A Visionary Idea and a Pragmatic Tool

Making a case for a database listing resolutions to cultural property claims

By

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> *Draft version: Please mind that this text is more a script to be performed, than an essay to be read; it is intended to be delivered out loud in front of an audience. Please do not quote without the permission of the author.*

Ladies and Gentlemen, dear friends and colleagues, a couple of hours before my departure from New York City, I was told by my Korean dry cleaner, where I picked up this suit, that this time of year in Korea is called *SEASON OF THE HIGH SKY*. I think the sky of our host city, the past couple of days, has earned that name. So, inspired by the poetic vision and practicality of the Korean diaspora in NYC this talk is then entitled *A Visionary Idea and a Pragmatic Tool.*

Let me begin by thanking Harrie Leyten and Per Rekdal, who initially encouraged me to develop my ideas. Special thanks to Per, who invited me to speak in front of such a distinguished audience here in Seoul. I would also like to acknowledge Daniel Papuga for his patience with me in the publication process of my article *Repatriation between Rhetoric and Reality*, which contents are the subject of my talk here today. But for those of you, who haven't had the chance to read the September issue of *ICME News*, let me begin by briefly recapping.

In the latest issue of *ICME News,* I responded to Harrie's call for a reinvigorated debate about the future of ICME's Working Group on Repatriation. I did this by way of offering the idea to build a searchable database listing already resolved cases of cultural property claims. I outlined the rationale and some of the more technical and practical issues involved in such an undertaking. However, instead of reiterating this piece, which is accessible to everyone on the web, I will do three things in the following 18 minutes: 1) I will contextualize the idea by reviewing the modern history of cultural property issues; 2) I will summarize the rationale and substance of the project and; 3) I will wrap up by relating this project to Professor Phelan's proposal here in Seoul about setting up an international arbitration panel to adjudicate in cultural property disputes.

Let me begin by a rather reckless attempt to take you through what I see as four distinct eras of modern history, where cultural property issues have attracted sustained attention. My periodization can indeed be questioned, not the least for taking a rather euro-centric perspective on world history. It is intended as a sketch only, based on my conviction that we can only move forward by looking back, i.e. by looking at what has actually been done in this field and the lessons we can learn from this.

First Period (1800-1840s): The Napoleonic Wars and their Aftermath

The first era emerged in the wake of the Napoleonic Wars in Europe in the first two decades of the 19th Century. Napoleon's generals appropriated art treasures in today's Italy, Germany, the Benelux countries, and Egypt to adorn the newly created *Musée Napoleon*, which later became the *Louvre.* The archaeologist Quatrèmere de Quincy protested against Napoleon's acquisitions in his letters to General Miranda and in doing so he became the father of the *in situ* argument, namely that monumental works of art are best appreciated in the context where they are created. During the same period Lord Byron argued on the other side of the Channel along the same lines, as the House of Commons debated the morality and legitimacy of Lord Elgin's removal of the Parthenon Sculptures from the Acropolis. In 1815 at the *Congress of Vienna* partial restitutions were imposed on the French delegation. The Horses of Marcus went back to Venice, Rembrandt back to

Antwerp and Venus of Medici back to Florence. These cases are considered some of the first instances of cultural restitution in world history.

Most people know that the British Parliament purchased the Parthenon Sculptures from Lord Elgin in 1816, which settled the case as far as the authoritative bodies of government in England were concerned. However, fewer people know that the British Museum commissioned the production of a series of casts of the sculptures, which were shipped to Athens in the 1840s to accommodate the first restitution claims in the wake of Greece's independence in 1833. On this ground we might conclude that this era reached ambiguous conclusions with regard to the rightful location of what later became referred to as "cultural property'.

Second Period (1861-1954): Lieber and his Legacy

With a precedent set at the Congress of Vienna, the second period came to foster right regimes, which radically redefined the doctrine of what Hugo Grotius (1583-1645) had set forth in his famous *De Jure Praedae* (Commentary on the Law of Prize and Booty*):* "The essential characteristic of just wars consists above all in the fact that the things captured in such wars become the property of the captors" (Hugo Grotius, 1604/05). The man who is credited with a dramatic reformulation of this dictum is Francis Lieber (1798–1872), who drafted a set of rules to govern the conduct of soldiers in the field during the American Civil War (1861-65)[1]. After approval by President Lincoln it was adopted by the Union forces. The *Lieber Code* basically stated that in the absence of military necessity the appropriation of cultural treasures in enemy territory could not be justified. Now, generally referred to as the *Lieber Code*, the document became the legal ancestor to the Hague Convention First Protocol of 1954, as well as the acts of restitution in the wake of WWII. With regard to this period an inventory of restitution cases is in process. The American Association of Museums has a web portal where they list resolved Holocaust cases and there are a number of other databases listing resolved WWII cases of cultural property.

Third Period (1960s-1980s): Decolonization and Commoditization

The third period began with the conjuncture of the political decolonization of the so-called Third World in the 1960s, and emerging evidence of rampant looting of archaeological sites. As the erstwhile colonial demarcations gave way to new national borders, a new global divide entered the cultural property debate: *Source Nations* versus *Market Nations*. The source nations possessed the cultural resources still unearthed, and the market nations the capital to make these resources circulate often through illicit channels. This traffic, and the looting it encouraged, was a threat to the cultural patrimony of the new nation states, as well as the pursuit of *in situ* knowledge recovered by archaeological excavation techniques.

UNESCO responded to this situation with two initiatives: The UNESCO 1970 Convention was primarily an attempt to fight the illicit traffic in cultural property. However this instrument was not retroactive. To meet the claims addressing the return of cultural property which had left the new sovereign states during colonial times the UNESCO *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation* (better referred to as the Committee with the long name, as Harrie said) was set up in 1978. With his evocative appeal in 1979 the former Director-General of UNESCO M'Bow came to coin the type of claims representative of this era: "One of the most noble incarnations of a people's genius is its cultural heritage, built up over the centuries …the vicissitudes of history have nevertheless robbed many peoples of a priceless portion of this inheritance in which their enduring identity finds its embodiment….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."[2]

These two UNESCO initiatives (legal instrument and the IGC body) were founded on two important premises:

1) A philosophy of government action, which required claims to be designated as "cultural property' by the requesting state. Accordingly, states were considered as the primary beneficiaries and stakeholders of cultural property. Consequently only claims filed through official diplomatic protocol were recognized as legitimate. This brought a centralized cultural property regime in place, which is currently challenged by so-called "First Nations'.

2) A distinction between *return* and *restitution*. The former designated cases where objects had left their country of origin during colonial times. The latter applied to cases of illicit appropriation.The first term implied voluntary action and is intentionally impartial. The second term covered retribution or reparation for injury in a judicial sense, turning on formal obligation[3].

Emblematic of the *return* category was Denmark's transfer of the *Codex Regius* and *Flateyjarbok* to Iceland in 1971; Belgium's transfer to what was Zaire of 114 cultural objects between 1976-82; the return of the *Singasari* statue in 1978 from the Netherlands to Indonesia; and the return of the *Teotihuacan* wall murals from the U.S. to Mexico in 1985. There are also a number of cases of voluntary return in the Pacific, especially from Australia and New Zealand to P.N.G.

Regarding the *restitution* category, Article 7A of the UNESCO 1970 Convention modified the general rule in international

jurisprudence that a nation has no obligation to enforce another nation's restrictions on the export of cultural property. However, what has emerged out of actual litigation processes in foreign courts demonstrate an array of different resolutions: The *Union of India v. The Norton Simon Foundation* for the return of a stolen *Shiva Nataraja* back to India was postponed to enable the *bona fide* acquirer to display it for ten years in the U.S. In 1994 Turkey brought a suit against the Metropolitan Museum of Art in New York for the acquisition of the Lydian Hoard. The burden of proof rested with the plaintiff, who claimed that the gold treasure had been illicitly excavated in 1967 in Turkey. However, after litigation had begun in the New York District Court, the Met (as we say in New York) chose to voluntarily return the collection, before a verdict was reached by the court. In my ICME article I mention the widely quoted public affaire erupting in the aftermath of the opening of the *Louvre* exhibition *Les Arts Premiers* in Spring 2000, which represents yet another resolution model, in this case between France and Nigeria. I have drawn your attention to a range of cases from the two different categories to convey the fact that history can teach us something, but unfortunately we have no systematic inventory of the constructive resolutions actually achieved in this third period.

Fourth Period (1980s-): The Recognition of the Fourth World

> *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, as well as the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs; …the right to use and control of ceremonial objects; and the right to repatriation of human remains.*
> United Nations Draft Declaration on the Rights of Indigenous Peoples, Part III, Article 12 & 13

Today, we are immersed in what I would call the fourth period of focused interest on cultural property issues. In the past two decades we have seen a resurgence of the so-called Fourth World, and along with it a global movement towards recognition of the cultural property rights of indigenous peoples. Just to mention some of the signposts here: Australia's passing of the *Aboriginal and Torres Strait Islander Heritage Act* in 1984; the *Native American Grave Protection and Repatriation Act* of 1990; the establishment of ethical frameworks and strategies in Canada for cultural institutions and First Nations to work in partnership; the 1993 *Mataatua Declaration* (the world's First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples held in New Zealand); the United Nations proclamation of 1995 to 2004 as the *International Decade of the World's Indigenous People*; and the ultimate triumph for the Fourth World, namely the 2001 establishment of a *Permanent Forum for Indigenous Issues* at the UN Headquarters in New York.

This era has also seen the beginning of a reformulation of the very idea of a museum as a collection holding institution serving the general public. The "bi-cultural' *Museum of New Zealand Te Papa Tongarewa* in Wellington (est. 1998) and the *National Museum of the American Indian* in Wahington DC (est. 2004) are two institutions, which have actively pursued international repatriation efforts benefiting indigenous communities. Within settler nations the aforementioned legislatures, and their broad institutional support, speak for themselves: Since the 1980s repatriation has become explicitly supported by the governments in the U.S., Canada, Australia and New Zealand.

The cases of repatriation to Aboriginals, Native Americans and First Nations within national settler societies are many, but far rarer in the international area. Just to mention a few: Sarah Bartman (also known under the name of *Hottentot Venus*) was returned from *Musée de L'Homme* in Paris to the Khoisan people in South Africa in 2001; the National Ethnographic Museum in Stockholm decided in 1994 to return a totem pole to the Haisla First Nation in Canada; in the 1990s *Ayauda* textiles have been returned from the U.S. to Andean indigenous communities in Corona, Bolivia; and the NMAI in DC has repatriated cultural material to native communities in Cuba, Peru and Canada. Whereas the conducted repatriations of the third period typically concerned a transaction between two museum institutions, we are now emerged in a period where resolutions also play out between indigenous constituencies and museums.

The Database Idea

Now, the point of outlining these four periods of sustained focus on cultural property issues is to show the factuality of plurality at play here. What we have before us is a vast array of resolutions some with recourse to codified regimes, some ad hoc ethically driven and some within the framework of institutional partnership and exchange. The idea of a database listing these resolutions is based on the rationale that there is something to be learned from what has already been achieved, not the least with respect to indigenous peoples. There is also a need to share experience among museums of how they have dealt with this difficult question. A database could keep track of "best practice' in the field, promote institutional experience sharing and in due course provide a more firm ground for the establishment of overarching principles. Briefly, I envision the outcome to be a pragmatic tool, simply listing a variety of constructive precedents and resolution models, which can enlighten and inspire ICOM members in their collection management.

I would deem that the natural host for such a project would be the UNESCO-ICOM Information Centre in Paris. Here one would find the capacity to design and maintain a database as an internet portal providing a registry featuring a range of searchable entries such as type of object transferred, identity of receiving institution/constituency, identity of deaccessing

institution, justification of transaction, a narrative of the process, etc. Such a database would provide a much needed information service to ICOM members and UNESCO staff.

In my ICME article *Repatriation between Rhetoric and Reality* I have justified this project as being an instrument to reach the objectives set forth in Article 4 (4) and Article 6 (6) of ICOM's *Code of Ethics*. In the ICME article I further discussed and gave tentative answers to the more practical implementation questions: What cases to in-and exclude? What type of information to include? How should the necessary data be collected?

Let me clarify some of the fundamental implementation issues here. The database would not list instances of repatriation object by object, but case by case. This implies that if we have a case where several thousands of objects were transferred, which meets the criteria for inclusion, then this case would figure as *one* entry. The intention is not to list *all* transactions of cultural property since the Congress of Vienna, but perhaps let the national ICOM commissions submit cases which they deem can serve as instructive and constructive models in different cultural property categories. That being said, it is important to stress that it has never been my intention to deliver any blueprint, but rather to make the initial case for the idea as such. The issues relating to the design, scope and limitations of the project would have to be debated in a meeting of interested parties, or in a working group, if there is a will within ICOM to consider this project.

International Arbitration

In wrapping up I would like briefly to relate this project to Professor Phelan's proposal to establish an ICOM arbitration panel to achieve the best available form of dispute resolution mechanism. Would arbitration be the way to resolve pending cases, such as Greece's claim for the Parthenon Sculptures in London, Turkey's claim for the *Boazköy* Sphinx in Berlin, and Korea's claim for the *Oe-Kyujanggak* Books in Paris?

Arbitration is a resolution mode, which does not seek to compromise disputes, but to decide them. It is resorted to only if both parties agree to it. The arbitrator has to be neutral and is expected to rule in a judicial manner by weighing the evidence presented by the parties. The verdict is typically final and binding. Thus, arbitration is decisional by nature and has the formality of the court room. I should mention that the use of arbitration to settle cultural property disputes first came up during discussions at the 3rd session of the UNESCO IGC held in Turkey, 1983, so it is not a new idea. Also the UNIDROIT Convention of 1995 actually has an arbitration provision in Article 8 (2), but the question here is whether ICOM should consider supporting a court of arbitration for cultural property disputes. The two respondents and Manus Brinkman were hesitant for a number of reasons I cannot go into here. However, what was most striking to me was the audience discussion, which followed. We witnessed an evocation of a whole range of testimonies of different resolved cases from Australia to Austria, from the Check Republic to the U.S., from Norway to Gibraltar, etc.

Now, what all these achieved resolutions suggest is that ICOM members are knowledge of a range of constructive precedents. A database could systematize this knowledge, which could be tailored to any particular dispute, helping the parties to identify creative solutions. In conclusion, to return to Harrie's original question: What should the future be of ICME's Working Group on Repatriation? In discussing this question I would like you to consider the idea of a database listing what already has been achieved regarding resolutions to cultural property claims? Thank you very much for your attention!

Notes

1 During the Civil War, Lieber prepared for the Union government *Instructions for the Government of Armies of the United States in the Field,* known in its final form as *General Order No. 100,* issued in 1863.

2 Amadou-Mahtar M'Bow: A plea for the return of an irreplaceable cultural heritage to those who created it in *Museum,* Vol. XXXI, No.1, Paris, UNESCO: 1979.

3 The concepts of *Return* and *Restitution* were defined at the twentieth session of UNESCO's General Conference in 1978. See *Guidelines For The Use Of The "Standard Form Concerning Requests for Return or Restitution" Established By the Intergovernmental Committee,* Volume 1, Paris, 1983:1.
