Decolonizing collections: A legal perspective on the restitution of cultural artifacts
Décoloniser les collections : perspective juridique sur la restitution des biens spoliés

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Moreover, I hope that the conquerors to come will learn through these reflections not to strip the cities they submit, and not to use the calamities of others as the ornament of their homeland.

Polybius, Histories. Book IX, Fragment III

Abstract

Despite an abundance of international instruments devoted to the restitution of illegally exported cultural artifacts, they usually exhaust their usefulness regarding artifacts looted during the Colonial Era.
These requests are indeed confronted with various obstacles, whether it is the limited scope of the conventions, their non-retroactive nature, or the expiration of periods of limitation. In the absence of applicable international standards, plaintiffs must then refer to national laws and courts of justice in the States concerned in the dispute. However, due to the complexity of situations and the diversity of legal systems, legal proceedings are often unpredictable and unsatisfactory. In these circumstances, many restitutions today are the result of alternative processes (voluntary restitution, mediation, or arbitration) which allow the participants to invoke moral, ethical, or deontological principles and lead to equitable solutions adapted to each situation.

Keywords: Cultural Heritage, Restitution, Decolonization, Law.

Résumé

Décoloniser les collections : perspective juridique sur la restitution des biens spoliés

Malgré une abondance d’instruments internationaux consacrés à la restitution des biens illicITEMENT exportés, leur utilité révèle ses limites lorsque vient le moment d’examiner les demandes portant sur des biens culturels spoliés durant la période coloniale. Ces dernières sont en effet confrontées à divers obstacles, qu’il s’agisse du champ d’application restreint des conventions, de leur nature non rétroactive ou encore de l’écoulement des délais de prescription. En l’absence de normes internationales sur lesquelles fonder leurs requêtes, les demandeurs doivent alors se référer aux législations nationales et aux tribunaux des États concernés par le litige. En raison de la complexité des situations et de la diversité des systèmes juridiques, les procédures judiciaires se révèlent cependant souvent imprévisibles et insatisfaisantes. Dans ces circonstances, nombre de restitutions sont aujourd’hui le résultat de processus alternatifs (restitution volontaire, médiation ou arbitrage) qui permettent aux participants d’invoquer des principes moraux, éthiques ou déontologiques pertinents et d’aboutir à des solutions équitables adaptées à chaque situation.

Mots clés : Biens culturels, restitution, décolonisation, droit.
Introduction

As one of the most visible manifestations of a people’s unique identity, cultural artifacts have always been a source of wonder and curiosity, but have also often been intentionally targeted to punish, or sometimes to help eradicate, the community they belonged to. Throughout the 18th and 19th centuries in particular, the massive displacement of cultural artifacts from colonized territories resulted both from punitive expeditions, military lootings, or war tributes, as well as from trades and exchanges for collection purposes or to meet the “necessities” of scientific research.

As they gained independence, formerly colonized States, and more recently Indigenous peoples, naturally showed themselves eager to recover their heritage, many important elements of which are still scattered in the museums of the former colonial metropolises and among private collectors. Since the 1960s, these “new” actors on the international scene have notably demanded that restitution principles similar to those put in place in the aftermath of armed conflicts be applied to them. They also base their demands on the need to re-establish the sacred links between population, territory and cultural heritage, and on a broader notion of the right to self-determination of peoples who must be able to revitalize and develop their cultural identity (Prott & Kowalski, 2011). With the release of the Sarr-Savoy Report in November 2018, at the French government’s behest, these restitution requests have benefited from a renewed interest. However, despite the media and political enthusiasm of recent years, the restitution of cultural artifacts continues to meet resistance. Skeptics and opponents rely on practical, logistical, economic, or even philosophical and nationalistic arguments to justify the conservation of these items in collections, public or private, far from their land of origin. In most cases, it is ultimately the law which proves the most successful instrument to deter, delay or prevent restitution. Despite a plethora of legal instruments devoted to cultural heritage, these indeed prove to be largely ineffective in ensuring the return of artifacts looted during the Colonial Era.

1. This contribution takes up various elements discussed in more detail in my doctoral thesis on reparations for cultural damages (unpublished), and in an article written in collaboration with Prof. Bernard Duhaime on legal disputes surrounding the ownership of the Dead Sea Scrolls. (Duhaime & Labadie, 2016).

2. Regarding material cultural heritage, the recent literature tends to refer to them as cultural “artifacts” or “objects” rather than “cultural property”. While keeping in mind that this expression can be criticized as well, the present paper also favors the expression “cultural artifact” to emphasize that heritage cannot be – and should not be – strictly apprehended through the lens of “private property”.

3. The acquisitions of artifacts during the Colonial Era did not always stem from violent, unlawful, or immoral acts. Although it can be argued that it took place within unequal power dynamics preventing “fair exchanges”, many items were traded or purchased in good faith, or gifted by the local communities. Moreover, members of those communities were also often skilled merchants. They were therefore not always helpless in the face of Westerners’ requests, as evidenced by the existence of local networks for the reproduction of cultural artifacts intended to be sold (Cornu & Renold, 2010; Desmoulins, 2012; Prott & Kowalski, 2011).
In this context, this article proposes to examine briefly the international legal instruments aimed at prohibiting looting and regulating the possible restitution of cultural artifacts, and to underline the main provisions which limit their scope and make them inapplicable to most of the claims presented today. In the absence of suitable international instruments, and in the absence of a legal regime designed specifically for cultural heritage, it will then be possible to show that courts of justice are generally ill-equipped to resolve restitution claims in a fully satisfactory manner. This will include going over some of the main practical and procedural obstacles that may arise, in particular when the dispute is of an international nature. Finally, this paper will highlight the relevance of resorting to alternative restitution mechanisms that make it possible to bypass legal and judicial obstacles and to develop original solutions adapted to each case.

Restitution of cultural property: from practice to law

From a historical point of view, the practice of restitution of cultural artifacts emerged between States during the 16th and 17th centuries, although it only appears occasionally in peace treaties signed in the aftermath of conflicts, and essentially stems from political and diplomatic objectives (Perrot, 2005). At the beginning of the 19th century, during the Congress of Vienna in 1815, the European nations also demanded that France return the numerous archives and artworks seized by Napoleon’s armies, and most of the peace treaties concluded until the end of the century contained similar restitution clauses. Those signed at the end of the First World War almost systematically contained provisions relating to the restitution of looted artifacts, or to compensation by items of equivalent value (Desmoulins, 2012; Francioni, 2008; Perrot, 2005; Prott & Kowalski, 2011). Then in 1943, faced with the scale of the looting perpetrated by the Nazis, 17 allied countries signed the London Declaration, by which they reserved the right to invalidate any transfer of property carried out in a territory occupied by Germany, whether it was the result of looting or a seemingly legal transaction. Finally, the 1945 Paris Conference on Reparations provided that cultural artifacts looted by the German Army, if they could not be returned, should as far as possible be replaced by equivalent items.

This empirical and sometimes opportunistic practice has gradually embedded the principle of restitution in international law. In addition to the provisions protecting all property of a civil nature, the specific prohibition on looting cultural artifacts is thus recognized by The Hague Conventions of 1899 and 1907, which also impose an obligation on States to guard against the violation of this prohibition.

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4. These conventions do not, however, explicitly provide for an obligation of restitution, and are limited to protecting “works of art” which only constitute (arguably) a restricted category of cultural artifacts. Several military codes of conduct and international law codification attempts also previously aimed at limiting or prohibiting the destruction and spoliation of cultural heritage, such
This principle was then enshrined in the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* and its two protocols which prohibit the export of artifacts from occupied territory and explicitly require their return to the territory from which they have been taken.

In 1970, the law relating to wartime was supplemented by the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* which commits the international community to mobilize, at all times, against illicit trafficking of cultural artifacts. Then in 1995, in the absence of a solution to respond to international disputes, the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* was adopted. Developed at UNESCO’s request, it aims to apply uniform treatment to requests for the return of stolen or illegally exported cultural artifacts and urges Member States to standardize their legislation accordingly.

Even more recently, several United Nations Security Council resolutions have explicitly addressed the obligations of States with regard to the restitution of cultural artifacts illegally exported as a result of armed conflicts or terrorist activities, and, in 2006, the International Committee of the Red Cross established that the prohibition of the looting of cultural heritage and the obligation to return artifacts illegally exported from an occupied territory fall under customary international law and therefore apply to all States, regardless of whether or not they have ratified the aforementioned international instruments (Henckaerts & Doswald-Beck, 2006). Finally, it is also worth mentioning that concerning Indigenous peoples in particular, the *UN Declaration on the Rights of Indigenous Peoples*, although not a binding instrument, calls on States to provide reparation—which may include restitution, with regard to cultural artifacts of which they have been deprived. However, despite this normative arsenal in terms of the prohibition of looting and the obligation to return cultural artifacts, the existing instruments often prove inadequate to resolve the demands relating to the Colonial Era.

### The limits of international law

The first, and arguably main obstacle, is that these instruments are non-retroactive; that is, they cannot be applied to an act committed before they came into force. Regarding cultural heritage, whether it is the *Hague Conventions* of 1899,

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5. There are also many other resolutions and recommendations from UNESCO, the United Nations General Assembly, regional organizations and NGOs such as the International Council of Museums.

6. Despite its nonbinding nature, States such as Bolivia have taken steps to integrate the UN Declaration into their domestic law, while the Inter-American and African courts of human rights have made explicit references to its dispositions in several decisions in recent years.

7. The principle of non-retroactivity is a legal safeguard recognized at the national (often included
1907 and 1954 relating to armed conflicts, or the 1970 UNESCO Convention and that of UNIDROIT, their provisions do not concern events occurring before their respective date of coming into force. Consequently, cultural artifacts acquired through colonial conquests cannot be returned on the basis of the existing instruments. In the absence of retroactively applicable norms, it is therefore necessary to examine the law existing when the spoliation occurred. Unfortunately, many practices, now considered criminal or immoral, were widespread at the time they happened. In matters of spoliation, the rights to loot and plunder in time of war were widely accepted customs. That being said, the reference to the law in force at the time generally refers to the law as it was codified and interpreted by the victors, and it was most often formulated in a way that served their interests.

In addition to their non-retroactive nature, international instruments also contain various provisions which limit their scope. The Hague Conventions of 1899 and 1907, for example, are limited to situations of armed conflict between recognized States. Developed by Western colonial metropolises, these conventions thus exclude colonial conquests and wars of national liberation that did not qualify as interstate conflicts. As highlighted above, European nations who benefited from colonialism usually used International Law as a functional instrument for their expansionist interests. Specifically, the notion of terra nullius served to justify their occupation, expropriation and looting of Indigenous peoples’ lands around the world.

The 1970 Convention is characterized by an extremely narrow scope. Under its article 7b, the only cultural artifacts taken into consideration are those meeting the double criteria of coming from a museum (or similar institution), and of being inventoried. Such provision therefore excludes cultural artifacts which have been the subject of misappropriation before their registration, and those in constitutional texts), and international level (for example in the Universal Declaration of Human Rights, or in the Vienna Convention on the Law of Treaties).

8. While several norms relating to cultural heritage in situations of armed conflict are now recognized as having customary force, it is up to the courts to determine, on a case-by-case basis, whether the standard considered already had customary force in 1805 or 1915, for example.

9. From antiquity until the 20th century, the right to loot was generally regarded as an inevitable consequence of war, even as the prerogative of the victors. Around 370 BCE, Xenophon thus affirmed in the Cyropedia, that “it is a universal and eternal law that, in a city taken on enemies in a state of war, everything, people and goods, belongs to the winner”. From a legal point of view, the “right to appropriate what was taken from the enemy”, to use the words of the jurist Hugo Grotius in the 17th century, was a lawful and codified practice of war throughout Europe.

10. Before the promulgation of the Geneva Conventions of 1949, the outbreak of war, in a legal sense, was through a declaration between recognized States. However, the colonized territories were generally regarded by Western powers as “barbarians” or “uncivilized” and not as States. The conflicts between their populations and the colonial forces were therefore not legally considered to be wars. Moreover, The Hague Conventions of 1899 and 1907 are only applicable between Member States. The Second Protocol to the 1954 Convention, which came into force in 2004, extends the provisions of the Convention to non-international conflicts, but is not retroactive either.
belonging to individuals or communities. Finally, as regards the UNIDROIT Convention, although it allows the requests for restitutions to benefit from a relatively uniform judicial treatment in a few Member States, it sets a time limit on these requests by imposing a limitation period of three years from the moment the plaintiff has all the information necessary to proceed with a legal action and, in all cases, of 50 years from the date of the theft. The Convention provides a few exceptions to this limit regarding cultural artifacts forming an integral part of an identified monument or archaeological site, artifacts belonging to a public collection, and cultural artifacts used by a tribal or Indigenous community as part of that community's traditional or ritual use.

International instruments thus suffer from several impediments, whether it is the requirement for the ratification of texts (customary norms being recognized in the context of armed conflicts only), their non-retroactivity, or the constraints fixed to their respective scope, which prevent their application to spoliation perpetrated during the Colonial Era. Even though it could sometimes be possible to refer to the spirit of these conventions, to the principles of justice which presided over their elaboration, or even to the need for an updated interpretation of these instruments, those arguments do not have legal force. Moreover, it is also clear that disputes relating to cultural artifacts generally face additional obstacles due to their complexity.

First, restitution claims are often complicated by the diversity of artifacts and legal entities involved. Indeed, there is a wide variety of situations not only depending on the nature of the item, but also depending on whether the claims are addressed from State to State, from State to individual, from individual to State, to a community, an institution (public or private) or another individual, or any combination of these actors. The claims may also relate to artifacts located within the State of the plaintiff, or in another State. Finally, such properties may be in the hands of private owners, while still being subjected to national legislation prohibiting the exportation of cultural artifacts, for example.

Second, the parties usually rely on a wide range of arguments to justify their request for restitution, or to oppose it. By way of illustration, in the case of the Dead Sea Scrolls, the Palestinian Authority and Jordan base their claims on territorial (the place of discovery of the Scrolls), humanitarian (their illegal dispossession following the annexation of East Jerusalem by Israel in 1967) and

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11. Most legal systems have established time limits between the commission of a crime and legal action. Once this period has elapsed, it is no longer possible for the victim to initiate legal proceedings. In this case, we speak of “extinctive” prescription. Conversely, the principle of limitation may also, under certain conditions, make it possible to “gain” a right. A person could thus be recognized as the legitimate owner of an asset (for example a piece of land, a sculpture or a painting), when it has been in her possession for a certain amount of time. We then speak of “acquisitive” prescription. With the exception of the UNIDROIT Convention, instruments relating to cultural property are silent on prescription and leave States free to set their own limitation periods in their national laws.
legal arguments (Jordan claims to have proof of purchase of several manuscripts). For its part, Israel claims a status of “guardian” (rather than “owner”) and relies primarily on moral and religious principles, invoking the sacred history of the Jewish People and recalling that these scrolls are of fundamental importance for the heritage of Judaism (Duhaime & Labadie, 2016). However, to date, doctrine and case law do not provide a definitive answer to the question of the primacy between territorial ties and “privileged cultural links” formed between a community and an artifact originating from another country, nor to the question of the primacy among claims based on legal norms and those based on competing moral, ethical, or religious considerations.

Third, from a practical point of view, many restitution requests relate to objects acquired decades or centuries ago. In addition to the inapplicability of international instruments, these claims may thus be further complicated by the determination of the unlawful nature of the dispossession itself, or by material difficulties relating to the traceability of the artifacts insofar as they have often been subject to multiple transfers of ownership, nationally and internationally, which can obscure the chains of title. To support any claim for restitution, the plaintiff must indeed be able to prove “ownership” of this artifact. To establish their title, many States rely on the protective legislation they have adopted regarding their cultural heritage. However, States do not necessarily agree on the definition of what constitutes a “cultural artifact” and do not always exhaustively identify the items to which they attach particular importance. Moreover, as mentioned previously, many criteria can be used to determine the belonging of a property, and it can be recognized not from a legal point of view but rather with regard to the link established between the community and the property concerned. As for requests presented by individuals or communities, not only do they not always consider the artifacts to be “property” that can be privately owned (as required by most Western legal standards), but the older the spoliation, the more difficult it will be to present material evidence in support of their claim. Their requests will therefore often have to rely on costly, and sometimes controversial, anthropological, ethnographic, or geotechnical reports attesting to the geographical or cultural origin of the claimed artifacts.

The inadequacy of national courts

In the absence of applicable international standards, applicants must then refer to existing national laws in the States concerned by the request for restitution. However, States generally do not have a specific legal regime in place for cultural artifacts. These are then often treated as material goods like a car.

12. Cultural artifacts can be considered part of the heritage of a State without necessarily having a direct link with its territory or its culture. The ‘Mona Lisa’ for example, although not having any link with France, is now fully assimilated into the Louvre and French heritage (Prott & Kowalski, 2011; Cornu & Renold, 2010; Desmoulins, 2012).
or a computer, and are therefore subject to the provisions governing private property or contract law, and to the vagaries of private international law when requests for restitution go beyond national borders.

In these cases, indeed, courts often come up against the problem of “conflicts of laws” that arises when laws from different countries or legal orders may apply to the same dispute. Depending on the situation at hand, the requests for restitution may, in fact, require a combination of public and private laws, of international and domestic laws, or of laws from different countries, with sometimes competing or even contradictory rules. When it comes to determining the law applicable to restitution claims, it is generally the “the law where the item is situated” (lex rei sitae) that is the consensus. However, courts do not necessarily agree on the “moment” that must be taken into consideration: is it the law of the country where the artifact is situated at the time of the claim? Or the law of the country where it was situated when it was acquired by its current owner? States such as France and Switzerland favor the law of the location on the day of the claim, while British and American courts tend to favor the law of the location on the day of the acquisition (Lagarde, 2006). In addition to these two options, “special attachment” solutions are sometimes offered to reconcile the parties. They aim to identify the legal system having the closest links to the situation in dispute, and they sometimes lead to the recognition of the legislation of the place of origin of a stolen cultural object (lex originis) as being the most appropriate (Desmoulins, 2012; Lalive d’Epinay, 1996).

Depending on the applicable law retained, the rules that will be used for the resolution of the dispute can then vary greatly, considering that States have developed different legal traditions. Restitution requests are thus complicated by legal rules, such as periods of limitations, the protection of bona fide buyers, standards relating to contract law, export control or burden of proof, of which modalities differ from one national legal order to another. These fluctuations in the identification of the law and the resulting applicable rules are a source of great uncertainty for plaintiffs (as well as for defendants) who may find themselves subject to more or less favorable legal provisions. Finally, in many cases, the inalienability of national collections, the immunity from seizure of cultural artifacts on loans from foreign States (Le Moine, 2020), or the principle of State immunity, can also be invoked to delay or prevent requests for restitution.

13. A notable exception concerns the properties looted by the Nazis. Many States responding to the London Declaration have put in place special legislative frameworks and restitution mechanisms for such properties. See Laloum, 2002; Lillteicher, 2007; Perrot, 2005; Rykner & Hershkovitch, 2011. We will limit ourselves to stressing that, despite these special frameworks, requests for the return of properties looted during the Second World War now often encounter problems similar to other requests, particularly when they have an international dimension.

14. In several States, such as France, national collections are protected by a “principle of inalienability” by virtue of which their components are considered to be national property and cannot be sold or transferred without a legislative amendment adopted by the Parliament.

15. Provided for by international and domestic laws, these jurisdictional immunities provide that...
restitution. As a result, the solutions proposed at the end of legal proceedings often prove unpredictable and unsatisfactory, both legally and ethically (Peters, 2012; Prott & Kowalski, 2011).

Considered by many to be too long, too complex, and too costly, it is believed that relatively few restitutions are the direct result of a court injunction. By way of illustration, in a case which reveals the complexity of many disputes, an American court had ruled, after several years of proceedings, that the Greek Orthodox Church could recover icons looted from a Cypriot church on the grounds that the US-based trader, who bought them in Switzerland from a Turkish seller, did not ensure their provenance with all due diligence despite their dubious origin (Amineddoleh, 2020; Prott & Kowalski, 2011).

If the various normative instruments provide a legal framework for the restitution of many cultural artifacts, it must nevertheless be noted that most claims have such specific characteristics that it is difficult to formulate legal principles or rules of general application. The diversity of cultural artifacts, the way in which they were acquired, the identity of their holders, and their trajectories, make any generalization questionable. Faced with the complexity of these historical, political, diplomatic, economic, or spiritual issues, the need to appeal to more flexible rules is undeniable.

**Favoring alternative mechanisms**

Although there is, as we have seen, no international legal obligation to return cultural objects acquired during the Colonial Era, their restitution is generally perceived as a moral duty and stems from a sense of obligation to repair past injustices (Desmoulins, 2012). To bypass the various legal and practical limits – or when legal proceedings have failed – many restitution disputes are now resolved by alternative mechanisms that make it possible to invoke historical, moral, ethical, or deontological principles in order to reach a satisfactory settlement.

Among the main alternative methods, mention should first be made of “voluntary returns”. Although relatively rare, a few States, institutions or individuals

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16. In the now famous *Portrait of Adele Bloch-Bauer* case, the US Supreme Court ruled that Austria was not immune from a lawsuit in US courts. To reach this verdict, the plaintiff had to demonstrate that the claimed artworks had been stolen in violation of international law; that the Austrian State or one of its agencies (in this case the Österreichische Galerie Belvedere) was in possession of these artworks; and that the State or the agency in question was carrying on business in the United States. However, the court did not rule on the ownership of the paintings as such, and the case was ultimately settled through an arbitration process in Austria to avoid additional years of litigation (*Republic of Austria v. Altman*, 2004). On the other hand, in the case *Federal Republic of Germany et al. v. Philipp et al.* in 2021, the Supreme Court concluded that it had no jurisdiction to rule on a dispute between the German government and its own nationals over the forced sale of artworks during the years preceding the outbreak of the Second World War.
proceed to voluntary donations or restitutions. For example, the Kelvingrove Museum in Glasgow directly returned to the Wounded Knee Survivors' Association a shirt that belonged to an alleged victim of the 1890 massacre. Robert Peters reports that “as part of the decision, the Council emphasized the fact that it did not act out of legal obligation, but rather on the basis of ethical and humanitarian considerations” (2012; Prott & Kowalski, 2011). In March 2021, a similar process was initiated by the Parisian Musée d’Orsay, which launched a procedure for the return of a Gustav Klimt painting, looted in Vienna in August 1938, to the beneficiaries of the collector Nora Stiasny.

However, the majority of disputes today are resolved through mediation or arbitration. Although often still long and costly, these processes have several important advantages. As they differ from the strict application of the law, they make it possible to appeal to norms and values other than legal ones, and they are more oriented towards the satisfaction of the parties and the reconciliation of their interests in order to achieve fair settlements. They also make it possible to directly involve various actors, such as museums, which can have a certain freedom in the management of their collections and thus the use of discretion to return items in their possession (Cornu & Renold, 2010; Desmoulins, 2012). The search for fair solutions adapted to each situation has thus led to the development of extremely varied solutions.

The return can, for example, be carried out in the context of an exchange. In 2007, the British Museum of Natural History returned the bodies of 13 Aboriginal ancestors to a community in Tasmania, in exchange for the conservation of DNA samples taken from the remains for scientific research (Cornu & Renold, 2010; Desmoulins, 2012). In the same vein, a 2006 agreement between Italy and the Metropolitan Museum of Art in New York provided that in exchange for the restitution of the Euphronios Krater, the American museum would be loaned other items of equal beauty, historical and cultural significance (Amineddoleh, 2020; Cornu & Renold, 2010; Desmoulins, 2012). Agreements reached in mediations may also provide for the formal recognition of the importance of artifacts to the cultural heritage of one of the parties. The February 2002 agreement between France and Nigeria, for example, recognized Nigeria’s ownership over Nok and Sokoto artworks, in exchange for a free and renewable 25-year loan to the Musée du Quai Branly (Cornu & Renold, 2010).

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17. For Robert Peters, “The term ‘voluntary return’ indicates that the restoration of cultural objects takes place under three premises: firstly, the return is made without the request of financial compensation (as provided, for example, in the case of a bona fide purchase); secondly, the return is conducted without any formal (legal) procedure; and thirdly, the return has not been facilitated by the mediation of a third party” (2012).


19. Unlike mediation, arbitration processes are usually more formal, and their awards are binding like a court judgment.
The extrajudicial processes also allow for the arrangement of particular property regimes. In 1984, following the failure of legal proceedings, a co-ownership agreement concerning Aztec frescoes was put in place between the Fine Arts Museum in San Francisco and the National Institute of Anthropology and History of Mexico. It provided for a sharing of the paintings and of the costs relating to their exhibition and preservation between the two institutions. In some cases, museums that hold the artifacts may also accept that they be used by the community from which they originate for ritual purposes20, or they can agree to display copies of original artifacts that have been returned (Cornu & Renold, 2010; Desmoulins, 2012). Finally, other agreements such as the purchase of an artifact by a State already in possession of it, the establishment of cultural cooperation programs, or the payment of compensation (Cornu & Renold, 2010), can be adopted by the parties. Overall, unlike international instruments and court judgments, the solutions elaborated through these alternative mechanisms, although they heavily rely on the goodwill of all parties involved, are simply not limited.

Conclusion

Two thousand years ago, Polybius called upon victorious armies to cease using the tragedy of the people they vanquished as an ornament of their homeland. In view of the ever-increasing number of acts of restitution, these words seem to have been heard at last. Unfortunately, many disputes remain unresolved, including the restitution of the treasures looted from the Summer Palace, that of the Parthenon Marbles and of the Dead Sea Scrolls, as well as numerous requests for restitution presented by formerly colonized States and Indigenous peoples, to which the law struggles to provide solutions.

Indeed, if cultural artifacts benefit from a wide range of instruments relating to their protection and the obligation of restitution, the requests presented today reveal the many limits of international texts. They are faced with the limited scope of the conventions, their non-retroactive nature or even periods of limitation. Most claims for artifacts looted during the Colonial era thus generally fail at the doorsteps of the courts, as no legal provision is applicable. As for requests that have overcome these obstacles, judges and lawyers must then submit to complex practical and procedural exercises aimed at identifying the applicable law, with often unpredictable results. They are also bound to treat cultural artifacts as any other material goods even though these items are often imbued with deep values and significance that transcend the concept of “property” and cannot be transposed in legal terms.

20. These “half-restitutions”, and restitutions accompanied by conditions of conservation or use, are not always well received by the communities who sometimes see in them a continuity of colonialism or Western paternalism.
In the absence of binding or adequate legal provisions related to colonial looting, we nevertheless observe the emergence of a practice of restitution which stems from a moral and ethical feeling of the necessity to repair historical injustices. However, it should be emphasized that restitution of cultural artifacts is not always enough to repair the other damages that may have arisen from the material deprivation. In the case of dispossession of human remains, of sacred artifacts or of items associated with unique ancestral know-how, restitution alone is not always sufficient to repair the loss of knowledge or the social and spiritual disturbances resulting from their disappearance during an extended period of time. As Mamadou-Mahtar M’Bow points out:

“The peoples who are victims of this secular plunder have not only been stripped of irreplaceable masterpieces: they have been dispossessed of a memory that would undoubtedly have helped them to know themselves better, and would undoubtedly have helped others to understand them better” (as cited in Prott & Kowalski, 2011, p. 31, author’s translation).

Alternative dispute resolution mechanisms, because of the original results they can produce, seem to constitute an interesting avenue for a more comprehensive repair of historical cultural damages and injustices, and certainly not the least.

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