v. 'Portrait of Wally'* 105 F.Supp. 2d 288 (S.D.N.Y.2000); *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 *18 n4 (S.D.N.Y. 2002). (For a full explanation of the abbreviated titles of all these reports, consult any good Law Library). An effort at mediation failed in 2006 and the painting is still in storage in 2008 pending completion of the litigation.

10 J.H. Dobrzynski 'Claims for Art Collection Pose a Challenge to Hungary' *New York Times* July 7, 1998 <http://query.nytimes.com/gst/fullpage.html?res=9D05E3DD133EF934A35754C0A96E958260Esec=Espon=Epagement=all> accessed 7 October 2008; 'Statement of Martha Nierenberg to the Committee on Banking and Financial Services of the United States House Of Representatives 10 February, 2000' <http://financialservices.house.gov/banking/21000nic.htm> accessed 7 October 2008.

2. Alternative Routes to Dispute Resolution

In the light of the countervailing disadvantages of litigation, it is instructive to reconsider two alternative methods of dispute resolution in this context.

2.1 Arbitration

While arbitration might assist confidentiality, the conventional view is that the award might have to be based on strict legal doctrine, drawn from the law of a particular national legal system.¹¹ In the art world, with its wealth of conventions, codes and soft law generally, this can be unhelpful.

Arbitration cannot normally arise without original consent, which in the case of a third-party title claim would require an *ad hoc* agreement, at a time when the parties' relations might be less than cordial. The parties would almost certainly have legal representation and the process would have other formal quasi judicial aspects; for example, the arbitrator should not speak to one party in the absence of the other. But the arbitrator has sanctions and other procedural resources and the resultant award could at least be enforced internationally.

2.2 Mediation

Mediation, like arbitration, cannot occur unless the parties consent. But it can be (and normally is) conducted on principles other than strict law. A well-conducted mediation can produce a result geared to the attainment of future needs and the establishment of future relationships rather than to the simple redress of past wrongs. The mediator, who acts as a 'shuttle diplomat' need not be a lawyer and the parties need not be legally represented, though in a substantial claim this is likely, especially as the normal aim is to produce a binding agreement. Any resolution would be the product of further agreement between the parties rather than imposed *ab extra* by the neutral third party, who acts as a mere facilitator. It can extend to any matter in the joint interests of the parties and is not confined to the issues in dispute or the types of order which a court or arbitrator can make. The mediator can, with the parties' consent and normally in confidence, speak to an individual party in the absence of the other side. As with arbitration, the proceedings themselves can be confidential and the parties can agree this in advance. But the outcome, while characteristically enforceable as a contract, does not benefit from any international enforcement convention. This is, of course, a drawback for cross-border claims.

¹¹ Further discussed in article cited in n.4 above.

2.3 Codes, Ethics and Dispute Resolution

The past decade has seen a sharp rise in the formulation of 'soft law' instruments that seek to give principled guidance on practice and conduct within the art community. A modern example is the draft code of practice evolved to regulate the holding and treatment of human remains by museums within England and Wales.¹² Other examples abound.

These statements vary in scope and content. They may apply to museums, merchants or other entities within the art community. They can be individual (regulating a particular institution) or collective, federating individual organizations or other collective or representative groups. They may be national or international in application. National codes often draw on international models.

Such codes are not devoid of legal effect. Compliance can enable traders and museums to avoid legal entanglements. Even where such acquisition occurs, proof of observance of the code may support a defence of good faith, or a right to compensation from the claimant on grounds of due diligence. It is also conceivable that a code may in due course set the legal standard for professional conduct within its particular field, rendering a violation of it a breach of legal duty. In time the code itself may become the source of the duty.

A further point in favour of such codes is that they have a distinct educational function, and can achieve worthwhile results by elevating professional mores. Their existence might also influence the process of dispute resolution, by putting pressure on bodies to find a process that takes account of this wealth of soft law and its common international flavour, which strict forensic processes do not.

3. The Trend towards Alternative Dispute Resolution (ADR)

3.1 Dispute Resolution Bodies

Accompanying the increasing evidence that claims for the restitution and repatriation of cultural objects cannot satisfactorily be resolved by reliance on legal doctrines and processes alone is a proliferation of non-governmental devices for the non-forensic resolution of such disputes. In June 2000, the United Kingdom specialist not-for-profit dispute resolution service ArtResolve was inaugurated. Welcoming this initiative, the Minister for the Arts, Alan Howarth (now Lord Howarth of Newport), observed that it reflected the government's own policy of encouraging parties toward the out-of-court resolution of disputes.

¹² Editor's note: Extracts given in Part 3, p. 270 of this compendium.

3.2 *Inter-Professional Agreements*

In 1996, the Rare Books Group of the Libraries Association and the Antiquarian Book Dealers' Association in the United Kingdom concluded an inter-professional agreement for the resolution of claims relating to antiquarian books stolen from libraries and acquired by members of the trade: a class of object which traditionally has high scholarly value but insufficient economic value to justify legal action.¹³

3.3 *International Conventions and Declarations*

International conventions and conferences have also opted for alternative dispute resolution. By Article 17(5) of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them. By Article 8(2) of the 1995 UNIDROIT *Convention on Stolen and Illegally Exported Cultural Objects*, parties to a dispute under either Part II or Part III of the Convention 'may agree to submit the dispute to any court or other competent authority or to arbitration.'

Alternative dispute resolution is specifically advocated in the case of Holocaust-related claims to cultural property by the Eleventh Principle of the Washington Principles of 1998, endorsed by the Vilnius Forum in October 2000, and by the Resolution of the Parliamentary Assembly of the Council of Europe of 4 November, 1999, as well as by museum groups in the United States. The establishment of the French Holocaust Restitution Committee in September 1999 and of the UK Spoliation Advisory Panel in May 2000 accords with the spirit of these enjoiners.

3.4 *Local Panels*

Local panels entrusted with responding to requests for repatriation by non-national museums offer a further potential solution. At least one local authority in Scotland, aided by the greater liberty of local authorities to release objects from collections, has created such a panel and, through its deliberations, has permitted an object in a museum under its control to be returned overseas. That body is the Glasgow City Council, which established a Repatriation Committee to deal with claims, and has evolved five criteria for their resolution. The criteria for repatriation are:

1. the status of those making the request, i.e. the right to represent the community to which the object/s originally belonged;

13 J. Feather 'Disputed Titles in Antiquarian Books' 2 *Art Antiquity and Law* (1997) 373.

2. the continuity between the community which created the object/s and the current community on whose behalf the request is being made;
3. the cultural and religious importance of the object/s to the community;
4. how the object/s have been acquired by the museum and their subsequent and future use; and
5. the fate of the object/s if returned.

Applying those criteria, the Committee decided in November 1998 to return the Lakota Ghost Dance Shirt to the Wounded Knee Survivors Association, in circumstances that were to the cultural benefit of the City.¹⁴ The City Council took close account of local public opinion, gleaned from a public hearing and from invited correspondence, and testified that the public response was strongly in favour of restitution.

Giving evidence to the House of Commons Culture, Media and Sport Committee on 18 May, 2000, the Head of the Glasgow Museums and Galleries gave clear support for the view that legislative constraints should not be used to discourage broader policy arguments and informed public debate. In its Seventh Report, the Culture, Media and Sport Committee commended the City Council's procedures, its resourcefulness and its regard for the cultural interests of its citizens. It might be useful to consider the use of a similar body (again, with public consultation) when institutions are evolving proposals for relinquishment of cultural objects on financial grounds.

3.5 Government-Appointed Advisory Panels

1. The United Kingdom Spoliation Advisory Panel

In May 2000, the Minister for the Arts, Alan Howarth, established the Spoliation Advisory Panel to consider claims against UK public museums by persons (or the descendants of persons) who lost possession of cultural objects during the period 1933 to 1945. Comparable panels now exist in France, Austria, the Netherlands and Germany.

The powers of the Spoliation Advisory Panel are purely advisory, but recommendations can be made on two levels: as to the response to be made to a particular claim, and as to more general legislative or other changes that should be made to deal with present or future claims. Prominent among the latter

¹⁴ See Memorandum submitted by Glasgow City Council to the Select Committee on Culture, Media and Sport in *5 Art Antiquity and Law* (2000) 371.

targets for change might be museums' statutory disposal powers, art export controls, limitation periods and even human rights laws.

The Panel is charged with evaluating both the legal and moral aspects of claims. Legal aspects can be the subject of specific findings based on independent legal advice, but the Panel's findings are not determinative of the rights of the parties. Moral evaluations must take into account the conduct and circumstances of both parties and might, for example, reflect the degree of pertinacity and scrupulousness shown by a museum on acquiring a relevant object.

A determination by the Panel need not be accepted by the Minister or followed by the parties. A dissatisfied claimant could take his or her case to law unhindered by any earlier reference to the Panel. The Panel is not strictly either an arbitrator or a mediator, though the process bears some resemblance to mediation.

The Panel is not confined to recommending the return of a work. It can also recommend monetary compensation, an *ex gratia* payment, or some appropriate commemoration of a work retained in a museum collection. Financial assessment can be particularly problematic, not least because there may be a need to avoid formulations that could not be applied, on similar facts, to cases of restitution of the work.

2. Human Remains

In November 2003, the Report of the Working Group on Human Remains in Museum Collections recommended the establishment of a Human Remains Advisory Panel ('HRAP').¹⁵ This Report was the product of detailed consultation by the Working Group on the law and practice relating to current legal status of human remains in publicly funded museums and galleries in the United Kingdom. The recommendation to establish the HRAP was but one of a number of suggested measures to ameliorate the problems identified by the Working Group in this field.¹⁶

The proposal for the establishment of the HRAP was the central plank of the Working Group's recommendations in relation to 'Dispute Resolution.' The object of the proposed panel was to consider references relating to claims and controversies regarding the retention and treatment of human remains by national institutions. To this end, the Working Group recommended that the HRAP 'shall be accessible to all relevant parties with a sufficient interest in the treatment and condition of human remains held in public museum

15 See generally *Report of the Working Group on Human Remains*, available at http://www.culture.gov.uk/reference_library/publications/4553.aspx (visited April 2009), ch. 10, as to these problems [hereinafter Report].

16 In the event the recommendation was not adopted.

collections' and 'shall have the power to make recommendations on all issues relating to the return, retention, treatment, handling, use, safekeeping and control of human remains.' Its composition was to be of independent, government appointed experts.

As with other instances of ADR, the philosophy behind the HRAP was to 'foster a mood of understanding' between parties and to explore 'alternative solutions to all or nothing' "adversarial attitudes." As the Working Group itself noted, the ultimate success of the initiative would depend upon the goodwill of the parties involved. However, it was hoped that once the HRAP had gained standing and credibility it might then provide a model for additional local panels set up to deal with issues at a regional level. Regrettably, these aspirations have yet to be realized.

3.6 Private Mediation

Entities like the Spoliation Advisory Panel and the Glasgow City Repatriation Committee, with their regard for moral, historical, educational, cultural, spiritual and diplomatic as well as legal factors, and their evolution of future-orientated solutions, offer something akin to mediation. (It was hoped that similar benefits would attach to the proposed Human Remains Advisory Panel). The parallels are not complete, for several reasons: for example, the involvement of third parties in the shape of the public (or at least local constituents) in the Glasgow case, and the production of a report containing findings and a form of recommendation by the Spoliation Advisory Panel. Even so, such processes differ sufficiently from litigation to invite inquiry as to whether private mediation is an appropriate way forward for art restitution claims where no formal structure for resolution is, or can be made, available. Like the foregoing procedures, private mediation seems to offer a further means of resolution by which factors other than legal rights and wrongs, and solutions other than those available to a court or arbitrator operating under strict law, can be brought into account.

Admittedly, the adoption of mediation gives rise to serious questions for public authorities and for parties in general. There is, for example, a potential collision between the private interests to be served by mediation and the wider public interest. The object of mediation is to reach agreement. In a claim for the return of looted art, for example, that agreement may involve the suppression of information about past discreditable conduct, or even the permission to engage in future discreditable conduct. Examples from mediations are rare because of the secrecy of most settlements, but we have one illustration from a negotiated compromise. It is said that one term in the settlement of a dispute between the American collector Norton Simon and the Government of India over an Indian antiquity bought by Simon was that the government would take no action against him for a period of one year in respect

of any further Indian antiquity outside India acquired by him. One might inquire whether such matters can necessarily be left to private agreement alone.¹⁷

Where mediation fails the parties may resort to litigation. If matters have already been disclosed in confidence the recipient may not be allowed to use that knowledge in court proceedings unless it is necessary for disposing fairly of the litigation. But he or she still has that knowledge and it may be hard to avoid the fear that mediation will give the other party too clear an idea of the weaknesses of one's case and of one's unwillingness to raise the stakes in adversarial proceedings. In arbitration that risk is much slighter because an arbitral award is normally conclusive. The result may be a reluctance to mediate; a sentiment fueled by unfamiliarity and hostility on the part of legal advisers accustomed to litigating. The question is a very large one and one can merely raise it here. Suffice it to observe that apprehensions about 'showing one's hand' prematurely could in theory discourage people from participating not only in private mediations but in, for example, the deliberations of government-created panels.

3.7 A Collaborative Approach

Despite these reservations, the handling of recent restitution requests by certain museums shows that a timely and resourceful response may not only mollify claimants and create worthwhile partnerships, but even prevent claims from becoming disputes in any adversarial sense. Such is the clear prevailing policy of UK and American museums confronted by claims relating to the Second World War. In the words of one American museum director, whose institution voluntarily returned the Gerard Terborch painting *The Letter* to the descendant of a Jewish victim: '[w]e felt we had a moral responsibility to be responsive to claims, which was just as important as our legal obligation.'

Recent agreements on the repatriation of material between museums and first nation groups in the United States, Canada, Australia and New Zealand also show the diversity and reciprocal value of possible arrangements. In some cases a solution has been reached that does not involve the physical relocation of objects from the museum.

In due course, national governments might consider establishing general reparations advisory panels without limit as to the nature of the object or the circumstances of its original removal. Reference to the body could be voluntary and its powers (like those of the Spoliation Advisory Panel) could be purely recommendatory. A willingness to resort to it might, however, be taken into account in the allocation of funds and the administration of museum standards generally.

¹⁷ See further N. Palmer 'Repatriation and Deaccessioning of Cultural Property: Reflections on the Resolution of Art Disputes' in 54 *Current Legal Problems* (2001) 447, 472. A mediator's own ethics might also forbid him from accepting or continuing his appointment where, to the mediator's own knowledge or belief, a party has committed a material offence, against the law of any country.

4. Conclusion

Those who collect and deal in cultural objects form a broad but reasonably distinct community. The artefacts in which they deal are normally compact, of high commercial worth, of great public interest, and (in many cases) of a highly sensitive personal association. That renders the community vulnerable to both criminal and media penetration.

In response, the art world places much reliance on confidentiality, on close personal relations, and a corpus of grey letter law: ethics, guidelines, conventions and codes rather than legal rules. To these factors are added, in the case of public museums, a vulnerability to political change, a pre-occupation with scholarship, and (perhaps) a desire to be seen to act elegantly or fashionably as well as honourably.

All of these responses point compellingly towards a system of dispute resolution that reflects the desire for discretion and dignity as well as efficiency and ethicality. With proper encouragement, this is a field that lends itself particularly to the non-forensic resolution of disputes involving public and private parties alike. In some quarters that development might properly extend to the creation of cross-border initiatives, subjecting specific categories of claim to common international standards and procedures, and removing the lottery that exposes individual claims to the vagaries of national law and practice.

The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration¹⁸

F. Shyllon

I. Introduction

THE MAJORITY OF AFRICAN COUNTRIES that could benefit by becoming States Parties to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* are not States Parties. Since it came into force on 24 April 1972, there have been only twenty African States Parties to the Convention.¹⁹ Similarly, the majority of African States were absent from the full diplomatic Conference in Rome, which adopted the text of the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* in June 1995. Thirteen African countries sent representatives²⁰ and one sent an observer. The Convention entered into force on 1 July 1998 between China, Ecuador, Lithuania, Paraguay and Romania. Seven other nations including Italy have joined the Convention. Not a single African country is a State Party, although Burkina Faso, Cote d'Ivoire, Guinea, Senegal and Zambia are signatories to the Convention.²¹

By all accounts, African States appear to be the most vulnerable of any group of countries to illicit trade in cultural property. Such recent volumes as *One Hundred Missing Objects – Looting in Africa*,²² *Illicit Traffic in Cultural Property: Museums against Pillage*²³ and *Plundering Africa's Past*²⁴ attest to this.

18 Condensed from 'The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration' 5 *Uniform Law Review* (2000) 219.

19 Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Cote d'Ivoire, Democratic Republic of Congo, Egypt, Guinea, Libya, Madagascar, Mali, Mauritania, Mauritius, Niger, Nigeria, Senegal, Tanzania, Tunisia and Zambia. There are fifty-three African Member States of the United Nations Organization. Editor's note: as of 30 March 2009, seven more African States have joined the Convention (Rwanda in 2001; Morocco, Gabon and South Africa in 2003; Seychelles in 2004; Zimbabwe in 2006 and Chad in 2008).

20 Algeria, Angola, Burkina Faso, Cameroon, Cote d'Ivoire, Egypt, Guinea, Libya, Morocco, Nigeria, South Africa, Tunisia and Zambia. Apparently, not all African States were invited to the diplomatic Conference, priority being given to those States that had joined the existing Conventions relevant to the subject: the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, and the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Ghana sent an Observer.

21 Editor's note: As of March 2009 two more African States (Gabon and Nigeria) have acceded to the 1995 UNIDROIT Convention.

22 ICOM, Paris, 1994 reprinted 1997.

23 H.M. Leyten (ed.) (Royal Tropical Institute, Amsterdam, 1995).

24 P.R. Schmidt and P.J. McIntosh (eds) (Indiana University Press, Bloomington/Indianapolis, 1996).

II. Misplaced Priority

During the flush of independence, attention was focused on objects expropriated in colonial times. This explains why the twelve States that sponsored the first United Nations General Assembly resolution on the subject of cultural property – ‘Restitution of works of art to countries victims of expropriation’ (Resolution 3187 of 1973)²⁵ – were all African. The resolution in its preamble deplored ‘the wholesale removal, virtually without payment, of *objets d’art* from one country to another, frequently as a result of colonial or foreign occupation’; it went on to maintain in the first substantive paragraph that ‘the prompt restitution to a country of its works of art, monuments, museum pieces and manuscripts and documents by another country, without charge,’ will constitute ‘just reparation for damage done.’ In 1978, there followed ‘A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It,’²⁶ issued by the then Director-General of UNESCO, Amadou Mahtar M’Bow, himself an African. He lamented that ‘the vicissitudes of history’ had robbed many peoples’ ‘priceless portion’ and ‘irreplaceable masterpieces’ of their inheritance. In the meantime, while the anticolonial initiatives of African States went ahead in the United Nations General Assembly,²⁷ the large-scale theft and pillaging of cultural property in the continent continued apace. This is evidence that while much was lost during the colonial period, much remained to be protected with vigilance. Henrique Abranches, in his 1983 report (to the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation) on the situation in Africa, drew attention to this misdirection of focus. His conclusion was that the problem of protecting the cultural heritage against illicit traffic was ‘in most countries badly tackled.’ He called on governments and African intellectuals alike to come together and install a system that could effectively monitor the protection of the cultural heritage.²⁸ If many works of African art in museums in Europe and North America are stolen or pillaged, much of what is left is in danger of going the same way. Both the UNESCO and UNIDROIT Conventions offer legal means of recovering stolen, clandestinely excavated and illegally exported cultural objects that still remain in Africa. But not enough is being done to use the means available.

25 Full text in Part. 1, p. 27.

26 UNESCO Doc. SHC-76/Conf. 615.5, 3.

27 For a list of resolutions on the subject see *Return or restitution of cultural property to the countries of origin*, UN Doc. A/36/L.22/Rev.1 and Rev.1/Add.1 (1981). The debates on the series of resolutions are summarized in L.V. Prout and P.J. O’Keefe *Law and the Cultural Heritage: Volume III – Movement* (Butterworths, London, 1989) 814.

28 UNESCO Doc. CLT-83/CONE216/3.

III. Old Options

Prior to the adoption of the UNIDROIT Convention, there were (and are) four options available to any country that sought the return of its cultural property.

(a) Litigation in foreign courts

Any State is at liberty to seek redress in the courts of the country or domicile of a defendant who is alleged to have stolen or illegally removed its cultural property. This option is bedevilled by two intractable problems. The first is that prosecution is often difficult with regard to stolen objects because of evidentiary problems.²⁹ The second difficulty relates to unlawfully exported objects in breach of export control and the widespread rejection or reluctance by foreign courts of legislative extraterritoriality exemplified in the case of the *Attorney-General of New Zealand v. Ortiz*.³⁰ In any case, few African countries can afford the expense involved in foreign litigation.

(b) UNESCO Convention

If the requesting State and the holding State are Parties to the Convention, then the requesting State can have recourse to the provisions of its Articles 3 and 7, but the object must be inventoried. As we shall see, African States still have some ground to cover in the area of systematic inventories of their cultural property collections. Furthermore, even where both States are States Parties to the Convention, success is not always easily achieved, as was demonstrated in *R. v. Heller*,³¹ in which the Government of Canada prosecuted a New York dealer who had imported into Canada a Nok terracotta sculpture illegally exported from Nigeria. Both Nigeria and Canada are Parties to the Convention. The prosecution failed on the technical ground that the Canadian statute implementing the Convention only applied to objects illegally exported after the entry into force of the Canadian legislation. Expert witnesses had been flown in from Nigeria, but despite the spirited effort of the Canadian Government, Nigeria could not recover the unlawfully exported cultural property. This was in spite of the fact that the judge in the case accepted that Heller and his codefendant, Zango knew before the object was imported into Canada that it had been illegally exported from Nigeria. Accordingly, African States that do not have the resources to prosecute claims in foreign courts have ignored this option.

29 J. Nafziger 'The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property' 15 *New York University Journal of International Law and Politics* (1983) 789, 794.

30 [1982] 2 *Weekly Law Reports* 10; [1982] 3 *Weekly Law Reports* 570; [1983] 2 *Weekly Law Reports* 809.

31 (1983) 27 *Alberta Law Reports* (2d.) 346.

(c) UNESCO Intergovernmental Committee

Surprisingly, African countries whose agitation at the United Nations General Assembly led to the establishment of the Intergovernmental Committee have made little use of the Committee's good offices in the recovery of their expropriated cultural property. One explanation might be the difficulty of completing its Standard Form concerning Requests for Return or Restitution. But UNESCO assistance is always available to Member States in this regard. It has been suggested that the lack of initiative is not due to lack of interest. 'It is far more likely to be lack of resources, or a certain scepticism as to the likely effect of such initiatives in relation to the amount of work required.'³² African countries can point to the fact that Greece's request for the return of the Parthenon marbles, which goes back to 1984, remains unrequited. But Greece offers African countries an object lesson in determination and persistence, for it has never failed to raise the return of the marbles at all subsequent meetings of the Committee in spite of the regular negative British response. Indeed, the fourth Committee session convened at Athens and Delphi and the seventh in Athens, in 1985 and 1991 respectively, at the invitation of the Greek Government. This leads us to say that the African inaction is due to lack of stamina for the necessary follow-up, as Salah Stétié has suggested.³³

It is exasperating to hear that on certain occasions, African diplomatic missions have contacted either UNESCO or UNIDROIT and having been advised as to how to proceed, seemingly fail to follow up on this. Are they waiting for UNESCO to do their work for them?

(d) Bilateral agreement

In the context of bilateral negotiations some outstanding examples of restitution have taken place since de-colonization. These include the return of objects by Belgium to the Democratic Republic of Congo, by the Netherlands to Indonesia and by Australia and New Zealand to Papua New Guinea. It is noteworthy that countries that have achieved important return programmes have done so with the entire goodwill of the former holding States.³⁴

In the area of illicit trafficking in cultural property, both UNESCO and the International Council of Museums (ICOM) have been of great assistance to developing countries in recovering stolen cultural property. The first step is to notify the international community of these thefts, in cooperation with Interpol. To cite a famous example: in May 1987, UNESCO reported the theft of nine objects from

32 Protte/O'Keefe, *op. cit.*, *supra* note 8, 860 quoting Chairman Stétié.

33 *Ibid.*

34 *Ibid.*

the Jos National Museum in Nigeria. One of these objects, a fifteenth century Benin bronze head, was subsequently identified at an auction in Switzerland and returned.

In 1983, the United States Congress passed the *Convention on Cultural Property Implementation Act* to give effect to the 1970 Convention. The Act enables the President of the United States to enter into bilateral cooperation treaties pursuant to the UNESCO Convention to apply import restrictions on cultural property from nations that request such cooperation from the United States. So far, the United States has entered into such a treaty with Mexico and has made similar executive agreements with Bolivia, Canada, Ecuador, El Salvador, Guatemala, Peru and lately, with Cambodia and Cyprus.³⁵ Mali is the only African nation to benefit from such protection. This exceptional measure was taken in the wake of the rampant pillaging of archaeological sites in the Niger River Valley. It is once again a matter of surprise that Mali should be the only African State that has entered into a special bilateral agreement with the United States. It is as though it were the only African country troubled by the plundering of cultural property. Admittedly, presenting a request to the United States Government is a highly technical and formidable challenge. However, that should not constitute an insurmountable obstacle. A request seeking the protection of import controls is submitted to the Director of the United States Information Agency (USIA),³⁶ which carries out the President's decision-making functions and determines whether a request merits the imposition of United States import restrictions. The important thing is for African States to take the initiative that is too often lacking in matters of cultural property rescue.

From 22–24 October 1997, a group of African museum directors met with European and American museum professionals in Amsterdam to discuss ways and means of protecting Africa's cultural heritage. It is sufficient for our purpose here to note that the conference recommended the recognition of a periodically revised 'Red List' of categories of objects that are presently particularly vulnerable to looting. For the moment, this 'Red List' includes the following categories:³⁷

- Nok terracotta statuettes from the Bauchi Plateau in the Katsina and Sokoto regions (Nigeria)
- Terracotta and bronze heads from Ife (Nigeria)
- Stone statues from Esie (Nigeria)

35 The agreement with Canada made in 1997 related to archaeological and ethnological materials of Canada's First Nation peoples. Editor's note: Since 2000 Bolivia, China, Colombia, Honduras, Italy and Nicaragua have been added to this list. As of 26 September 2008, the agreements with Canada, Cambodia, Honduras, and Nicaragua, have lapsed. See US State Department website <http://culturalheritage.state.gov/chartdate.html>

36 The USIA was abolished in 1999 and these functions are now performed within the State Department.

37 H.M. Leyten 'African Museum Directors Want Protection of their Cultural Heritage: Conference on Illicit Trade in Cultural Heritage, Amsterdam (22–24 October 1997)' 7 *International Journal of Cultural Property* (1998) 261, 264; 'Africom's Red List' *ICOM News*, Issue 2, 1998; cf. also ICOM website: www.icom.org/redlist

- Terracotta statuettes, bronzes and pottery (so-called Djenne) from the Niger Valley (Mali)
- Terracotta statuettes, bronzes, pottery and stone statues from the Bura system (Niger, Burkina Faso)
- Stone statues from the North of Burkina Faso and neighbouring regions
- Terracotta statuettes from the Koma region (Northern Ghana) and Ivory Coast
- Terracotta statuettes (so-called Sao) from the Cameroon, Chad, Nigeria regions.

Apart from Mali, six other countries – Burkina Faso, Cameroon, Chad, Ghana, Niger and Nigeria – feature in the red alert list, with Nigeria listed in four out of the eight categories identified. Given the pivotal position of the United States as an art-importing nation, the lack of initiative on the part of African countries like Nigeria to take advantage of the United States scheme is an illustration of the failure of African museum professionals to take measures to protect their cultural heritage.

It is not surprising, therefore, that at the Amsterdam Conference some ‘Western experts demand[ed] that Africa first put its house in order.’³⁸ The evidence adduced so far shows that the African States have not diligently pursued the options available to them for the protection of their cultural heritage. It is understandable if they stay away from litigation, but there is absolutely no excuse for not aggressively utilizing the other options.

IV. A New Option – Arbitration

Article 8(2) of the UNIDROIT Convention offers the avenue of arbitration for the recovery of stolen or illegally exported cultural objects. It provides that ‘[t]he parties may agree to submit the dispute to any court or other competent authority or to arbitration.’

The use of arbitration for the settlement of cultural property disputes first came up in discussion at the third session of the UNESCO Intergovernmental Committee (IGC) held at Istanbul, Turkey, 9–12 May 1983. Salah Stétié, Chairman of the first three sessions of the IGC, had emphasized that according to procedures defined by the Committee it could only intervene when bilateral negotiations between nations had failed. He recalled that it was decided at the second session that once a request had been submitted to the Committee and transmitted to a holding country, the latter would be given one year to react to the claim. ‘If at the end of the one year period the Committee felt that the position of the holding country was unjustified, it could extend its good offices or perhaps even *arbitrate*³⁹ in order to find an acceptable

38 *Ibid.* 264

39 Emphasis added.

solution.’ Several members then took the floor to stress that the method of bilateral negotiations must be respected absolutely. One member stated that it was impossible for his country to accept the idea of ‘arbitration’ on the part of the Committee, for the latter’s role was one of mediation only. ‘To arbitrate would be to support the position of a particular country’; it was not for the Committee to pass judgment in such a manner but rather to analyse the reasons for the failure of an attempt to obtain a return or restitution through bilateral channels. The Chairman was quick to respond that he had used the word ‘arbitration ... in a general way.’ The Committee could only bring together people of good will eager to find workable solutions: ‘its path was that of mediation and moral pressure.’⁴⁰ In contrast, at the diplomatic Conference that adopted the UNIDROIT Convention, the arbitration provision was relatively uncontroversial.⁴¹

The Executive Secretary of the diplomatic Conference, Marina Schneider, has remarked that the 1995 Convention ‘seeks to establish an international cooperation mechanism ... Its approach ... is a pragmatic one, an affirmation that however real the conflict, there is yet concrete ground for cooperation, including the legal mechanism to make it work.’⁴²

It is fitting, therefore, that the Convention has an arbitration provision, since arbitration is a civilized method of settling disputes introducing, as it does, ideas of charity and fairness in dispute resolution. The major characteristics of arbitration are as follows: it is a method not of compromising disputes but of deciding them; it is resorted to only by agreement of the parties; the dispute is resolved by a third and neutral person or persons (the arbitrator(s)); the arbitrator(s) are expected to determine the dispute in a judicial manner – this does not necessarily mean strictly in accordance with the law, but rather giving equal opportunity to the parties to put their case and by weighing the evidence put forward by the parties in support of their respective claims; the person making the decision has no formal connection with the system of courts; the solution or decision of arbitrator(s) (the award) is final and conclusive and puts an end to the parties’ dispute; the award is binding on the parties by virtue of their implied undertaking when agreeing to arbitration that they will accept and voluntarily give effect to the arbitral decision; and the arbitration proceedings and award are totally independent of the State: the ordinary courts will only interfere – and then strictly within the confines of their *lex fori* (their own jurisdiction) – to give efficacy to the arbitration agreement, to regulate the arbitration proceedings or to give effect to the award where it has not voluntarily been carried out by the parties.

40 IGC, Third Session, UNESCO Doc. CLT-83/CONF.216/8.

41 L.V. Pratt *Commentary on the UNIDROIT Convention* (Institute of Art and Law, Leicester, 1997) 72. The provision on arbitration lacks the specificity and detail of the arbitration provisions in the 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*. I am grateful to Frédérique Mestre for drawing my attention to the arbitration provisions of the Basel Convention.

42 M. Schneider ‘The UNIDROIT Convention on Cultural Property: State of Play and Prospects for the Future’ 2 *Uniform Law Review* (1997) 494, 496.

There are other known forms of dispute settlement besides litigation and arbitration. These include negotiation, conciliation and mediation. What distinguishes arbitration from these is its decisional nature, which gives it an air of formality that brings it closer to the judicial process.⁴³ It should be stressed, however, that not all arbitration proceedings end in an award. As the parties in a dispute present their case, the weakness in the case of one party or the other may become apparent, creating the opportunity for settlement or resolution through negotiation, conciliation or mediation. This is one of the great strengths of arbitration.

In recent years, litigation in the United States over stolen or illegally exported cultural objects confirms the suggestion that arbitration could play a role that makes both parties winners. Thus, in the *Union of India v. The Norton Simon Foundation*,⁴⁴ the return of a stolen 'Siva Nataraja' to India was postponed to enable the good faith acquirer, a United States collector, to display it for ten years. In the case of a garland sarcophagus lent to the Brooklyn Museum, the lender of the sarcophagus, a private collector, appeased the Republic of Turkey that was claiming it by donating the US\$11 million artefact to the American-Turkish Society. Subsequently, the American-Turkish Society sent the garland sarcophagus back to Turkey, the plaintiff country, where it remains on loan indefinitely. Similarly, the Metropolitan Museum of Art in New York returned the 'Lydian Hoard' to Turkey after litigation had commenced in response to the 'blackmail' of a potentially successful lawsuit.⁴⁵

All these cases suggest that there are already precedents that arbitrators can use through process design to help parties create value.⁴⁶ For example, why not share the Parthenon marbles, or lease them back to Greece in perpetuity or for a given period? Then, why not make perfect copies of the Parthenon marbles? If a perfect copy of the marbles could be made, would it matter if the originals were at the British Museum or in Athens?⁴⁷ Skilful arbitrators as process designers can begin to teach us that perhaps cultural goods should be treated differently. Perhaps in cultural property arbitration, just as in commercial arbitration, it is possible to construct a process that can help the parties create value for themselves in a wide range of disputes, large and small.

43 S.A. Tiewul and F.A. Tsegah, 'Arbitration and Settlement of Commercial Disputes: A Selective Survey of African Practice' 24 *International and Comparative Law Quarterly* (1975) 393; Lew, J.D.M. *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications Inc., Dobbs Ferry, New York, 1978) 12.

44 United States District Court, Southern District of New York, 74 Cit. 5331; United States District Court, Central District of California, Case No. CV74-3581-R1K.

45 These and other cases are discussed in L. Borodkin 'The Economics of Antiquities Looting and a Proposed Legal Alternative' 95 *Columbia Law Review* (1995) 377, 389, 401.

46 R.H. Mnookin 'Creating Value Through Process Design' 11 *Journal of International Arbitration* (1994) 125, 131.

47 A. Mas-Colell 'Should Cultural Goods Be Treated Differently?' 23 *Journal of Cultural Economics* (1999) 87, 91.

V. Advantages of Membership of the Conventions

Whereas the UNESCO Convention is basically founded on a philosophy of government action and therefore requires cultural objects to have been 'designated' by the State requesting return, the UNIDROIT Convention, being a scheme under private law, does not require that a cultural object be 'designated' by the State for it to be covered by the Convention.

Accordingly, cultural objects stolen from private homes, from all kinds of religious buildings, from private collections that are not yet registered with the State and from traditional communities, can all be claimed back, even though the State has neither registered nor designated them.⁴⁸ It would be difficult, however, for a country to prove ownership unless the stolen object had been adequately registered or inventoried. This is a major problem area for Africa. Few African museums have comprehensive inventories of their collections. In this age of digital information, computerized registration of objects means that in case of theft of museum objects, the relevant information can be passed on to Interpol and international channels immediately. The report on the Amsterdam Conference of African museum directors gave the following bleak summary of the situation in Africa:⁴⁹

At present, even the most basic facilities for adequate registration are lacking in the majority of African museums. Interpol, for instance, requested member States in 1995 to supply the office with data concerning objects stolen in 1994 ... Of the African countries, only Zimbabwe was able to supply adequate data on stolen objects.

The impression should not, however, be conveyed that there is a total lack of initiative in this matter. The major African contribution in the area of documentation is the *Handbook of Standards* published by ICOM in 1996.⁵⁰ The result of a four-year effort of professionals of six African museums and the ICOM International Committee for Documentation (CIDOC), it has been described as 'one of the most important museum documentation standards of recent years.'⁵¹ What is lacking, obviously, is assiduous application of the available techniques.

In any event, the UNIDROIT Convention has a broader provision on inventories when compared with the UNESCO Convention that should prove more advantageous to African States. Article 3(7) of the UNIDROIT Convention states that a 'public collection' consists of 'a group of inventoried or otherwise identified

48 L.V. Prott 'UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects' 1 *Uniform Law Review* (1996) 59, 62.

49 Leyten, *op. cit.*, *supra* note 23, 265.

50 ICOM, *Handbook of Standards: Documenting African Collections* (ICOM, Paris, 1996).

51 R. Thornes *Protecting Cultural Objects in the Global Information Society: The Making of Object ID* (Getty Information Institute, Los Angeles, 1997) 17.

cultural objects' owned by a Contracting State; a regional or local authority of a Contracting State; a religious institution in a Contracting State; or an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognized in that State as serving the public interest. The phrase 'otherwise identified cultural objects' means any other satisfactory means or evidence of identification would be admissible in court proceedings to establish ownership other than conventional inventories.

The UNESCO Convention provides for action by a Contracting State 'at the request of the State Party of origin' and that requests for recovery and return should be made 'through diplomatic offices' (Article 7(b)(ii)).

Thus, claims can be formulated only on a government-to-government basis. The UNIDROIT Convention operates quite differently. It provides for a claim to be brought before a court or other competent tribunal. This means that a private owner may make use of the normal legal channels available in the country where the object is located in order to seek a court order for the return of a stolen object, and a State may take similar action for the return of an illegally exported cultural object.⁵² But as stated at the beginning of this study, only twenty of the fifty-three African nations that comprise the African membership of the United Nations are Parties to the 1970 Convention. And with regard to the 1995 Convention, not a single African country is a Party, although at the ninth session of the Intergovernmental Committee in 1996 the observer from Tunisia expressed his country's intention of joining the UNIDROIT Convention.⁵³ What, then, is the point of paragraph 6 of the African Declaration read out at the second session of the IGC in 1981 that 'the Conventions relating to the protection of cultural property should be ratified as a matter of urgency'?⁵⁴

Becoming a Party of both Conventions is an important step towards inclusion in the community of States combating the rising tide of theft and pillage of cultural objects all over the world. The thirty-three African States⁵⁵ that have not joined the UNESCO Convention, and the fifty-three African nations that are yet to become States Parties to the UNIDROIT Convention are hereby enjoined to ratify⁵⁶ or accede to the Conventions as a mark of their determination to fight a major scourge of our time – trafficking in cultural property. 'Together the two Conventions,' com-

52 Protte, *op. cit.*, *supra* note 21, 65–66.

53 IGC, Ninth Session, UNESCO Doc. 29C/REP. 12. Editor's note: Gabon acceded to the Convention on 12 May 2004 and Nigeria on 10 December 2005.

54 IGC, Second Session, UNESCO Doc. CC-811/CONF. 203/10.

55 Benin, Botswana, Burundi, Cape Verde, Chad, Comoros, Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Lesotho, Liberia, Malawi, Morocco, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Uganda and Zimbabwe. Ed. See now n. 19.

56 Burkina Faso, Cote d'Ivoire, Guinea, Senegal and Zambia are signatory States to the UNIDROIT Convention. Ed.: Only Gabon and Nigeria are Parties as of 30 September 2008.

mented the leading jurist in this field, 'close many of the loopholes that had prevented courts from combating more forcefully the illegal trafficking of cultural objects.'⁵⁷

The Director-General of UNESCO described the UNIDROIT Convention as 'a breakthrough international framework to combat private-sector transactions in stolen art and cultural property' and as 'a watershed in our common struggle to defend cultural property.'⁵⁸ First, the Convention confronts the legal constraints that impede identification of the current location and of the possessor of stolen cultural property by providing that a claimant to a cultural object may choose a court either in the possessor's country or in the country where the object is currently located.⁵⁹ More often than not, it is the location of a cultural property or artwork that is known, not its possessor. In the case of cultural property, missing objects are found when offered for sale in an auction catalogue or by a dealer in a country with a major art trade, although the vendor is not known or is not in that jurisdiction. The provision was felt desirable because the claimant may know where the object is (in a museum on loan, in a restorer's workshop, in a bank vault) but may not know the identity of the possessor.

Second, the Convention challenges legal obstacles preventing the recovery of stolen cultural property once it has entered the art market. Under most existing national laws, it is virtually impossible for rightful owners to retrieve a stolen object once it has been sold to a good faith purchaser. This holds true even if the object in question is widely acknowledged to be stolen, provided the purchaser was never informed of or involved in the object's theft. Australia, Canada, New Zealand and the United States, whose laws favour the original owner of stolen cultural property, are exceptions. The Convention puts the burden of proof on the holder of allegedly stolen cultural property. It states that the 'possessor of a stolen cultural object must return it,' regardless of personal involvement or knowledge of the original theft (Article 3(1) and there is a similar provision concerning illegally exported objects, Article 5(1)). It further denies any compensation for the return of a cultural object unless 'the possessor neither knew nor ought reasonably to have known the object was stolen' (Article 4(1) and there is a similar provision concerning illegally exported objects, Article 6(1)). The Convention may indeed be regarded as 'the best international legal means' available to deter the illicit trade in cultural property.⁶⁰

57 UNESCO Sources, No. 72, September 1995; quoting Lyndel Prott.

58 UNESCO News, Vol. 2, No. 5, 20 September 1995, 74.

59 Article 8(1). The Secretary-General of the Hague Conference on Private International Law, a member of the Study Group, pointed out that the use of a court in the jurisdiction where the object was located was in fact a new ground of jurisdiction which in the circumstances was reasonable. *Acts and Proceedings, op. cit., supra n.??*, 111-12; Prott, *op. cit., supra n. 21*, 71.

60 Prott *op. cit., supra n. 23*, 89. Five States, including Algeria, Egypt, Libya and Morocco, voted against the adoption of the Convention at the diplomatic Conference. They wanted to express the view that the Instrument does not go far enough and especially does not oblige States to return stolen cultural objects unconditionally, i.e. without compensation of a *bona fide* purchaser. K. Siehr 'Editorial' 5 *International Journal of Cultural Property* (1996) 7.

VI. Towards Harmonization of African Cultural Property Laws

At the Amsterdam Conference on the Protection of African Cultural Heritage, some Western experts demanded that Africa should first put her house in order. African States must indeed do so. Let us first, however, note that even the richest countries, with state-of-the-art security, are seeing major thefts from public museums and private collections as well as unauthorized digging at protected archaeological sites, doing irreparable damage to their archaeological heritage.⁶¹ Nonetheless, there is scope for concerted efforts by the African States. They should examine their legislations on the protection and preservation of cultural property and make sure they are adequate to deal with the current emergency. After such reviews, the laws should be upgraded in accordance with all the international instruments. In this connection, it is important to bear in mind that certain basic provisions are indispensable for the successful protection of Africa's cultural property, having regard to the various problems confronting cultural heritage management in Africa at present. It would be necessary to state that all archaeological objects belong to the State. It would also be expedient to prohibit the export of cultural objects unless the State's licence is given. The crucial point is that unless a country has adequate national legislation, joining the international Conventions will have only limited effect in overcoming the scourge of illicit trafficking.⁶² The next stage should be the harmonization of laws (through the Organization of African Unity),⁶³ as is being done in the European Union, for example. There would be a need to establish joint border patrols. The 'Red List' approved at the Amsterdam Conference, for example, names Chad, Cameroon, Cote d'Ivoire, Ghana, Niger and Nigeria. These countries, when linked in a chain, are neighbours. The feasibility and productivity of joint patrols is surely obvious. There is no reason why the respective police, customs and immigration departments cannot have special units linked together under bilateral and multilateral, mutually beneficial agreements. National budgets should provide for the expansion of preventive activities, so that cultural heritage can be passed on to future generations.

61 UNESCO Press No. 9811 (1998), 'A Major Step In the Fight Against Illicit Traffic in Cultural Property.'

62 UNESCO and UNIDROIT are available to give technical assistance to a country wishing to revise or indeed introduce legislation for the protection of its cultural heritage.

63 There already exists a Commonwealth Scheme for the Protection of the Cultural Heritage, but the majority of African States are not members of the Commonwealth. The Commonwealth Scheme is reproduced as Appendix VIII, 'Scheme for the Protection of Cultural Heritage within the Commonwealth,' in Prot, *op. cit.*, supra note 21, 117. See also P.J. O'Keefe 'Protection of the Material Cultural Heritage: The Commonwealth Scheme' 44 *International and Comparative Law Quarterly* (1995) 147. The Scheme, which was adopted at the Commonwealth Law Ministers' Conference at Mauritius in November 1993, only covers illegally exported cultural objects and excludes stolen cultural objects (Article 1(1)). Its potential was immediately undermined by the declaration of the British Attorney-General that, while Britain welcomed the Scheme, it could not at present join it, citing, inter alia, difficulties arising from placing bureaucratic burdens on its large art trade.

VII. A Plea to African Governments

Early African political leaders such as Julius Nyerere, Kwame Nkrumah, Jomo Kenyatta and Leopold Sedar Senghor were connected both to their roots and their past. Kenyatta wrote the classic anthropological and sociological study of his people, *Facing Mount Kenya*,⁶⁴ while the championing of the concept of negritude by Senghor in his poetry and other writings is well-documented. The present generations of Africans are alienated from their past, and future generations may have no link with it at all, if the current trend continues.

The reasons why African States have not embraced the Conventions include:

- the failure of African lawyers to show an interest in the intricate issues involved in the return and restitution of cultural objects, resulting in ignorance of the benefits to be derived from membership of the Conventions;
- the cost and duration of pursuing cases in foreign courts;
- the failure of previous attempts to recover cultural objects in foreign courts.

But with the innovative provisions (already highlighted) of the UNIDROIT Convention, litigation in the courts of States Parties should be less daunting than hitherto. Besides, the Convention's arbitration option offers a more practical avenue for the settlement of cultural property disputes. It has the potential of being a better and cheaper means of resolution of return or restitution claims whether between States or between a State and a private party, or between two private parties.

The value of bronze and terracotta figures stolen from a single museum at Ife, in Nigeria, has been estimated at US\$ 250 million.⁶⁵ Burkina Faso was the setting of the nightmarish scene of Bobo priests driven to suicide by their extreme anguish upon discovering the theft of their village's entire store of ritual objects.⁶⁶ These are just two incidents among many which bear eloquent evidence to the magnitude of the cultural tragedy now being played out in Africa. African Governments can show their deepest concern about what has been described by some as cultural genocide by becoming parties to these Conventions, a duty that must be performed without delay.

64 *Facing Mount Kenya, The Tribal Life of the Kikuyu* first published 1938, many reprints.

65 Antiques dealer Ralph Klehlo, who works from Cotonou, Benin's chief port, gave the figure. Quoted in I. Conway 'Art dealers plunder Africa of its past' *The European*, 14–20 September 1995, 5; Protz, *op. cit.*, supra note 21, 89.

66 S. Mcfadden 'Africa Plundered – How Collectors are Stealing the Art of a Continent' *The Bulletin – The News Weekly of the Capital of Europe* 14 March 1996, 24, 30.

The moral impact of fifty-three African countries acceding to the UNIDROIT Convention should not be underestimated.⁶⁷ It would be a clear signal to the community of nations that Africans are saying that something grave is happening to their cultural heritage, so grave that they are collectively calling in aid the concept of the comity of nations, which the judge in the English case of *Bumper Development Corp. Ltd v. Commissioner of Police of the Metropolis*⁶⁸ used, *inter alia*, to justify his decision that the idol 'Siva Nataraja' should be returned to India.

Cultural property provides access to the history of nations. It is the foundation for cultural and social identity. Finally, it enriches lives, providing joy and sometimes even edification as a part of daily life.⁶⁹ The identity of peoples is inseparably bound up with their material culture.

67 For example, the Report of the Swiss Working Group that considered whether Switzerland should ratify the UNESCO and UNIDROIT Conventions concluded that should Switzerland choose not to ratify, the country would become more attractive as a hub for illicit trade of stolen and illegally exported cultural objects, and 'we can reasonably expect that a growing number of shady transactions will not promote a positive image of Switzerland abroad.' Federal Office of Culture, Switzerland, 'International Transfer of Cultural Objects – UNESCO Convention 1970 and UNIDROIT Convention 1995' – Report of the Working Group (Berne, 1999) 30.

68 [1991] 4 *All England Law Reports* 638, 647.

69 M.M. Muller 'Cultural Heritage Protection: Legitimacy, Property, and Functionalism' 7 *International Journal of Cultural Property* (1998) 395, 405.

Requests by Community, Institution or Individual to Institution or Individual

i. Negotiation

The Wei Dynasty *Bodhisattva*⁷⁰

THE MIHO MUSEUM, a major new antiquities museum in the mountains about 20 miles from Kyoto, was established by the Shinji Shumeikai religious order. The building was designed by the architect I. M. Pei and contains about 2,000 rare artefacts primarily from ancient Egyptian, West Asian, Greco-Roman, Chinese, Japanese, Korean and Persian civilizations. It was opened in 1997.

In 1983, an article illustrated with photos from the Chinese journal *Cultural Relics* described a group of newly excavated stone carvings from Boxing County in Shandong Province. The carvings were the first in a major new discovery of ethereal Buddhist sculptures from the Northern Wei dynasty (AD 386–534). One of the statues, an exquisite 47.5-inch stone carving of a standing Buddhist figure, known as a *bodhisattva*, was stolen from Boxing County offices on 4 July, 1994.

In late December 1997 Yang Hong, a leading scholar of ancient Buddhist sculpture and a senior fellow of the Institute of Archaeology of the Chinese Academy of Social Sciences, received a copy of the lavish catalogue of the Miho Museum. Its showpiece appeared to be the same statue as the one described in the 1983 article – a *bodhisattva*, with a large halo and singular features including an extremely rare cicada figure on the crown. It also had the same dimensions, the same stone and, even more tellingly, exactly the same pattern of damage to the arms and body. Mr. Yang was certain that it was the stolen sculpture. The Miho Museum had purchased the statue from a major London dealer in October 1995 for an undisclosed sum. At this time Japan was not a Party to the *Convention on the Means of Prohibiting and Preventing the*

70 This summary is based on the following articles: E. Eckholm and C. Sims 'Stolen Chinese Relic A Showpiece in Japan? Archaeologists See an Epidemic of Theft' *New York Times* 24 April 2000 text available at <http://query.nytimes.com/gst/fullpage.html?res=9C03E3DA1031F933A15757C0A9669C8B63&sec=&spn=&pagewanted=3#>; He Shuzhong 'Le retour de la Statuette,' extract from the Report on China in *Protection de la propriété culturelle et circulation des biens culturels – Etude de droit comparé Europe/Asie* (Study by CECOJI-CNRS for the mission recherche du ministère de la justice français), translated from the Chinese by Wang Li and Hai Ying, doctoral students at CECOJI-CNRS (to be published in 2009); and C. Sims 'Japanese Agree to Return a Stolen Statue to China' 18 April 2001, <http://www.museum-security.org/01/089.html>



This statue of a Bodhisattva created during the Wei Dynasty 386–534 CE was stolen from Shandong province in China some time after 1983. Sold in London in 1995, it was returned to China voluntarily by the Miho Museum in Japan in 2008 and is now displayed in the Shandong Museum. ©HE Shuzhong

Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (it ratified the Convention in 2007).

The curator of the Miho Museum, Mr. Katayama, stated that the museum tries to avoid trouble by purchasing from reputable dealers. ‘We make every effort to check the origin of works in our collection,’ he said. ‘Since we purchased it in good faith, it is our asset and we cannot return it for free,’ he added, implying that with compensation, a return might be possible. ‘Of course we need to keep friendship with China, so we are willing to consult and negotiate with them.’ After eight months of negotiation the Miho Museum came to an amicable arrangement in 2000 with the Shandong officials despite strong opposition from Japanese museums and collectors.

On 16 April 2001 both Parties signed a Memorandum for the return of the statue and an agreement for a loan for exhibition. In return for the museum’s willingness to return the *boddhisattva* without payment, China agreed to lend the statue to the Miho without charge until 2007, the tenth anniversary of the opening of the museum. As part of the agreement, the Chinese government stated publicly that it believed the Japanese museum had bought the statue in good faith on the open market and had not acted improperly. ‘The Miho Museum believes that art plays a significant role in creating greater tolerance and peace in the world,’ said Hiroo Inoue, the museum’s director. ‘In keeping with that philosophy, we have agreed to present the *bodhisattva* to the People’s Republic of China in good faith.’

Under the agreement, the museum stated that China promised to take steps to improve the management and security of its cultural artefacts and to provide prompt international notification of stolen relics. According to the agreement China will demand the return of any artefacts that are known to have been stolen. In return, the Miho will consult with Chinese cultural officials before making any new purchases of Chinese artefacts.

The Miho declined to say how much it paid for the statue, but museum and Chinese officials have estimated the value of the limestone carving to be about 100 million yen, or about US\$830,000. Xin-hua News reported in January 2008 that the purchase price paid for the purchase from the dealer was US\$2 million.⁷¹

On 9 January 2008 the statue took its place in the Shandong Museum after fourteen years absence from its country of origin.

71 *Xinhua News*, 16 January 2008 <http://www.kaogu.cn/en/detail.asp?ProductID=1659>

The Return of Relics between Churches in Different Countries

In the twentieth century a movement evolved in many of the separate Christian denominations towards unification. This 'Ecumenical movement' was particularly promoted by Pope John XXIII (1881–1962). A Decree on Ecumenism (*Unitatis Redintegratio* in Latin) was adopted in 21 November 1964 and proclaimed by Pope Paul VI at the historic church Council Vatican II (1962–1965). As part of this approach, the Pope initiated a process of return of relics to the Orthodox churches, who valued such relics highly.

In 1965 the relics of St. Titus, which had been kept at St. Mark's in Venice, were returned to Crete at the request of the Orthodox Church there. They were placed in the Cathedral of St Titus in Heraklion on Crete, where they had originally lain until taken by the Venetians to Venice in 1669.⁷²

In 2000 Pope John Paul II returned the relics of St. Gregory the Illuminator, considered by the Armenian Orthodox Church as the Second Enlightener of the Armenian people and a great saint of the holy universal Church. He is also viewed as a pre-eminent lawgiver among the Armenian nation, and their first *Catholicos* (spiritual head). As such, the relics are regarded as a priceless treasure by the Armenians. They had previously been held in the Convent of St. Gregory the Armenian in Naples, and were placed in the newly completed Cathedral of St. Gregory in Etchmiadzin in Armenia on the 1700th anniversary of Gregory's conversion of the King of Armenia in 301 CE.⁷³

In 2004, the relics of St. Gregory the Theologian and St. John Chrysostom, two Fathers of the Eastern Church and Patriarchs of Constantinople, were returned by Pope John Paul II to Patriarch Bartholomew I of Constantinople. The Orthodox Church claims that the relics were removed from Constantinople when Crusaders sacked the city in 1204, although another version states that the bones of St. Gregory were brought to Rome by Byzantine monks in the eighth century. Without negating the tragic events of the thirteenth century, a Vatican spokesman stated that this gesture was intended to promote unity between the Catholic and Orthodox churches. In 2001, John Paul apologized for Roman Catholic involvement in the siege of Constantinople. Patriarch Bartholomew I met John Paul II in Rome on 29 June, 2004, at which time he invited the Pope to Istanbul, and also asked if the relics of the saints could be returned from the Vatican, where they had been kept in St. Peter's Basilica.⁷⁴

72 For more detail see P.J. O'Keefe, 'Sacred Objects' above.

73 http://212.77.1.245/news_services/bulletin/news/7981.php?index=7981&po_date=10.11.2000&lang=it. In his speech at the Vatican, the Armenian Patriarch Karekin II mentioned that Pope John Paul II, 'several years ago' despatched to the Armenian Church the relics of the Holy Apostle Bartholomew, co-worker with St. Thaddeus in the task of evangelizing the Armenian people.

74 <http://www.msnbc.msn.com/id/6588646>

In 2004 Pope John Paul II also returned the *Madonna of Kazan* to the Russian Orthodox Church in Moscow. It is currently held in the Cathedral of the Holy Cross in Kazan, Tatarstan. The city of Kazan has decided to build a new pilgrimage centre for the Kazan icon.⁷⁵

Pope John Paul II made reconciliation among the divided Christian churches one of the major themes of his papacy. It is clear that the transfer of relics has been a major element in this policy.⁷⁶

ii. Litigation

The Cypriot Icons in The Netherlands (*Lans Case*)⁷⁷ S. Matyk

After the Turkish invasion of Cyprus in 1974 a number of Greek Orthodox churches were ransacked and their icons removed. Although the Turkish administration of the area under occupation declared itself to be an independent State, the international community, with the exception of Turkey, did not recognize the Northern Cypriot regime as an independent State and continued to regard the area as occupied.

In 1999 the Greek Orthodox Church in Cyprus,⁷⁸ sued the purchasers of four important icons which had been illegally removed from the Antiphonitis church in the part of Cyprus occupied by Turkey. They had bought them from a dealer in the Netherlands during the 1970s. The possessors, Mr and Mrs Lans, argued that they had purchased them in good faith, and were therefore not required under the Netherlands *Civil Code* to return them. They further argued that the transaction had taken place in the Netherlands and should be governed by Netherlands law.

The *Protocol of 1954 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954*, to which both the Netherlands and Cyprus were Parties at all material times, requires the seizure of cultural property illicitly removed from territory during occupation and its return to the 'competent authorities of the

75 <http://www.insidethevatican.com/newsflash/2007/newsflash-may13-07.htm> For details of the return see O'Keefe, cited n.1.

76 <http://www.msnbc.msn.com/id/6588646>

77 This note has been condensed from S. Matyk 'The restitution of cultural objects and the question of giving direct effect to the Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954' 9 *International Journal Cultural Property* (2000) 341 and P.J. O'Keefe 'The First Protocol to the Hague Convention Fifty Years On' 9 *Art Antiquity and Law* (2004) 99, 110. Updated by courtesy of Sabine Gimbrere.

78 *Greek Autocephalous Orthodox Church in Cyprus v. Lans*, Court of Rotterdam (Civil), 44053HAZ95/2403, 4 Feb 1999; no official report of this decision exists.

territory previously occupied.' In the Netherlands, international law (including, therefore, the law established by a legal instrument such as the 1954 *Protocol to the Hague Convention*) prevails over national law in the case of such an inconsistency.

However, in the *Lans* case the judges decided that the international obligation lay between the Netherlands and Cyprus, whereas the case itself involved the Church and two private citizens. Their very specific rights under the *Civil Code* could not be removed by a general provision in the *Protocol*. These provisions included time limitations on actions in the courts and the protection of good faith purchasers. An appeal against this decision by the Church was unsuccessful.

The Netherlands has now adopted the *Law on the Return of Cultural Property Exported from Occupied Territory* of 8 March 2007 containing Rules on the Seizure of and Establishment of a Claim for Return of Cultural Property exported from Occupied Territory in time of Armed Conflict. This legislation prohibits the import into the Netherlands of cultural property from occupied territory (Article 2) and also gives the relevant Minister power to seize it where there is a reasonable presumption that it has been exported from occupied territory or where a request is received from the authorities of that territory (Article 3).

This case can be contrasted with that of *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*⁷⁹ where the United States Court of Appeals held that the Greek Orthodox church could recover mosaic icons from the Kanakaria church in northern Cyprus, because the United States dealer, who had bought them in Switzerland from a Turkish seller, had not exercised diligence in inquiring into their provenance.

79 717 F. Supp. 1374 (1989) (*Federal Supplement law reports US*); 917 F.2d 278 (7th Cir. 1990) (*Federal Reporter 2nd series US*).

State Request to Institution or Individual

i. Litigation

*Iran v. Barakat: Iran Wins Barakat Appeal*⁸⁰

D. Fincham

THE GOVERNMENT OF IRAN sued a London dealer, the Barakat Gallery Ltd., for the return of certain antiquities, which it claimed came from the Jiroft region in the Halil River valley in south-east Iran. The region is thought to have been the home of one of the earliest literate societies in the world, dating back to the third millennium BC. It has only recently been discovered and excavated. The antiquities were carved jars, bowls and cups made out of chlorite.

The Barakat Gallery trades in ancient art and antiquities from around the world. It admitted to being in possession of the antiquities but disputed Iran's claim to them. It did so on the basis that it had acquired good title to the antiquities according to the law of the countries where it acquired them, namely France, Germany and Switzerland. It also argued that even if Iran had good title by the law of Iran, it could not succeed, since English law courts will not enforce the penal or public laws of other States.

The question of Iran's ownership of the antiquities turned out to be quite complex, since there was no single provision in the many laws cited by the experts on Iranian law which directly stated this to be the case. Though the judge found it clear that Iran had gone to some lengths to list and secure protection for its heritage and to penalize unlawful excavators and exporters, the laws did not confer title, and vesting ownership in the State could not occur by default or as a matter of inference.

The judge went on to hold that the Iranian provision for forfeiture of discovered antiquities requiring imprisonment for the wrongful possessor was a penal law and that the forfeiture of the objects would amount to an exercise of State sovereignty. It was therefore a public law, which would not be enforced by another State.

For all these reasons, Iran's claim failed in the High Court. However the English Court of Appeal upheld Iran's claim. As the Court of Appeal noted

80 <http://illicit-cultural-property.blogspot.com/2007/12/iran-wins-barakat-appeal.html> accessed 13 August 2008

This ... was a conclusion which the [High Court] judge himself described (para 100) as 'a regrettable one,' and added (presumably not having been informed that the United Kingdom had ratified the UNESCO Convention) that the answer might be an international convention on the subject. It seems that the judge was unaware of the existence of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 and that the United Kingdom was a Party to it.

It is significant that the Court of Appeal noted that 'it is important to bear in mind that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the purposes of the conflict of laws.' The distinction from the lower court's decision depended not on the legal significance of a proclamation such as 'Iran declares itself the owner of all undiscovered antiquities'; but rather on the individual rights which Iran had given itself in these objects. If the sum of these rights amounts to ownership under English law, then Iran had a viable legal claim. The Court of Appeal stated (para. 80):

We consider that this is an arid issue. Given our conclusion that the finder did not own the antiquities (and the fact, as was common ground, that the owner of the land from which they came had no claim to them), there are only two possibilities. Either they were *bona vacantia* [ownerless goods] to which Iran had an immediate right of possession and which would become Iran's property once Iran obtained possession and which could not become the property of anyone else or they belonged to Iran from, at least, the moment that they were found. We consider that the former alternative is artificial. Iran's personal rights in relation to antiquities found were so extensive and exclusive that Iran was properly to be considered the owner of the properties found.

The question then became: under English law does the Iranian interest in the objects support a claim, and if so is the claim founded on a penal or public law? The appeal court distinguished between the provisions dealing with criminal penalties for unlawfully excavating or dealing with antiquities and those with respect to ownership. The former is clearly a public law and unenforceable (unless there is some treaty obligation) while the latter is justiciable. When a State owns property in the same way as a private citizen 'there is no impediment to recovery.'

Though the court did recognize difficulty in enforcing Iran's sovereign authority, the Court of Appeal classified the claim as a 'patrimonial claim.' In distinguishing this claim reference was made to US precedent, *United States v Schultz*,⁸¹ in which the Second US Circuit Court of Appeals recognized an Egyptian patrimony law even though Egypt had never reduced the objects concerned to possession. Importantly, the

81 See summary by Gerstenblith in Part 4, p. 346.

Court of Appeal reasoned that even if it was wrong in not characterizing the claim as the enforcement of foreign public law, the claim would still not be barred because there exists no 'general principle that this country will not entertain an action whose object is to enforce the public law of another State.' In supporting this principle reference was made to the UNESCO Convention, the UNIDROIT Convention, and the Commonwealth Scheme⁸² (although this has not been fully implemented), as well as the relevant EU directives.

This judgment is a great stride forward in the protection of cultural heritage of nations with vast and vulnerable fields of antiquities. It means that English courts will now recognize foreign ownership declarations even when they are not explicit, so long as they grant rights to the source nation similar in nature to ownership requirements under English law.

After the judgment *Fayez Barakat*, the owner of the gallery said 'This means that the Iranian government could claim every Persian item at a British Museum, and that doesn't make any sense.' Such proclamations are patently ridiculous, and sadly indicative of the absurd exaggerations that follow a ruling like this. The British Museum will not be emptied of its Persian collection because of this decision; rather antiquities dealers are unable to sell new and illegally excavated objects from Iran.

This decision means that source nations need no longer fear the English precedent of the *Ortiz* case⁸³ where New Zealand failed to recover an important Maori carving when it tried to apply its heritage legislation, just as uncertainty about recognizing the title of source countries was scotched by the United States Supreme Court in the *Schultz* case. This development in the jurisprudence of the two countries with the largest trade in art and antiquities is particularly favourable to those countries seeking the return of illegally acquired objects from their cultural heritage.

82 Editor's note: This scheme was adopted by fifty of the then fifty-one States of the Commonwealth of Nations (former British colonies and dominions) at Mauritius in 1993 and a Draft Model Law was adopted by Law Ministers in Trinidad and Tobago in 1999.

83 A decision of the House of Lords in 1983: reports in the *Law Reports* – [1982] Q.B. 349 (High Court), [1982] 3 *Weekly Law Reports* 571 (Court of Appeal) and [1983] 2 W.L.R. 809 (House of Lords) which denied New Zealand's claim for return of important Maori sculptures which had been illegally exported.

ii. Negotiation

From Banyoles to Botswana: the Return of a Bushman to Africa

N. Parsons, N. and A.K. Segobye ⁸⁴

Who was ‘El Negro’?

6 ‘EL NEGRO’ is the popular name given to the stuffed body of an African man that had been the central exhibit of a small municipal museum (the Darder Museum) in the town of Banyoles, Catalonia, Spain since 1916.

He stands about 130 cm high, wears a flat leather apron and carries a small spear. Some parts of him appear to be naturally desiccated, others seem to have been filled or reconstituted with wire and plaster. His large glass eyes concentrate fiercely on some invisible prey. There is no explanatory legend.⁸⁵

The man’s skin had been blackened using boot black. A CAT-scan conducted in 1993 found that the body consisted of mummified flesh, with only the skull and leg and arm bones intact inside; the rest consisted of iron support rods and grass or hay stuffing.⁸⁶

The body had been collected at some time between 1829 and 1831 by Jules (1807–73) and Edouard Verreaux (1810–68), French natural scientists in the Cape Colony. Jules Verreaux worked as a taxidermist supplying a Paris shop run by his father and brothers. The Parisian shop, ‘Maison Verreaux,’ supplied numerous exhibits to museums.

The two brothers travelled to an area later described as being between the Orange and Vaal Rivers on the border of the Kalahari in what is now South Africa. Around this time there were small groups of BaTlhaping (the mostly southerly Tswana or ‘Bechuana’) living on the lower Vaal near its junction with the Orange. Since about

84 Edited excerpts from ‘Missing Persons and Stolen Bodies: the Repatriation of ‘El Negro’ to Botswana’ in C. Fforde, J. Hubert and P. Turnbull (eds) *The Dead and their Possessions: Repatriation in Principle, Policy and Practice* (Routledge, London, 2002). Originally presented as two papers at the University of Botswana Workshop on the Repatriation of ‘El Negro’ on 24 May 2001, held at the Department of History (which includes an Archaeology and the Museum Studies Unit), University of Botswana.

85 A.E. Robertson, ‘The Desiccated African in Banyoles’ 9 *Anthropology Today* (1993) 1, 3.

86 Post-mortem report summarized for participants at a meeting in the Ministry of Foreign Affairs conference room, 26 Sept. 2000; personal communication to author from Miquel Molina, no date. See <http://ubh.tripod.com/afhist/elnegro/eln-pm.htm> for this summary.

1800 the area had come under the general sovereignty of the Griqua republic, which lay to the north of the Cape Colony frontier along the Orange River. To the north of the Griqua republic lay the independent BaTlhaping and BaRolong kingdoms. The area of the Orange–Vaal junction seems to have been a major centre for the sale and processing of wild animal skins.

The brothers dug up the body of a ‘Betjouana’ man the night after its burial, and took it back to Cape Town, where the body was stuffed. By 15 November 1831 the body was forming part of an exhibition of taxidermia by the Verreaux brothers at the Paris emporium of ‘le baron Benjamin Delessert.’ A French newspaper reported the lifelike body of a ‘Betjouana’ man, who wore antelope fur clothing, carried a spear and had a leather bag with glass beads in it.⁸⁷

Jules Verreaux appears to have started auctioning the contents of *Maison Verreaux* after the deaths of his brothers Edouard and Alexis in 1868.⁸⁸ Francesco Darder, a Catalan naturalist, bought the remains of the collection including the body of the ‘Betjouana’ in 1880, and exhibited his new acquisition at the Barcelona Universal Exposition in 1888. Judging from the drawing of ‘El Betjouana’ in the catalogue, the antelope fur in which he had presumably been buried had disappeared, as had the little leather bag with its beads. But he is shown standing erect, carrying an hourglass-shaped shield and a very long, barbed spear. Bird feathers adorned his head.⁸⁹ These accoutrements would have been characteristic of a Tswana warrior c. 1830. The barbs on the spear, making it into a kind of harpoon, are unusual; but a harpoon would have been necessary for the extremely dangerous sport of hunting hippo (*kubu*, ‘sea-cow’) along the Orange and Vaal Rivers. A famous sketch by Thomas Baines portrays the young chief of such ‘Bechuana’ as were living on the Vaal around 1850, surrounded by his mates and elders, all sewing *karosses* (furs) while they conversed in the *kgotla* courtyard.⁹⁰

In 1916, the whole of Darder’s collection was bequeathed to the town of Banyoles and the collection became known as the Darder Museum.

87 *Le Constitutionnel, Journal du Commerce, Politique et Littéraire* (Paris), Nov. 1831 (copy courtesy of Jacinto Anton).

88 Australian National Botanic Garden website on J.E. Verreaux citing A.E. Orchard (no date) *A History of Systematic Botany in Australia* 1.

89 Catalogue in Spanish for Darder exhibit at Barcelona Universal Exposition, 1888 (partial copy courtesy of Miguel Molina).

90 N. Parsons *A New History of Southern Africa* (Macmillan Education, Basingstoke, 1983) 42–44, 80–89; see also A.R. Willcox, *The Great River: The Story of the Orange River* (Drakensberg Publications, Winterton, Natal, 1986).

How 'El Negro' Became Controversial

In December 1991, some months before Banyoles was due to be the venue for water sports at the 1992 summer Olympics, Alphonse Arcelin, a medical doctor practising in the town of Cambrils, began to protest about the degrading exhibition of 'El Negro' in the Darder Museum. Arcelin wrote to the national daily newspaper *El País*, demanding that the exhibit be removed before it caused offence to Olympic visitors and African athletes.⁹¹

It is incredible that at the end of the twentieth century, someone still dares to show a stuffed human being in a show case as if it were an exotic animal.

Spain is the only country in the world where this occurs. If the man is not moved, I'm willing to ask all black athletes not to participate in competitions in a place where such a racist statement is made even worse: it is a man stolen from his grave.⁹²

The townsfolk of Banyoles responded with outrage at the slight to their municipality: 'He is our African, and we are very fond of him.'⁹³ Both conservatives and socialists on Banyoles town council responded with a mixture of bewilderment and defiance. They voted to keep 'El Negro' on display in his glass box as before. According to Councillor Carles Abella, who was also the Darder Museum's curator: 'El Negro is our property. It's our business and nobody else's. The talk of racism is absurd. Anyway, human rights only apply to living people, not dead.' Abella was backed by the socialist mayor, Juan Solana.⁹⁴ Later, Abella justified the retention of the exhibit as an integral part of the thematic 'unity' of the museum:

The black man of the [Darder] museum forms part of the city's popular culture taught in school ... of course we don't consider it [racist] ... this is a museum that shows different races and cultures with adequate respect. It is a racial exhibit, ... racism or morbidity may be a personal attitude from visitors⁹⁵

The Nigerian ambassador in Madrid expressed his dismay that 'a stuffed human being can be exhibited in a museum at the end of the twentieth century.' He added: 'I have already consulted with other African countries and we are making a protest at the highest levels of the Olympic Organizing Committee in Barcelona and the Spanish

91 See also D. Jaume, G. Pons, M. Palmer, M. McMinn, J.A. Alcover, and G. Politis 'Racism, Archaeology, and Museums: the strange case of the stuffed African male in the Darder Museum, Banyoles (Catalognia), Spain' 6 *World Archaeological Bulletin* (1992) 113.

92 Cited in Robertson 1993, note 85 above 2.

93 *Ibid.*

94 *The European* 5 March, 1992.

95 *Lagos Daily Times* 11 March, 1992.

Foreign Ministry.’⁹⁶ By March 1992, the matter was before the International Olympic Committee (IOC), where it was raised by the Senegalese Vice-President of the IOC who argued that ‘El Negro’ was exhibited ‘in such a way that it might cause offence.’ An American member of the IOC was quoted as saying: ‘It is unbelievable. I can’t imagine that a country hosting the Olympic Games can be so inhumane and insensitive. It’s time for Spain to join the modern world.’ The International Olympic Committee reportedly ‘ordered an urgent investigation after African diplomats in Madrid threatened to boycott the [Olympic] games unless the mummy is removed.’⁹⁷ It was around this time that ‘El Negro’ started to become known as ‘II Bosquimano,’ the Bushman. Abella believed that, according to skull shape, the man was a ‘Bosquimano’ from the Kalahari rather than a ‘Negro.’⁹⁸

Media interest ran high.⁹⁹ The first academic discussions of the case were published in 1992–93¹⁰⁰ but despite this, and all the media attention at this time, the issue appears to have been more or less forgotten during the next five years. Certainly, there were no moves to repatriate the body during this time.

However, in 1997, the matter was brought to the attention of the Organization of African Unity (OAU). The representatives of the Republic of Botswana were urged to receive and lay the body of ‘El Negro’ to rest. In the *Botswana Gazette* (Gaborone) of 9 July 1997, the Permanent Secretary in the Ministry of Foreign Affairs, Mr Ernest Mpfu, was quoted as saying, ‘whether we like it or not, people are saying that the remains are that of a Motswana. We have no choice.’

Mpfu used the term ‘Motswana,’ which had been adopted since independence in 1966 to cover any citizen of Botswana regardless of original ethnicity. The Botswana government, Mpfu said, was willing to accept the body from the Spanish government, and would then bury it. The *Gazette* then suggested to Mpfu that the body was only being accepted ‘because of the pressure put on the government by some West African countries.’ Mpfu denied this but added that Africans wanted the body repatriated from Spain, and the Botswana government was doing ‘what we can do as Africans.’

Two and a half years later, in January 2000, the issue of repatriating ‘El Negro’ resurfaced in Banyoles. Opposing the repatriation, Joan Domenech, the Provincial Minister for Cultural Affairs in Girona, argued that, ‘politicians would better concern themselves with live black people than dead.’

96 J. Ramsay ‘Lost in time.’ *Mmegi/The Reporter* (Gaborone), 3 April 1992 (‘Back to the Future’ column no. 67). Editor’s note: *Mmegi* is a Botswana daily newspaper.

97 *The European* 5 March, 1992, 1.

98 When the CAT scan was conducted on the body in 1993, the lawyer-anthropologist among the gathered scientists pronounced that the man was a Bushman.

99 Editor’s note: The full article includes much detailed information of media treatment of the case.

100 See Jaume *et al.*, n. 91 above; Robertson, A.E article cited n. 85 above 1.

The majority view in the Banyoles town council, however, was in favour of repatriation. The deputy mayor, Jordi Omedes, insisted that ‘the return of the soldier to his country of origin is the most satisfactory solution,’ and the position of the municipal governing party on ‘the repatriation of the body of el bosquimano’ would not change – whatever the opposition parties did.

The matter was then taken up by the Spanish National Government, which welcomed the decision of the Banyoles Council after such extended debate. The responsibility for the actual repatriation was then handed over to the Spanish Ministry of Foreign Affairs.¹⁰¹

Identity in Doubt

In 2000, the combined efforts of investigative journalists and academics in Barcelona and Gaborone brought to light information that showed not only that the body had been stolen in about 1830, but confirmed that it belonged to a ‘Bechuana’ and had probably been taken from a place near the Orange and Vaal rivers, on the border of the Kalahari desert, in what was now South Africa. The intervention at this late date of information that showed ‘El Negro’ was not, in fact, from Botswana threatened to muddy the ‘clear waters’ of repatriation for the politicians and bureaucrats. The Ministries of Foreign Affairs in Madrid and Gaborone sounded less than pleased. The Spanish Secretary for Foreign affairs, Julio Nunez, responded somewhat testily when confronted by *La Vanguardia*:

The government’s hope is that the bushman’s body may go to Botswana. If they don’t want it back there – something which is difficult to [arrange] – we will look for another place where they have ethnic groups similar to the body which was exhibited in Banyoles. Besides I talked last week with the Botswanan secretary of foreign affairs, Mr Ernest Mpofo, who said that his government will prepare for ‘El Negro’ the ceremony that it deserves when there is an agreement with the Spanish government for its return. He seemed willing to accept the return of the body. More than this, he said it will be something symbolic for the whole [of] Africa.¹⁰²

However, although the location of the most likely group of ‘Bechuana’ and their descendants could be identified in South Africa, no initiative was forthcoming from the South African side to claim the body of ‘El Negro.’

Mpofo reiterated¹⁰³ that as far as the Botswana government was concerned, ‘El Negro’ was, as mandated by a resolution of the Organization of African Unity, ‘a bushman from Botswana.’ With a Spanish general election imminent, the authorities

101 *La Vanguardia* 25 January, 2000; 3 and 4 February, 2000.

102 Reported in *Mmegi* 3 March 2000.

103 *Ibid.*

of Banyoles and Girona delayed their final decision on 'El Negro' until after April 2000. The National Museum in Madrid took possession of the body from the Darder Museum in Banyoles around August 2000. A last ditch attempt by the Darder Museum to stop the repatriation argued that since 'El Negro' was really a Kalahari 'Bushman,' the Botswana government should be punished for the maltreatment of people in the Kalahari today by withholding the body from repatriation. The museum's attempt failed, and arrangements were made to transport 'El Negro' to Botswana.

Arrival in Gaborone, October 2000

The eight years of campaigning for the return of 'El Negro,' and the controversy that surrounded it, ensured that the eventual arrival of 'El Negro' in Botswana would attract great public and media attention. Crowds of people converged on the Sir Seretse Khama airport, to greet the arrival of 'El Negro.' However, it became clear as soon as the remains were taken from the plane that the controversy would continue. The first startling revelation was that the remains were contained in a plain wooden packing case measuring approximately 1.5 x 1.5 m. Immediately, members of the public present at the airport began asking why 'El Negro' was not in a coffin. The box was received by a small guard of the Botswana Defence Force who draped a flag in national colours over the box and carried it to a hearse for immediate transport to the Gaborone City Hall. Here the remains were to lie for the public to view the body.

Hundreds of people had come to witness this event. To their horror, instead of the expected body of 'El Negro,' a bare skull was all that was displayed in the glass window of a square box, the dimensions of which suggested that it did not contain the complete stuffed body of 'El Negro' as had been displayed standing up in the Darder Museum. Over the next few days, the intense public dismay and perception that Botswana had been 'hoodwinked' was conveyed in the media and via talk shows, phone-in radio programmes and other public forums.

Of overriding concern was the question of what had happened to the rest of the body, and its corollary, how could anyone be sure that the skull was really that of 'El Negro'? There were no immediate answers to these questions. What would emerge later in a statement from the Spanish museum professionals who had been responsible for preparing the body for transportation was that during this process they had taken the liberty of scraping the skin from the bones and removing all other accessories and material culture which had been displayed with 'El Negro' for more than a hundred years. The statement suggested that this had been done because of the Botswana request for 'remains' (*masalela*), which had been interpreted to exclude any material culture, which, they argued, was Spanish property. While 'accounting' for the lack of artefacts, this statement clearly did not explain why the body had been reduced to a skull and a few bones.

Public dismay in Botswana was fuelled by the disappointment expressed by Arcelin who had spent over eight years fighting a lone battle in Spain to see the body returned to Africa. Having travelled all the way from Spain, he was shocked to see the skull and indicated that there was no way of now telling whether or not it belonged to 'El Negro.' The public was outraged at the extreme insensitivity of the Spanish officials who had, as they claimed, reduced 'El Negro's' body to a skull.

Burial

The burial ceremony, held on the morning of 5 October, 2,000, was a sombre affair attended by large crowds. During his address, the Spanish ambassador announced that his government could not be held responsible for the tragedy surrounding 'El Negro's' departure from Africa since the people who took him were not Spanish. Instead, he suggested that by bringing the body back, his country had done more than enough. These words provoked the reaction of the Senegalese diplomat who represented the OAU, who had also travelled to attend the reburial. He noted that it was not the action of the Spanish per se that was being atoned for by the ceremony, but the collective wrong of any nation which had indulged in the inhuman act of trading in human beings whether alive or dead. As such it was wrong for Spain to argue its innocence by claiming it had merely displayed the body and not stolen it from Africa in the first place. He noted that Botswana's offer to rebury 'El Negro' was an equal act of collective goodwill because of the continuing uncertainty of 'El Negro's' origins.

Tsholofelo Park was chosen as a symbolic burial ground because of its central location in Gaborone, but many people felt that the body should have been buried in a proper burial ground. People also thought that given the 170 years of waiting for a proper reburial, it would have been best to wait a bit longer and trace his kin so that he could be buried properly amongst his people. The park was also chosen from a diplomatic point of view as a neutral place where people other than Batswana could easily visit the burial place, as 'El Negro' had become a Pan-African citizen. 'El Negro's' burial place has thus become a national monument and, as such, falls under the jurisdiction of the Botswana National Museum.¹⁰⁴

The inclusion of Christian rites at the burial ceremony was also questioned by people who felt that they detracted from the occasion of the return of a true son of Africa. Traditional doctors (*dingaka*) were not invited to officiate at the ceremony, and many people felt that failing to carry out the appropriate funeral rites would cause calamities, such as poor rainfall. They argued that while Botswana's decision to

104 Until 'El Negro's' remains were buried, they fell within the jurisdiction of the *National Monuments and Relics Act* because of their age. It is doubtful whether they remain under this jurisdiction now that they are buried.

accept the body for reburial might be honourable, the government had not fulfilled its responsibilities to 'El Negro.' Traditional ceremonies, such as cleansing ceremonies conducted for soldiers who had died in war, or hunters who perished in the bush, would have been more appropriate for someone such as 'El Negro,' whose actual identity was unknown. The reburial of the remains returned by Spain highlighted many issues hitherto not debated in the public domain in Botswana.

The decision to treat the repatriation of El Negro as a 'foreign affairs matter' meant that the whole exercise was not handled with the sensitivity it deserved. The exclusion of the Department of Culture and the Botswana National Museum in the preparations for repatriation, and the treatment of the body as a diplomatic exchange process, resulted in failure to take into account fundamentally important cultural issues. Spanish indifference may be explained by the negative attitude of relevant museum officials. In Botswana, the intense diplomatic sensitivity of the matter meant that the government wanted the whole matter finished as quickly as possible, instead of taking time to accord attention to the cultural issues involved.

Context

At the time of 'El Negro's repatriation, two major issues featured in the news that provide a context for the public response to the reburial. These were the current mistreatment of 'Bushmen' and ritual murders, increasingly associated in recent times with commercialized 'traditional' medicine and where the victims were mostly from poor families. Both are sensitive issues which highlight perceptions of identity and status in Botswana society.

The return of 'El Negro' to Botswana brought these issues to the fore. The history of 'El Negro' demonstrated the mistreatment of 'Bushmen' people and highlighted the continuing human rights issues in Botswana. The return of only the partial remains of 'El Negro' highlighted the continuing practice of ritual murders in Botswana and common jealousy of the newly rich and powerful. It has made Botswana aware of the need to question more critically incidences of disappearances of people, and the common lack of follow-up by law enforcement agencies.

Conclusion

The case of 'El Negro' stands as an example of a lingering belief that bodies of 'the Other,' in this case an African, can still be treated as objects that can be justifiably displayed in museum collections. While the existence of 'races' as biological entities has been refuted for decades, the popular perception of humankind in both Europe and Africa is often framed in racial classifications largely abandoned by the scientific

community. This popular view was supported by the exhibition of 'El Negro' in the Darder Museum, which served also to promulgate the view that a display of this kind was morally acceptable.

The history of the treatment of 'El Negro's' body raised questions among ordinary Batswana about the differential treatment accorded to the living people of different identities, 'races' and social classes. In particular, the arrival of bones, and not a body, from Spain and the controversy that ensued, showed that while Spanish authorities had agreed to return the remains of 'El Negro,' their fundamental attitude towards him had not changed. 'El Negro' continued to be perceived as a museum object, to the extent that, as a final act of abuse, his skin, nails, hair and penis were removed. It is still impossible to confirm whether the bones buried in the Tsholofelo Park are actually those of 'El Negro.' This caused deep resentment in Botswana and supported a perception that Spain's lack of sensitivity towards 'El Negro' pointed towards a similar attitude towards Africans in general.

The Sarcophagus of Akhenaten¹⁰⁵

31 January – 6 February 2002

Last week, part of the sarcophagus of Akhenaten, a smuggled antiquity, was returned from Munich. A team of Egyptologists led by Gaballa¹⁰⁶ travelled to Germany to take official possession of the lower, broken part of the sarcophagus, which was on exhibition in a special hall in a Munich museum.

This priceless object, the lid of which remained in the Egyptian Museum, was found in 1907 by American archaeologist Theodore Davis inside tomb KV55 in the Valley of the Kings. As was usual at the time, the object was transferred to the Egyptian Museum for restoration and conservation. Along with the fragments of the sarcophagus were pieces of wood and slivers of gold.

It was in this condition that the main part of the sarcophagus disappeared between 1915 and 1930. It reappeared, suddenly in 1980, in the possession of a Swiss antiquities collector who sent it to the Munich Museum for restoration. The chief curator of the Egyptian Museum of Art in Munich at the time, D. Wildung, informed the Egyptian authorities and offered help to safeguard and restore the fragments, but suggested as compensation a loan of objects from the Cairo Museum. More than ten years passed before the coffin fragments were finally donated by the private owner to

105 Adapted from *Al-Ahram Weekly Online*, 31 Jan. – 6 Feb. 2002, Issue No. 571 <http://weekly.ahram.org.eg/2002/571/tr1.htm> accessed 1 September 2008.

106 Gaballa Ali Gaballa, was Secretary-General of Egypt's Supreme Council of Antiquities at this date.

the Munich Museum. The golden fragments of the sarcophagus had been glued to a fibreglass base shaped like an anthropoid coffin while the wooden sheets had been restored and put on display next to it.

Egypt tried on many occasions to take possession of the lower part to reunite it with the lid in Cairo, but efforts failed because the museum insisted on returning the piece only on condition that another object, an Old Kingdom offering table, be given in exchange. During the 1998–99 Congress of Egyptology in Cairo, the matter was raised by the SCA (Supreme Council of Antiquities) and German archaeologists, and an article in *Der Spiegel* questioned how such a reputable museum could have been involved in a theft.

As a result, intensive negotiations took place at government level, and an agreement was finally reached in 2001 that the sarcophagus should return to Egypt, but only following a three-month exhibition of the piece in Munich, together with the lid and other items imported from Egypt – including a canopic jar from the same tomb, a stela from the tomb of Ay, a statue of Akhenaten, and another stela inscribed with a magical text. During the exhibition, 60,000 persons visited the Museum in order to have a last glimpse of Akhenaten's sarcophagus.

The Akhenaten sarcophagus and lid are now on display in the Egyptian Museum as an artistic masterpiece.

Editor's Note

This case is interesting because of the twenty-year process of achieving the return and the change of attitudes indicated by it. It can be contrasted with the later case of the return of a mummy, thought to be that of the Pharaoh Rameses I, to Egypt in 2003 as a gift from the Michael C. Carlos Museum, Emory University of Atlanta (United States).¹⁰⁷ See also The Sanggarah Stone: Java or Scotland? in Part 3 (page 200) Colonial Contexts (Indonesian request to an individual and to a Scottish trust).

107 See P. Lacovara 'New Life for the Atlanta's Emory University unveils a unique collection of Egyptian mummies and decorated coffins' *Archaeology* Sept./Oct. (2001); M. Rose 'Mystery Mummy, A royal body may be that of Rameses I, but can we ever be sure?' *Archaeology* March/April (2003); <http://www.carlos.emory.edu/RAMESSES/>

Institution, Community or Individual Request to State

i. Mediation

Return of the Remains of Seventeen Tasmanian Aboriginals¹⁰⁸

DURING THE 1980S the Tasmanian Aboriginal Council (TAC) of Australia requested the return of the remains of seventeen Aboriginals held by the Natural History Museum of London. The remains in question, including a complete skeleton, were collected from burial sites across Tasmania before 1850 and sent to London. At that time the museum had a collection of 19,950 human remains, dating back to prehistoric times, which originated in all parts of the world, with the majority coming from the UK. The museum considered it to be an internationally important collection used in the study of human evolution. The museum refused the Aboriginal request. The Tasmanian Aboriginal Council continued to press its case.

In May 2000 the Australian and British Prime Ministers made a joint declaration¹⁰⁹ in which they agreed to increase efforts to repatriate human remains to Australian indigenous communities, expressly recognizing the special connection that indigenous people have with ancestral remains, particularly where there are living descendants. They endorsed the repatriation of indigenous human remains wherever possible and appropriate, from both public and private collections, and noted that several British institutions, such as Edinburgh University, had, following negotiations with indigenous communities, completed repatriation requests.

The British government then set up, in July 2001, a Working Group on Human Remains that reported in November 2003. As a result of this report an amendment was made to the United Kingdom *Human Tissue Act* in 2004 to allow major museums in the United Kingdom to return human remains. It did not, however, oblige them to do so. In 2005 the relevant governmental Ministers in England and Wales,

¹⁰⁸ This report was assembled by the Editor after consultation with lawyers acting for the TAC, from Press releases issued by the Museum of Mankind and from a speech by one of the mediators, Sir Laurence Street, Sydney 5 February 2008 where he gave details of the mediation.

¹⁰⁹ See full text in Part 3, 268.

together with the chief officers of the National Museums Directors' Conference, the Museum, Libraries and Archives Council and the Museums Association welcomed and endorsed Guidance for the Care of Human Remains in Museums published by the Department of Culture, Media and Sport.¹¹⁰

Faced with a continued negative response from the Museum of Mankind, the TAC continued to press for the return of the remains.

On 17 November 2007 the museum announced that it would return the human remains to the Tasmanian claimants – after it had undertaken scientific tests of the material which ‘would be completed within three months from January,’ that is by 31 March 2007. The data collection process was to include photography, measuring, x-ray, and the taking of casts as well as DNA and isotopic analysis. It intended to obtain genetic material from the skulls and teeth by drilling and shaving off microscopic samples. Scientists said that by applying such techniques, they could use old bones to discern patterns of migration in human communities – who lived where, who mixed with whom and when – and even follow the spread of disease. The museum acknowledged that these remains had been wrongfully taken. However it held that the Aboriginal demands for return of the bones should be weighed against their scientific value.

According to Michael Mansell of the Tasmanian Aboriginal Centre (TAC), the tests planned were absolutely contradictory to Aboriginal tradition. The remains had to be returned to their burial place, or as close as could be determined, and the spirits of the ancestors merged with the remains through traditional ceremonies. Aborigines believe the deceased cannot freely enter the spirit world until their remains are returned to their homeland, and that tampering can cause spiritual harm where the remains have not been treated properly. That could affect living descendants since the spirits could inflict misfortune if people knowingly did not live up to their spiritual obligations.

The TAC challenged the museum's decision in the Administrative jurisdiction of the High Court and made an application for an injunction to stop all tests while awaiting the hearing on the substance. An interim injunction was granted to the TAC on 11 February by a judge of the High Court Queen's Bench Division to stop any further interference of any kind with the remains.

On 18 February the Museum sought to have the injunction discharged and asked for £100,000 to be lodged by the TAC as security for costs in the main action. Museum officials argued that the relics were of special scientific value because they date back to a time when the island of Tasmania had been isolated from the mainland

110 See text in Part 3, 270.

for a very long time and had genetically unique inhabitants.¹¹¹ The judge, pending the full hearing of the main case in two weeks time, granted partial relief from the injunction, maintaining it insofar as invasive techniques were in issue (pulverising, drilling or dissolving) but allowing non-invasive techniques such as photography and x-ray. These were equally unacceptable to the Aboriginals. He also made an order for security for costs in the reduced amount of £20,000.

The Australian High Commission was present in Court and reported the decision to the Australian government, which decided that it would pay the costs of the TAC, it being evident that this body would be unable to pay costs of that amount and that it would effectively prevent their claim being heard. The museum announced on 20 February¹¹² that it had undertaken to limit the range of techniques involved in the data collection from the remains pending a full court hearing.

In 1988, a tattooed Maori head had been offered in an auction catalogue in London. On application to the Court, a New Zealand judge had granted Letters of Administration¹¹³ to the chief of a Maori tribe to enable him to exercise the right and duty of an Executor or Administrator to arrange proper disposal of the remains of the deceased. This grant was recognized and enforced in the English courts. The head was, after further negotiation with its possessor, returned to New Zealand and buried in the appropriate tribal land. The TAC therefore went to the Tasmanian Supreme Court with a similar claim in respect of the remains of the Tasmanian Aboriginals held by the Natural History Museum, and Underwood C.J. granted the Letters of Administration. The TAC then had these resealed in London under the *Colonial Probates Act*, a procedure that made them equally enforceable there. At this point the museum went to the Chancery Division of the High Court in London to challenge the resealing of the Letters of Administration.

The legal advisers of the TAC had sought the agreement of the Museum to a mediation on many occasions, stressing the TAC's preference for an amicable resolution and the avoidance of legal costs, estimated for the museum at about £200,000. These proposals had all been rejected. However, it was evident that legal costs were mounting and the Board of Trustees of the Museum may well have considered that spending a large amount of money, which could have been used to support four research assistants or to mount a major exhibition, with no end in sight and no guarantee of success, might have put the Trustees in a difficult position. The Board at this stage agreed to a mediation. Each side appointed a mediator: Sir Laurence Street, a former Chief Justice of New South Wales, a very experienced mediator who had

111 Following campaigns of eradication and relocation, the last full-blooded Tasmanian Aboriginal died in 1876. The present Aboriginal population of Tasmania is of mixed descent. The separation of Tasmania from the mainland is usually considered to have occurred in the late Pleistocene, about 8,000 years ago.

112 Museum of Mankind, Press Release of that date.

113 'Letters of Administration' are granted to an appropriate applicant to administer a deceased estate where the deceased person has died intestate.

worked in matters of Aboriginal concern in Australia (nominated by the TAC) and Lord Harry Woolf, a respected British legal reformer (nominated by the Museum). The mediation began on 30 April 2007.

The mediators worked with the museum and the TAC to find out what was the most essential issue for each side. For the scientists at the Museum of Mankind, it was the preservation of DNA from the remains for the possibility of future scientific research. It was explained that the exact knowledge to be gained from this material could not even be foreseen. However, it was probable that it might assist in considerable medical advances in the treatment of some health conditions for the Tasmanian Aboriginal descendants. The Tasmanian Aboriginals, on the other hand, were distrustful of scientific claims, which had been used to exclude the return of their ancestors to their own country. They did not want physical interference of any kind with the remains and wanted to place them in a position where no future desecration could occur.

The mediators were able to find a solution. Recent medical research had shown that the cause of a certain incidence of blindness in part of the Aboriginal population was genetic. This was put to the Aboriginal claimants, who could then see the importance of retaining the DNA which had already been taken. It was then put to the scientists that, if secure custody of the DNA samples could be arranged, there would be no reason why the material could not be stored in Australia.

The agreed solution was that the remains, and all relevant documentation of them, would be returned to the Tasmanian Aboriginals. Four vials of already extracted DNA material would be stored in a secure medical facility in Australia and would not be accessed by anyone without the joint consent of the TAC and the Museum of Mankind. By agreement, casts would be taken of thirteen sets of remains (four had already been handed over), and representatives of the Aboriginals could be present if they wished. Both Parties agreed to stop the legal proceedings that had been instituted.

This case is particularly important as it shows that, with careful teasing out of the interests of both parties, the possibility of a solution that satisfies both sides, even though the premisses on which they were arguing were completely different and the controversy had been long and bitter. It also shows that mediation can find a solution relatively quickly and without heavy costs, in preference to litigation, which may be long, complex, very expensive and may well not solve the underlying issues.

In most case mediation is subject to a confidentiality agreement. This was not the case here, and for this reason it was possible to see in detail the way in which this apparent conflict of interests was resolved.

State to State

i. UNESCO Facilitation in Qatar 1998

UNESCO Press Release: Saudi Arabia Returns Smuggled Artefacts to Iraq

Paris, July 7 (No. 98–146) – Fifty-four valuable artefacts reportedly stolen from Iraqi museums and smuggled to Saudi Arabia were handed over to the Iraqi authorities on 29 June at UNESCO's Office in Doha (Qatar).

The antiquities, including figurines and seals some of them more than 6,000 years old, were seized by the Saudi authorities in the refugee camp of Rafa in Saudi Arabia. They were returned – despite the absence of diplomatic relations between the Kingdom and Iraq – in keeping with UNESCO's treaties and conventions protecting cultural heritage and prohibiting the illicit trade in cultural property.

The restitution was coordinated by UNESCO's Office in Doha with representatives of the United Nations High Commissioner for Refugees and the United Nations Development Programme. The objects – said to have been stolen from museums in northern Iraq – were returned by the Saudi Ambassador to his Iraqi counterpart in the presence of Qatari officials.

Press Release of the Royal Embassy of Saudi Arabia in Washington, 30 June 1998¹¹⁴

Iraqi antiquities recovered, returned by Saudi authorities.

The Kingdom of Saudi Arabia has handed over stolen Iraqi antiquities, recovered from a group of Iraqi refugees, to the UN's High Commission for Refugees Affairs. The Iraqi refugees were trying to smuggle the antiquities into other countries. The antiquities were handed over on Monday to UNESCO's office in Qatar in the presence of the regional representative of the UN's High Commission in the GCC (Gulf Cooperation Council) Member States (Dubai, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates).

¹¹⁴ Available at <http://www.saudiembassy.net/1998News/News/CulDetail.asp?Index=1478> Culture & The Arts News Story accessed 30 October 2008.

The fifty-four pieces of antiquities were taken from the Kingdom of Saudi Arabia to Qatar by the head of the mission of the High Commission in the Kingdom of Saudi Arabia at the request of the Saudi government and delivered to the Iraqi ambassador to Qatar under the supervision of the UNESCO office in Doha, in its capacity as the authority concerned with issues of heritage and culture.

Speaking on the occasion, Saudi ambassador to Qatar Hamad ibn Salih al-Toeimi said the decision of the Kingdom in this regard was in line with its moral values. The Kingdom of Saudi Arabia is keen on preservation of the heritage and culture of the countries of the region, he said, and added that the Kingdom has been cooperating with the concerned international organizations in this regard.

ii. Bilateral negotiation

The Case of the Khurvin Artefacts: *Iran v. Wolfcarius*¹¹⁵

Mme. Wolfcarius had lived for many years in Iran as the wife, then widow, of the Shah's personal physician who was French. She became very interested in archaeology and acquired a large collection of ceramics of great value from the necropolis of Khurvin: some by purchase from local traders and some from excavations organized by her. In 1965 they were exported from Iran, allegedly without an export permit as required by Iranian law, in the baggage of a Belgian diplomat. The bags were not therefore subject to customs inspection. The case came to the notice of the Iranian authorities when the diplomat's son fell out with his father and publicized his actions. The matter was, naturally, of some embarrassment to the Belgian authorities.

The ten crates of objects were deposited in 1971 in a Belgian collection at the University of Ghent for study and possible exhibition. In 1979, after the Revolution in Iran, Mme. Wolfcarius sought to retrieve them, fearing that they would be claimed by the Iranian Government. In 1981, after two years of discussion with the Belgian Government, which it saw as implicated by the action in 1965 of its diplomat, the Iranian Government commenced an action in the Belgian court system for the return of the collection. (Belgium is not a party to the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970.)¹¹⁶ Towards the end of 1981, the goods were sequestered by court order to prevent dealings in them during litigation: the collection was left in its current location and was to be conserved.

¹¹⁵ Report by the Editor on the facts given, based on the case report of the *Tribunal de 1re instance de Bruxelles* R.G. No. 144.084.

¹¹⁶ Belgium deposited its instrument of ratification to the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* on March 31, 2009.

The court ordered that the suit of Mme. Wolfcarius against Professor Vanden Berghe, the holder of the collection, for possession, and that of the Iranian government against Mme. Wolfcarius for return of the collection to Iran, be heard together. Mme. Wolfcarius also claimed damages for the eight years since her request in 1979 for her deprivation of possession. The Iranian government, on the other hand, claimed that according to Article 36 of its Law of 3 November 1930, illegally exported antiquities could be regarded by the State as contraband and forfeited. It did not, however, for the purposes of the litigation, deny that Mme. Wolfcarius was the owner of the collection, and did not seek title to the collection, but only its return to Iran.

The case was brought to the notice of the UNESCO *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation* in 1985. However, as litigation was pending, the Committee, according to its Statutes, decided to wait until all national remedies had been exhausted. No developments in this litigation have been recently reported to the Committee

Procedures under International Treaty

The Ptolemaic Map of the Spanish National Library¹¹⁷

EARLY MAPS are valuable examples of the world's cultural heritage. Thus, the theft in August 2007 from the Spanish National Library of pages taken from the rare edition of *Cosmographia*, published in Ulm, Germany by Leonardus Holle in 1482, was a most serious loss. Interpol was alerted and one of the Ptolemaic maps stolen was found in Australia two months later. Both Spain and Australia are parties to the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970.

This was one of twelve maps and other documents cut from various rare volumes, based on the original work by Claudius Ptolemy in the second century. The *Cosmographia* was one of the first occasions on which Ptolemy's revolutionary global projection of the known world had been printed. It had a profound influence on how geography was understood – it was the first to extend the global view beyond Ptolemy's ancient (second century CE) world view, the first such world map to be printed outside of Italy, and the first to bear an engraver's signature, 'Johann, woodcutter of Armzheim.' With its brilliant ultramarine painted oceans, it is also one of the most striking and copied of early world maps. The current Director of the Biblioteca, Milagros del Corral, has described the map as a national treasure that had been an integral part of the library's collection since it was founded about 300 years ago.

Sent first to the United States, the stolen map was bought on the internet by a Sydney dealer. Investigations by the Australian Federal Police led authorities to seize the map from an art gallery in Sydney. The map was then sent to the National Library in Canberra for assessment and safekeeping.

A ceremony was held at the National Library on 4 February 2008 at which the world map was returned to the Spanish Ambassador, Antonio Cosano. Mr Cosano applauded Australia's cooperation in locating and returning the map to Spain. 'This country is sending a very strong and firm message that it fully implements its

117 Based on M. Woods (Curator of Maps, National Library of Australia) 'Ptolemy World Map Returned to the Spanish National Library' 92 *Gateways* (National Library of Australia) April 2008 <http://www.nla.gov.au/pub/gateways/issues/92/story05.html> accessed 10 September 2008; and P. Cornford 'Precious stolen map turns up in Sydney' in *Sydney Morning Herald* 20 October 2007 <http://www.smh.com.au/news/national/precious-stolen-map-turns-up-in-sydney/2007/10/19/1192301045420.html>

international obligations and Australia is not a safe haven for the illicit export of the cultural heritage of any nation.'

Four of the stolen items are still missing. A Uruguayan national, Cesar Gomez Rivero, who was being held in Argentina, has since been charged with the thefts. It is believed that Rivero, a regular visitor and researcher at the Biblioteca, had taken away the documents on his various visits between 2004 and 2007.

Partly as a consequence of the discovery of the thefts, a massive inventory project has been undertaken of over 500,000 books, the most valuable among the 25,000,000 or so documents in the Library's possession. The task has also helped with an ongoing project known as *Biblioteca Digital Hispánica* (the Spanish Digital Library), which, in five years time, will offer online access to the complete texts of over 250,000 works of the library's valuable collection in several languages.



Ptolemaic map of 1482 returned to the Spanish National Library by the National Library of Australia.
© National Library of Australia

The Return of Ancient Textiles to Bolivia from Canada¹¹⁸

CANADA IMPLEMENTS the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 through its *Cultural Property Export and Import Act*. On 20 September 1990 Roger Yorke, a Canadian citizen, was charged with two offences alleging unlawful importation into Canada of Bolivian and Peruvian textiles contrary to s.37 of the *Cultural Property Export and Import Act*. The objects were seized for violations of both that Act and the *Customs Act*.

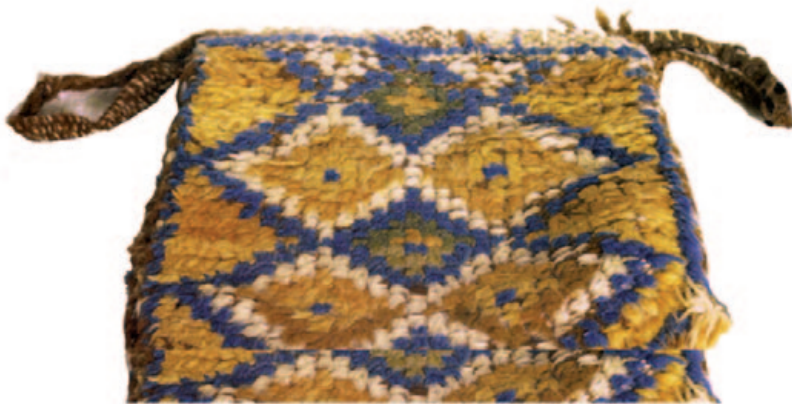
The textiles of the Coroma area in Bolivia have very special meaning to their holders. These weavings were formerly worn by their ancestors, and in times of trouble, are used in rituals designed to obtain guidance from these ancestors. They are kept in bundles by heads of the various *ailu* (clans) and are only brought out in public once a year on All Saints Day. In recent years art-dealers from North America have come to these annual festivals and photographed the textiles. Subsequently they or their agents have sought to persuade some of the custodians of the textiles to part with them.

Yorke had lived in South America, mostly in Bolivia, between 1976 and 1985. He operated as a dealer selling indigenous textiles and weavings. Textiles were shipped to Canada and offered for sale to collectors, including museums, in both that country and the United States of America. In 1980–81, Yorke was the guest curator of an exhibition of Bolivian textiles held at ten museums in Canada. Some forty-eight out of the fifty exhibits came from his private collection. In 1985, Customs, following a tip from American authorities, began to suspect that documents accompanying four shipments that year contained false information regarding the types of weavings and their value; that the textiles were in fact Bolivian cultural property.

Police and customs officials made a search of Yorke's home in Canada on 21 July 1988. Over 6,000 objects were seized. Yorke appealed against the seizure. The Adjudications Division found that some of the objects were declared cultural property and some not. The former were declared seized as forfeit (without terms of release) and the latter with terms of release, in other words, Yorke continued to own them but would have to pay a fine to get them back. In 1993 he lodged an appeal in the Federal Court but did not proceed with it.

The trial commenced in April 1992. The Nova Scotia County Court ruled that the evidence had been improperly obtained as the search warrant was too broadly expressed.

118 Extracts from D.A. Walden, 'Canada's *Cultural Property Export and Import Act*: The Experience of Protecting Cultural Property,' *Material Culture in Flux: Law and Policy of Repatriation of Cultural Property* *University of British Columbia Law Review* Special Issue (1995) 203, 210.



These three items are part of the assemblage of traditional textiles returned by Canada to Bolivia. They are, respectively, a *chullo* or woollen hat from the Calamarca region (1850–90), a *chuspa* or coca bag from Aymaya or Coroma (1825–90), and an *alforja* or saddlebag from the Coroma region (1650–1825). © Reproduced with the permission of the Canadian Conservation Institute of the Department of Canadian Heritage, 2009

As noted, a wide range of objects had been seized. The trial judge decided that the search and seizure were unreasonable and breached the accused's rights under s.8 of the Canadian *Charter of Rights and Freedoms*. The Nova Scotia Supreme Court allowed an appeal by the Crown, set aside the dismissal of the charge and ordered a new trial. This decision was affirmed by the Supreme Court of Canada.

The second trial began on 6 September 1994. In 1996, Yorke was found guilty as charged, fined CAN\$ 10,000 and placed on two years probation. His appeal to the Nova Scotia Court of Appeal was unanimously dismissed and the Supreme Court of Canada refused to allow an appeal.¹¹⁹

Certain of the matters raised before the Nova Scotia Court of Appeal and decided in 1998 are noteworthy. One argument was that the legislative scheme created by sections 37, 43 and 45 of the Act violated principles of fundamental justice. This raised questions of whether fair notice was given of the conduct declared criminal. The Crown introduced evidence of a Customs leaflet – a booklet on the operation of the Act and the Annual Reports published under the Act. Some 2,700 to 4,500 copies of the latter were distributed to museums, dealers, libraries and interested individuals each year. The Court was prepared to accept this was sufficient notice since, although the number of copies was small, they went to a specialized group of which Yorke was a member.

The question of publicity in the context of a prosecution may well be of concern in other jurisdictions. Australia, Canada and the United States all maintain websites. The Australian government has implemented an information strategy to make collectors, dealers and exporters aware of amendments made to the Control List in 1998 and 1999 and to 'increase general public awareness by publicizing the programme more widely.' The strategy involved press advertisements; a series of articles in national newspapers and journals; and the mailing of information brochures and radio interviews. The assistance of the major Australian auction houses has been enlisted in drawing the attention of their customers, particularly overseas buyers, to the operation of the Act. The auction houses include in their catalogues information to buyers on the need to obtain export permits and details on how to contact the administration.

The Nova Scotia Court of Appeal considered that the prohibitions of the Act constituted regulatory offences. Under general Canadian law, this meant that, the Crown having proven the offence, Yorke, to escape conviction, had to show that he had taken reasonable care to inquire as to the status of the textiles under Bolivian law.

... a person whose business is the trading in and importation of cultural property and artwork clearly has a duty to make greater inquiries [than a tourist]. Such a person has access to consular offices, Customs and police officials and

119 The relevant court reports of all this litigation will be found in the *Nova Scotia Reports*: R. v. Yorke (1992), 112 N.S.R. (2d) 240 (County Court); (1992), 115 N.S.R. (2d) 426 (Nova Scotia Supreme Court); (1993), 125 N.S.R. (2d) 238 (Supreme Court of Canada) and (1998), 166 N.S.R. (2d) 130 (Nova Scotia Court of Appeal).

other traders in the foreign lands. It is not unreasonable to expect of such persons that they make reasonable inquiries about the status of the property they propose to export from that foreign land.

The Court refused to accept that the Act incorporated Bolivian law by reference to create a criminal offence. In its view the offence was the importation of certain property into Canada.

This case does not involve the prosecution of crimes committed outside Canada. The offence occurred at or near Halifax. Bolivian law was merely a matter of fact to be proved at trial bearing upon matters with respect to which the appellant was under a duty to exercise due diligence or reasonable care, and which he did not demonstrate.

The trial judge had accepted that the prosecutors had proven beyond reasonable doubt that Bolivia specifically designated the textiles 'as being of importance for archaeology, prehistory, history, literature, art or science' to fulfil the requirement of being 'foreign cultural property.' At the appeal, Yorke contended that the Bolivian Decree did not sufficiently conform to the Convention, nor to the Act. The Court did not accept this. Expert evidence had been given on the nature of the Bolivian Decree. Weavings were specifically mentioned and covered the textiles in evidence. The Court stated that it 'would not be possible for a nation to create an itemized list of every piece of property to be protected.'

The textiles were subsequently returned by Canada to Bolivia.

The action of Canada in prosecuting Yorke and seizing the textiles was a most demanding one. It was difficult to find an expert to identify and date them. Canada spent hundreds of thousands of dollars on the litigation and the need for translation slowed proceedings. Canada was also responsible for the textiles during the six years of litigation and found at a certain stage that some had become infected with moths. Each of the 6,000 pieces was consequently vacuumed by hand and sealed in plastic bags. A subsequent discovery of moth larvae led to use of a disinfectant spray, which proved to be ineffective, and eventually the Canadian authorities froze the entire collection for the duration of their custody.

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

The Hittite Cuneiform Tablets¹²⁰

IN 1975 TURKEY MADE A REQUEST to the German Democratic Republic (GDR) for the return of cuneiform tablets from a site near Boguskoy in Anatolia. In 1906 the Royal Archives had been found. Two thousand five hundred fragments of cuneiform tablets recovered identified the city as the ancient Hittite capital Hattusha (inscribed as a World Heritage Site by UNESCO in 1986).

The cuneiform writing on clay tablets had been preserved because the tablets had been fired in a conflagration when the city was destroyed. Full-scale excavations were begun at this site in 1907 under the auspices of the German Archaeological Institute. German scholars have been active at the site almost continuously since 1906.

These tablets proved to be extremely important because they gave information not only about the little known Hittite Empire and its language, but also enabled far greater understanding of religion and cults, politics, and historical geography as well as many other aspects of life in the ancient Near East. The Berlin collection included such important Hittite texts as the fragments of a peace treaty between Ramses II of Egypt and Hattushili III dated 1259 BCE. The texts were in eight different languages, which enabled a number of languages, till then unknown, to be deciphered. It was the study of the cuneiform tables of Hattusha (up to 30,000 fragments) that led to the discipline of Hittitology which was carried out mainly by experts of the Prussian Academy, later the Academy of Science of the GDR. Because of the close and long association of the German Archaeological Institute with the site, German scholars have remained at the forefront of this subject.

¹²⁰ This information has been assembled from the report of the Committee (n. 21 below), information received by the Editor when visiting Hattusha as Chair of the Committee during negotiations between Turkey and the GDR and from <http://www.dainst.de/index.php?id=643&sessionLanguage=en> (website of the German Archaeological Institute) and http://cdli.ucla.edu/collections/vam/vam_intro_en.html (note by J. Marzahn, Curator, *Vorderasiatisches Museum*, 25 June 2001). The *Vorderasiatisches Museum* (Middle East Museum) is part of the Pergamon Museum.

In 1987 Turkey lodged a request to the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation for the return of the remaining 7,400 tablets still in the possession of the Pergamon Museum in the German Democratic Republic (GDR). In the division of Berlin between east and west, the 'Museum Island,' which housed the rich collections of the Berlin museums, had passed into the Eastern zone, which in 1949 became the capital of the GDR. According to Turkey, bilateral negotiations had proceeded for twelve years without result.

Part of the foreign policy of the GDR at that time was to distinguish itself from the Federal German Republic. One important method was by the signing of cultural and friendship treaties with as many countries as possible. Turkey let it be known that it would not be interested in a cultural treaty unless the remaining tablets were returned. The tablets were returned later that year. The transfer was accompanied by an agreement on continued joint research on these objects by experts from the two countries. The GDR authorities considered that the negotiations had led to the development of international scientific cooperation on matters relating to the cultural heritage.¹²¹

In 2001 the cuneiform tablet archives excavated at Hattusha, now kept in the archaeological museums of Ankara and Istanbul, were added to the UNESCO Memory of the World List.¹²²

121 Report to the Sixth session of the Committee 1989 by the UNESCO Secretariat, UNESCO Doc.CC-89/CONF213/3 paras. 4–5.

122 <http://www.hattuscha.de/English/english1.htm>

Regional and other Inter-State Organizations

Editor's Note

IN RECENT DECADES regional organizations have also become interested in the return of cultural heritage.

The '*Andrés Bello*' Convention concerning the Educational, Scientific and Cultural Integration of the Countries of the Andean Region (Bogotá, 1970) included in its Article 33 the agreement to joint action 'to facilitate the return of any works listed on the national inventories of historical and cultural heritage which may have left their own territory illegally.'

The Arab League Educational, Cultural and Scientific Organization (ALECSO) drafted a 'Standardized Law on Antiquities,' to serve as inspiration for national legislation in the Region: it addresses issues of trade, export and return in its third chapter.¹²³ The Commonwealth of Nations (the United Kingdom and its former colonies and Dominions) adopted the 'Commonwealth Scheme on the Protection of the Material Cultural Heritage,' also a kind of model law, in 1993. The United Kingdom said it would not be able to apply it, although the other fifty member States were in favour of it. (Perhaps that position could now be reviewed since the United Kingdom has become a party to the 1970 UNESCO Convention.)

Two regional organizations have been more active. The Organization of African Unity actively intervened in the negotiations for the return of the Bushman from Banyoles between 1997 and 2003. The European Union adopted in 1993 *Council Directive 93/7/EEC on the return of cultural objects removed unlawfully from the territory of a Member State* providing for cooperative mechanisms and a procedure for returning national treasures when these have left the territory of a Member State unlawfully as well as 'Return of Cultural Objects unlawfully removed from the Territory of a Member State of the European Union Regulations' in 2003. Only one proceeding for the return of an object was brought during the period 1993–99¹²⁴ (Finland from the United Kingdom) and three proceedings for the return of objects were brought by the Member States under Article 5 during the period 1999–2003;¹²⁵ two

123 C. Irshaid 'Cultural Property in the Arab World' 6 *International Journal of Cultural Property* (1997) 11, 12.

124 Commission of the European Communities, *First Report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State* (1993–1998) 14.

125 Commission of the European Communities, *Second Report* (1999–2003) 7.

were brought by Greece against Germany and one by France against Belgium. The Secretariat has commented:

The low number of proceedings may be explained by the fact that the mere availability of legal proceedings has a positive effect on efforts to find amicable solutions out of court. However, it is not possible to ascertain from the Member States' contributions the exact number of cases where objects have been returned out of court following implementation of the Directive. Indeed, some Member States (Greece, Spain, France and the Netherlands) generally prefer to use other legal methods to recover cultural objects because the conditions for bringing return proceedings are considered too restrictive (unlawful removal from 1993 onwards and/or the time limit of one year).¹²⁶

Gift (Any category)

Editor's note

IN ALL THESE CATEGORIES involving states, individuals and institutions it is possible that a return may be made without any such procedures being undertaken. In recent years there has been a remarkable development where the holder of an item has voluntarily notified the State of origin or the concerned community or individual of their holding and invited dialogue or simply "gifted" the item to the recipient. An example would be the Rouen Museum's voluntary notification and offer of return of the Maori tattooed head in the Rouen Museum, discussed in the International Symposium 'From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums,' Musuem of Quai Branly, Paris, 22-23 February 2008, summarized in Chapter 3 above.¹²⁷

Some items have been returned without compensation or lengthy negotiation: such seems to be the case of the return of the Pharaonic mummy from the Michael C. Carlos Museum in Atlanta to Egypt in 2003 described above (Sarcophagus of Akhenaten, editor's note). The relics given back to the Orthodox Church in Istanbul, discussed in Chapter 3 are another example. Yet other gifts have taken place only after a long period of negotiation or litigation. However, museums may wish to prevent a deterioration of existing relations or initial entry into an unfriendly dialogue by taking the first step. For example, at the Exhibition "Pieces of Paradise" on Melanesian

¹²⁶ *Second Report (1999–2003)* 8. The Commission advises that it is currently (October 2008) waiting for contributions for the next report covering the period 2004–2007 from Member States.

¹²⁷ The case is currently not resolved, owing to the intervention of the French government and is the subject of litigation.

culture in 1988, the Australian Museum in Sydney presented to each of the Directors of the National Museums of Papua New Guinea, Solomon Islands and Vanuatu, an important item of their own cultural heritage not well represented in their collections. This followed other gifts in a process begun in 1973. This continuing friendly dialogue has resulted in close collaboration with Pacific museums and national authorities for exchanges of information on origins, context and conservation, as well as joint training programmes and has been highly productive for all parties. The Madonna of Kazan was apparently offered by Pope John Paul II to the Patriarch of the Russian Orthodox Church in Moscow without a request first having been made.¹²⁸ Australia has notified China (illegally exported fossils) and Indonesia (illegally excavated shipwreck artefacts) found in Australia before any request was made. On the other hand, a number of examples given above show that long and sometimes contumelious dialogue may in any case finally result in outstanding gifts to requesters, prime examples being the Danish return of artefacts to Greenland and Iceland.

It is notable that the ICOM Code of Ethics now states in its Article 6.2: Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level.

The Principles and Guidelines of The Association of American Art Museums on acquisition take the same view.

If a member museum, as a result of its continuing research, gains information that establishes another party's right to ownership of a work, the museum should bring this information to the attention of the party, and if the case warrants, initiate the return of the work to that party, as has been done in the past. In the event that a third party brings to the attention of a member museum information supporting the party's claim to a work, the museum should respond promptly and responsibly and take whatever steps are necessary to address this claim, including, if warranted, returning the work, as has been done in the past.¹²⁹

128 See O'Keefe "Sacred Objects" full text in Chapter 3 above.

129 Paragraph G extracted from the Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art (revised 2008), approved by Art Issues Committee 4 October 2008.

List of Cases Exemplifying Claims and Instances of Return

Note

The first region or country mentioned is where the object was or is held; the second is the country or community seeking return. Some cases are pending, some are under active negotiation and some are no longer active or have been resolved to the satisfaction of the requester. Italics indicate that the case was litigated.

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List of International Legal Instruments Directly Related to the Return of Cultural Heritage Objects

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

Protocol 1954 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

Second Protocol 1999 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

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

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995

UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001

Statute of the International Criminal Tribunal 2002

UNESCO Recommendation on International Principles Applicable to Archaeological Excavations 1956

UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property 1964

UNESCO Recommendation concerning the International Exchange of Cultural Property 1976

UNESCO Recommendation for the Protection of Movable Cultural Property 1978

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Back cover

Steven Engelsman: statement to the International Symposium 'From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums' held at the Musée du Quai Branly, 22-23 February 2008, Workshop 1, text available at http://www.quaibrantly.fr/fileadmin/user_upload/pdf/Original_Version_Symposium_Human_Remains.pdf

Brett Galt-Smith: statement to the International Symposium 'From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums' held at the Musée du Quai Branly, 22-23 February 2008, Workshop 1, text available at http://www.quaibrantly.fr/fileadmin/user_upload/pdf/Original_Version_Symposium_Human_Remains.pdf

Françoise Rivière: record of the UNESCO Forum on Memory and Universality, UNESCO Headquarters, Paris, 5 February 2008 in *Witnesses to History*, page 46

Ana Filipa Vrdoljak: *Witnesses to History*, page 195

The present volume contains a selection of significant writings on issues related to the return and restitution of cultural objects. Addressing historical, ethical, philosophical and legal aspects of a most timely topic, these landmark texts by leading experts and institutions in the field have contributed to the emergence of a global ethic and will be of great interest to students, specialists, scholars and decision-makers as well as to the general public.

This publication was conceived in the framework of the commemoration of the thirtieth anniversary of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation.

Whether the original acquisition . . . was a legal or a moral act . . . does not make any difference in the decision taking process about what to do today. The only thing that matters is whether it is the right thing to do today. **Steven Engelsman**

Once you . . . make the decision to repatriate, you never see the world the same again. A whole range of opportunities and relationships open up, and the joy that it brings people is immense. **Brett Galt-Smith**

The issue at hand is not one of law nor one of legality but one of legitimacy. It is no longer a matter of establishing who owns a work but rather who has the right to access a work that is part of people's memory and will enable them to build their identities. **Françoise Rivière**

The underlying purpose that binds all rationales for the restitution of cultural objects is ensuring the continuing contribution of a people and their culture to the cultural heritage of all humankind. **Ana Filipa Vrdoljak**