History and Evolution of International Cultural Heritage Law: through the question of the removal and return of cultural objects

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30th Anniversary of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation

Expert Meeting and Extraordinary Session

Seoul, 25 to 28 November 2008

HISTORY AND EVOLUTION OF INTERNATIONAL CULTURAL HERITAGE LAW

THROUGH THE QUESTION OF THE REMOVAL AND RETURN OF CULTURAL OBJECTS

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The role of law in the removal and return of cultural objects has long been fraught and contested. This paper examines the history and development of the legal protection of cultural heritage at the international level with particular reference to the return of cultural objects.

With a view to facilitating the Intergovernmental Committee’s future work, the paper is divided into four parts. First, there is an examination of the historical development of international cultural heritage law in respect of restitution over the last two centuries. Second, the establishment and work of the Intergovernmental Committee is considered in this historical legal context. Third, the work of the Intergovernmental Committee is assessed in the light of recent legal developments in a variety of international forums. Finally, the notion of ‘return’ is reconsidered with reference to our current historical moment and the impact of new technologies.

The paper emphasizes the pivotal role of law in any discourse on removal and return of cultural objects and efforts to creatively and effectively negotiate claims in the future.
# History and Evolution of International Cultural Heritage Law:

*Through the question of the removal and return of cultural objects*

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History and Evolution of International Cultural Heritage Law:

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**Introduction:**

I am most grateful to be invited to address the extraordinary meeting on the occasion of the commemoration of the thirtieth anniversary of the creation of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation and the Korean authorities for their hospitality.

My communication focuses on the development of international cultural heritage law with special reference to the questions of removal and return of cultural objects. I am conscious that this intervention falls within the first extraordinary session designed to facilitate the Intergovernmental Committee’s agenda going forward. Accordingly, it is structured in four parts:

- First, I consider the historical development of international cultural heritage law in respect to removal and return of cultural objects;
- Second, I then place the establishment and work of the Intergovernmental Committee on Return or Restitution in this historical context;
- Third, I analyse the Intergovernmental Committee’s work in the light of relevant contemporary initiatives in other international forums; and
- Finally, I take up the offer made by the Director-General to make recommendations in respect of the Committee’s future work.

Before commencing the substantive part of my communication I will make some observations about two key developments concerning the issue of removal and return of cultural objects:

- The role of law; and
The role of peaceful settlement of disputes.

And the mutually reinforcing nature of these two purposes.

The role of law

The sustained evolution of a body of law for the protection of cultural heritage at the international level can be divided into two realms:

- the protection of cultural heritage within the general body of public international law;
  and

- the development of a specialist subset of public international law devoted to the protection of cultural heritage.

The protection of cultural heritage within the general body of public international law arguably has existed within the various manifestations of this corpus of law through the ages. Certainly, since the modern era and the earliest efforts to codify the laws of armed conflict from the nineteenth century, special provision has been made for cultural heritage. As I will seek to show during my communication, the questions of removal and return of cultural objects usually engaged public international law at this level, that is, within its general principles and processes. Indeed, these questions traverse significant areas of international law: from state succession to state responsibility, and from international humanitarian law to human rights. Yet, importantly, when cultural heritage is brought within the ambit of international law it is also distinguished from other types of property because of its exceptional nature and importance to humanity generally.

In addition to these general public international law principles addressing the protection of cultural heritage, cultural heritage law is emerging as a distinct field in its own right in international law (and domestic law) with its own concepts and principles in much the same way as environmental law or trade law. This development has occurred because of the adoption of international, regional and national specialist instruments in recent years; and the jurisprudence by adjudicative bodies which are formulating, overseeing and implementing this regulatory framework.

Yet, as we mark the work of the Intergovernmental Committee, it is essential that we contemplate why international cultural heritage law remains relatively underdeveloped when compared to international environmental law or human rights law, whose earliest specialist instruments were adopted within a few years of each other.

There is no denying that there had been a sustained resistance in certain quarters to the formulation and implementation of an international legal framework in the cultural heritage
field, especially in respect to the removal and return of cultural objects. However, it is clear that today that this resistance is dissipating. In its stead, there is a growing recognition and acceptance of the role of law (and indeed the rule of law) in the international protection of cultural heritage generally and the regulation of the transfer of cultural objects specifically. A telling example of this changing attitude is the uptake of the 1970 UNESCO Convention by countries which host the leading art market centres. This movement is part of a broader trend in international law toward codification through multilateral treaty-making.

**Forums for peaceful settlement of disputes**

The second development which I wish to highlight is similarly reflective of another general movement in international law which developed with codification initiatives from the nineteenth century: creation of avenues for peaceful settlement of disputes at the international level. The establishment of the Intergovernmental Committee in the 1970s was intimately related to the 1970 UNESCO Convention and its limitations. The Convention provides that when there is a dispute between States Parties over implementation UNESCO may extend its good offices to facilitate a settlement (Article 17, para.5). In addition, the Committee on Conventions and Recommendations, under the UNESCO Executive Board, is charged with oversee the implementation of the Convention.

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1. As at October 2007, UNESCO had 193 Member States and six Associate Members. The 1970 UNESCO Convention, as at November 2008, has 116 states parties. From 1971 to 1981, 47 countries became states parties; from 1981 to 1991, 22 countries became states parties (including the United States of America and Australia); from 1991 to 2001, 23 countries became states parties (including France); and from 2002-2008, 24 countries have become states parties including the United Kingdom, Japan, Switzerland and Germany, at <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (viewed 17 November 2008).


3. At its 178th session (November 2007) the Executive Board, having established its Committee on Conventions and Recommendations, gave it the following terms of reference: that the Committee would consider all questions concerning the implementation of UNESCO’s standard-setting instruments, in accordance with Article 18.1 of the Rules of Procedure concerning recommendations to Member States and international conventions, ensuring in particular the monitoring of the three conventions and 11 recommendations including the 1970 UNESCO Convention. The Committee is entrusted to therefore look at the periodic implementation reports of Member states; and communications relating to cases and questions concerning the exercise of human rights in UNESCO’s fields of competence. A communication can be filed “from the person or group of persons who, it can be reasonably presumed, are victims of alleged violations” or “from any person, group of persons or non-governmental organization having reliable knowledge of these violations”. The Executive Board decision setting up the procedure stated that “UNESCO should not play the role of an international judicial body” rather it seeks to “reach solutions to particular problems concerning human rights by initiating consultations, in conditions of mutual respect, confidence and confidentiality”: Decision 104EX/3.3. See also Marks, “The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization”, in HANNU (ed.), Guide to International Human Rights Practice, New York, 4th ed., 2004, p. 107; and P. Alston, “UNESCO Procedure for Dealing with Human Rights Violations”, Santa Clara L. Rev., 1980, p. 665.
Since the end of the Cold War there has been a resurgent interest in establishing new and strengthening existing avenues of disputes resolution at the international level, including those in the cultural heritage field. The Intergovernmental Committee created to assist in the resolution of claims for cultural objects removed prior to the entry into force of the 1970 UNESCO Convention has had its mandate extended beyond facilitating bilateral negotiations to include conciliation and mediation. As the Athens Conference earlier this year and the lessons articulated by speakers during the expert meeting highlight, restitution claims (some of which had lain dormant for years) are being negotiated and increasingly resolved through solutions which were considered unthinkable less than a decade ago.

So, although my communication covers the evolution of international cultural heritage law, in essence its core message relates to importance of recognising and promoting the roles of law and peaceful settlement of disputes relating to claims concerning the removal and return of cultural objects, and their mutually reinforcing character.

Now let me turn to a brief synopsis of how we got to this point.

**Historical development of international cultural heritage law:**

While the 1970 UNESCO Convention and 1995 UNIDROIT Convention address the issues of removal and return of cultural objects – they are of relative young vintage in the overall development of modern international law. As I mentioned earlier, we must instead look to the evolution of the general principles of international law to obtain a richer understanding of how it has dealt with these issues.

There are at least three discernible grounds for restitution of cultural objects in modern international law. These grounds can be summarised in the order of their chronological development and using the terminology of international law as:

- state succession
- state responsibility
- self-determination.

Even though each ground reached a high point of articulation over the last one hundred years, today, they are often used in combination by claimants making requests for return of cultural objects.
State succession
The link between people, land and culture (including cultural objects) has been repeatedly made throughout the centuries. For the conquering force, the occupation of territory and the subjection of its people were usually accompanied by the removal of their most significant cultural objects – often in a triumphal procession – to the archives, libraries and museums of its capital. It encapsulated the subjection and assimilation of the conquered into the physical space and cultural identity of the dominant power. We recognise these characteristics in the imperialist drive replicated on every continent throughout the millennia. However, these processes were not confined to empires. Policies of assimilation and centralisation were also deployed by modern states to exert their control over disparate peoples and nations within their borders through the promotion of a single national identity and language.

Unsurprisingly, when a dominant power was defeated, when empires were dismantled or when federations dissolved, the newly liberated nations sought the reversal of these policies through the return of their sovereignty, territory and their cultural objects.

With regularity but limited success, the international community has sanctioned the return of (select) cultural objects. At least from the nineteenth century onwards, peace treaties which redrew territorial boundaries often included provisions for the restitution of cultural objects. Early examples, contained in the 1815 Congress of Vienna (the negotiated settlement following Napoleon’s defeat) through to the 1919 Versailles peace treaties after the First World War, included lists of specific items deemed of particular significance. Gradually these provisions evolved from the particular to the general. Instead of predetermined lists of objects, treaties like the Treaty of Saint Germain or the Treaty of Riga between Poland and Russia recognised a general right to restitution by enunciating principles and processes for the resolution of claims.

These various strands only gradually evolved into the area of international law encompassed by state succession. The lengthy process of drafting and negotiating the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (which has not yet entered into force) excluded cultural property. However, it is important to recall that the principles relating to state property incorporated into provisions covering cultural objects contained in succession agreements finalised between in the former constituent states of the former Yugoslav federation in 2001, and the 1992 agreement between Commonwealth of

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4 Article 28(7) does provide that agreements between predecessor and successor states ‘shall not infringe the rights of the peoples of those states to development, to information about their history, and to their cultural heritage’.

Independent States (CIS) following the collapse of the USSR. These and other deliberations throughout Central and Eastern Europe, many of them ongoing, provide potentially fertile ground for evolving state practice on succession to cultural property. Some of these principles reflected in the 1983 Vienna Convention including reaffirmation of the territoriality principle, equitable distribution in cases of multiple claimants, preservation of and access to archives and collections, and facilitating return of items held by third parties.

**State responsibility**

The second ground for return of cultural objects in international law is its manifestation as a remedy arising from state responsibility for an internationally wrongful act. The question of ‘restitution’ of cultural objects as a remedy for breach of international legal obligations (with its taint of culpability) coloured the negotiation of the 1970 UNESCO and 1995 UNIDROIT Conventions and is reflected in the very title of the Intergovernmental Committee. While the wrongful act can relate to any international obligation, the leading examples of restitution of cultural objects concern breaches of the laws of armed conflict and international criminal law, specifically crimes against humanity (in particular, persecution) and genocide. It is because of this development that the ground is increasingly rationalised as reversing or ameliorating acts designed to destroy or damage the identity of groups and their constituent members.

Traditionally, the international wrongful act related to this remedy arose in respect of violations of the laws of armed conflict and belligerent occupation, gradually being codified from the nineteenth century onwards. From the outset, these efforts to humanise war delimited the impact of hostilities on cultural heritage and civilian populations. Indeed, these were the earliest examples of the protection of cultural heritage in international law. The international community has repeatedly authorised the return of cultural heritage following the cessation of hostilities or belligerent occupation where there has been deliberate and unlawful destruction.

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6 The CIS agreed on a settlement on succession to archives in 6 July 1992 which confirmed the application of the principles of integrity and territoriality. The succession agreement on cultural goods sanctioned their return to the place of origin: see critique by V. V. Pustogarov, *Mezhdunarodno-pravovoi status Sodruzhestva Nezavisimykh Gosudarstv*, GPr, 1993, vol.2, p.35; and M. M. Bogluslavsky, *Sovremennye voprosy vozvrashchenya kulturnykh tsennostey v stranu ikh proiskhozhdenya*, GPr, 1993, vol.11, p.129. Although the agreement refers to the 1970 UNESCO Convention it does not require the transposition of its obligations into domestic law. Further it does not stipulate a time limit nor provide a procedure for return. It only establishes a committee tasked with précising the objects covered by the agreement.


The obligations contained in 1954 First Optional Hague Protocol encapsulate many of the principles developed during the early twentieth century and are arguably part of customary international law given their replication in successive UN General Assembly resolutions. Principles like those prohibiting the retention of cultural objects as war reparations, the obligations on third party (or neutral) states to return objects deposited for safe-keeping upon cessation of hostilities.
damage and confiscation of cultural heritage by combatants. Examples appeared in post-World War I peace treaties (including the Treaty of Versailles sanctioning the transfer of certain objects from Germany to Belgium), the large scale Allied restitution programme after the Second World War which covered belligerents and neutrals, the UN General Assembly resolutions covering the return of objects removed following the Iraqi invasion of Kuwait, and to the restitution of items removed following the 1993 invasion of Iraq.

Significantly, since its earliest sanctioning of the restitution of the cultural objects removed in violation of these rules, the international community has recognised that return is not always feasible, nor possible for various reasons. Accordingly, alternative remedies have been bestowed on the claimant including restitution-in-kind, compensation, etc. The principles being developed by UNESCO in respect of return of cultural objects removed during the Second World War has encompassed this broader range of potential remedies (and reflected in those contained in the Articles on Responsibility of States for International Wrongful Acts adopted by the General Assembly in 2001).

Restitution of cultural objects has been an important remedy for ameliorating acts of genocide and massive and gross violations of human rights (including racial discrimination). The recognition of the international crime of genocide and the promotion and protection of human rights and fundamental freedoms was central to the new international order established after 1945. In this new milieu, states could and would be held to account not only for acts between themselves (and beyond their territorial borders) but for also behaviour directed at their own populations, within their own territory and during peacetime which violated the dictates of humanity. It was no a coincidence that the language of the Charter of the International Military Tribunal at Nuremberg referring to the persecution of people because of their ‘race, religion, nationality or ideology’ was reflected in the laws governing the Allied restitution programme. As the evidence before the Nuremberg tribunal exposed, the removal and destruction of the cultural heritage of targeted groups was intrinsic to the campaign to discriminate, segregate and ultimately eliminate them.

The resurfacing of restitution claims by Holocaust survivors and their heirs in the late twentieth century and by indigenous peoples and minorities highlight the potential importance of restitution of cultural objects as a remedy for large-scale human rights violations. But they also evidence the ongoing impact of these violations on their communities and their members and the significant limitations of existing international law in addressing the claims of non-state entities. Nonetheless, the jurisprudence of international, regional and domestic human rights bodies has led to a growing appreciation of the place of return of cultural objects and other forms of reparations for cultural loss have in remedying these violations.
Self-determination
The third ground for return of cultural objects in international law can broadly be defined as ‘self-determination’. The concept of self-determination arose from the revolutionary struggles of late eighteenth century and was transformed into a (political) principle in international relations following the First World War. It is generally agreed that it was not a legal concept until its inclusion in the UN Charter in 1945 and is further defined through various resolutions of the UN General Assembly from 1960 onwards during the decolonisation era.

It was in the post-1960 era, that the legal right to self-determination became fused to the right to development, including cultural development. Promoted initially by newly independent States, peoples in international administered territories and occupied territories and more recently indigenous peoples and minorities groups, this formulation of the principle of self-determination has remained largely unchanged and is replicated most recently in the 2007 UN Declaration of Rights of Indigenous Peoples.

This legal right to self-determination and cultural development from the outset was defined as encompassing the return of cultural objects removed during foreign (colonial) occupation (the intended work of the IGC), the adoption of an international instrument to regulate the transfer of cultural objects (1970 UNESCO Convention) and the transfer of knowledge and technology to enable newly independent states to their protect culture heritage within their own borders (UNESCO and the IGC).

While drawing on the logic of the preceding two grounds of return, that is, state succession (land) and state responsibility (identity), this ground was also distinguishable from them. It most defining characteristic is its inclusion as Common Article 1 of the International Covenant of Civil and Political Rights and International Covenant of Economic, Social and Cultural Rights adopted in 1966 as a legal enforceable human right. The tethering of return of cultural objects to the right to self-determination (and cultural development) is problematic because of its highly contentious character. Human rights are usually held by an individual right holder and the right to self-determination is considered as exceptionally held as a collective right. However, who is able to exercise this right beyond the colonial context had yet to be resolved by the international community (and is currently the subject of a referral for an Advisory Opinion before the International Court of Justice in respect of Kosovo’s declaration of independence).

Establishment and work of the Intergovernmental Committee:
The establishment of the IGC was driven by the heady days of decolonisation in the late 1960s and 70s – and informed by the divisions of the Cold War. This movement drew on all the grounds I outlined above including state succession, state responsibility and most especially, self-determination and cultural development.

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property was adopted a month after the UN General Assembly adopted the Declaration on Principles of International Law on Friendly Relations Co-operation Among States which reaffirmed the principle of the right to self-determination and cultural development and its application to all peoples.\(^8\) It is also no coincidence that the original impetus for the 1970 UNESCO Convention was instigated by the efforts of Mexico and Peru at the 11\(^{\text{th}}\) session of the General Conference shortly after the adoption by the UN General Assembly of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.\(^9\)

Nonetheless, it quickly became clear during the negotiation of the 1970 UNESCO Convention that the usual rules relating to treaty interpretation, especially non-retroactivity, would apply explicitly if it was to be adopted, ever into force, and have any chance of success. The question of the return of cultural objects removed over the preceding centuries of colonial occupation and prior to the treaty entering into force would not come within the ambit of the 1970 UNESCO Convention (nor the subsequent 1995 UNIDROIT Convention concerning private international law rules) despite the best efforts of various states. Disaffected countries employed a different tack.

Shortly thereafter, first UN General Assembly Resolution entitled ‘Restitution of works of art to countries [which are] victims of expropriation’, which made specific reference to GA Res 1514(XV) and the 1970 UNESCO Convention, would set in motion the eventual establishment of the Intergovernmental Committee.\(^10\) There is little doubt that the Intergovernmental Committee’s establishment was driven by a desire to complete the decolonization process in respect of the cultural ‘property’ of formerly colonized peoples. UN and UNESCO resolutions on restitution of cultural heritage during this period emphasized the reconstitution of national cultural heritage through the restitution of cultural objects removed during colonization. Indeed, the ILC had alluded to the Committee when excluding ‘works of art’ from the operation of the 1983 Vienna Convention.

\(^8\) GA Res.2625 (XXV) of 24 October 1970.  
\(^9\) GA Res.1514 (XV) of 14 December 1960.  
\(^10\) UNGA Res 3187(XXVIII) of 18 December 1973. A resolution has been adopted by the UN General Assembly
However, as the agenda of the Intergovernmental Committee attests, the grounds for restitution have transformed as the decades progressed and the membership of the international community and the concerns of its constituent states evolved. The range of claims raised before the Committee over the last two decades reflects an appreciation of complex history of the removal of cultural objects from communities beyond the agenda of the decolonisation era. The types of claims brought before the Committee may be divided into three phases:

First, from the establishment of the Committee to the present day, there has been a fusion of claims for cultural objects removed during colonisation and those removed illicitly following the 1970 UNESCO Convention. By the close of the 1980s, emphasis had shifted to curbing the illicit traffic of cultural objects generally and realization of the broader cultural development goals by newly independent states.\(^\text{11}\) This trend emphasised that the circumstances causing cultural loss during colonial occupation did not cease following independence.

Second, from the 1990s the Committee focused its attention on cultural objects which had been removed and destroyed as a result of armed conflict, and restitution claims of successor States following the dissolution of federations.\(^\text{12}\) In addition, the Committee’s work, especially with the re-emergence of the claims of Holocaust survivors and their heirs mirrored a process of remembering within the museum community and the general public. In particular, there is an emerging recognition of how museums facilitated and benefited from the policies of the past.

Third, from the late 1990s, there was increased understanding of the complex nature of European colonialism and its legacy concerning cultural objects.\(^\text{13}\) The Committee noted the efforts of certain states to protect the cultural heritage of indigenous peoples within their territory.\(^\text{14}\)


\(^{13}\) Namibian claim for the Cape Cross Padrão: Report of the Director-General of UNESCO on the action by the organisation on the return of cultural property to the countries of origin or its restitution in case of illicit appropriation, 4 October 1999, UN Doc.A/54/436, Annex, para.12; South Korea’s claim for the Oe-Kyujanggak Archives from France: Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, Twelfth Session, 25-28 March 2003, Secretariat Report, UNESCO Doc.CLT-2003/CONF.204/2, para.8; and Ethiopia-Italy negotiations: CLT-2003/CONF.204/2, para.7.

\(^{14}\) See UN Doc.A/54/436, Annex, para.8.
The UN General Assembly (and UNESCO General Conference) resolutions on restitution adopted every second year naturally reflected these changing concerns. The most recent resolution entitled ‘Return or restitution of cultural property to countries of origin’ adopted in December 2006 makes reference to the entire range of conventions and declarations encompassed by international cultural heritage law and urge states which have not already done so to sign up to these instruments. The question of removal and return of cultural objects is no longer confined to the realms of morality. Instead, it is placed squarely within efforts of the international community to provide legal protection for cultural heritage, diversity and human rights.

Given the sustained development of the law governing the protection of cultural heritage generally and restitution of cultural objects specifically in recent years, it is not surprising that there has been a parallel drive to establish and reinforce avenues of dispute resolution.

Relevant contemporary developments in other international forums:

The original mandate of the Intergovernmental Committee was to promote initiatives including public information, preparation of inventories, technical cooperation etc to encourage an atmosphere which facilitated the reconstitution of cultural heritage of significance to the claimant state. Its sole avenue of peacefully settlement of such disputes was confined to promoting bilateral negotiations.

By the turn of the twenty-first century, it was clear that the avenues in the Committee’s arsenal needed to be broadened to include mediation and conciliation. The requisite amendment to its Statute occurred in 2005. It is no coincidence that other international bodies and organizations were also encouraging and formulating principles and guidelines for the mediation of claims for restitution of cultural objects during this period. Including the work of:

- Intergovernmental Committee

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15 UNESCO Doc.33C/Resolution 44, Article 4, para.1 of the IGC Statute: The Committee shall be responsible for: (1) seeking ways and means of facilitating bilateral negotiation for the restitution or return of cultural property to its countries of origin when they are undertaken according to the conditions defined in Article 9. In this connection, the Committee may also submit proposals with a view to mediation or conciliation to the Member States concerned, it being understood that mediation implies the intervention of an outside party to bring the concerned parties to a dispute together and assist them in reaching a solution, while under conciliation, the concerned parties agree to submit their disputed to a constituted organ for investigation and efforts to effect a settlement, provided that any additional, necessary funding shall come from extrabudgetary resources. For the exercise of the mediation and conciliation functions, the
The cultural heritage committee of the International Law Association (ILA)\textsuperscript{16} has been instrumental in the development and dissemination of international cultural heritage law. The Legal Affairs Committee of the International Council of Museums (ICOM)\textsuperscript{17} has also played a key role in this area. The UN Working Group on Indigenous Populations (WGIP) and Permanent Forum on Indigenous Issues (PFII)\textsuperscript{18} have also contributed to this effort.

Most (if not all of these efforts) acknowledge that their work was precipitated by the growing number of high profile disputes being resolved, ranging from negotiated settlements to judicial adjudication, in the area. In addition, there has been an increased trend in many national legal systems to encourage use of alternative dispute resolution avenues, with litigation being a last resort. It is important for our purposes today to assess, compare and contrast this plurality of initiatives which sprang forth.

Committee may establish appropriate rules of procedure. The outcome of the mediation and conciliation process if not binding on the Member States concerned so that if it does not lead to the settlement of a problem, it shall remain before the Committee, like any other unresolved question which has been submitted to it.


Resolution No.4/2000 setting out the principles developed by the Cultural Heritage Law Committee was adopted by the 2006 Toronto ILA conference: Report of the Cultural Heritage Law Committee, International Law Association Toronto Conference (2006), \textit{Report of the Seventy-Second Conference, Toronto, 2006}, (London: ILA, 2006). The International Law Association is an international non-governmental organisation which has been actively involved in preparing and proposing codification projects since 1873 and has consultative status with a number of UN agencies including UNESCO. It has successful proposed recommendations to UNESCO in the past including the work which led to the adoption of the 2001 Convention on the Protection of Underwater Cultural Heritage.


International Council of Museums is an international non-governmental organization established in 1946 maintaining ‘formal relations’ with UNESCO and has its headquarters at the UNESCO Headquarters in Paris. It has 26,000 members in 151 countries, with membership (and its renewal) dependent on adherence to the organization’s Code of Ethics. The Legal Affairs Committee has a fixed term life which is renewable triennially (which was renewed again in 2008) and runs parallel with the ICOM Ethics Committee. The 1983 ICOM General Conference in Resolution No.5: Return of Cultural Property to its Countries of Origin ‘urge[d] ICOM members, both at the individual and institutional levels, to initiate dialogues with an open-minded attitude, on the basis of professional and scientific principles, concerning requests for return of cultural property to countries of origin.’

The schemes for mediation (and conciliation) of restitution claims, proposed by all four bodies, have comparable principles and procedures. It is interesting to also note that both the ILA and WGIP had initially advocated the preparation of a draft convention in respect of these issues, but have since withdraw from this position by putting forward guidelines and principles instead.

**Principles**

The common principles to be applicable to mediation of claims concerning removal and restitution of cultural objects are located both in the rules of procedure for mediation themselves or related documents like codes of ethics for ICOM or guidelines and principles as is the case with the WGIP. Include:

- Adherence to the law generally including international law and cultural heritage law
- Application of equitable principles like ‘good faith’, and ‘fairness’,
- Application to cultural objects of ‘fundamental significance’ for the cultural heritage of the claimant and to facilitate reconstitution of such heritage
- Recognition of the diverse context in which cultural objects have been removed and do not exclude so-called historic claims
- Submission by the parties to the procedure is voluntary and they may withdraw at any time.
- (all except the IGC rules of procedure) recommend a more stringent regime for human remains with a need for holding institutions to ‘affirm their recognition of the sanctity of such material and agree to transfer such material upon request to any requesting party

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19 Mediation involves a higher level of involvement for the third party (than good offices) who is seeking to assist the disputing states in their negotiations. He or she brings them together, and plays a role in the negotiations themselves. It falls short of adjudication but will involve the making of suggestions, alternative proposals and attempts at reconciling the conflicting positions with the object of assisting the parties in coming to an agreed settlement.

Conciliation closely resembles mediation and the words are often used interchangeably. However conciliation is more formalised and often involves the appointment of a conciliation commission by the disputing States. This may resemble an arbitral or judicial proceeding but the conclusions reached take the form of recommendations or opinions rather than binding determination, award or judgment. The Hague Conventions on the Pacific Settlement of Disputes 1899 and 1907 contained provisions facilitating the establishment of conciliation commissions by the parties to a dispute.

who provides evidence of a close demonstrable affiliation with the remains or, among multiple requesting parties, the closest demonstrable affiliation with the remains.’

Besides these key principles, the four bodies recognise a degree of fluidity in the remaining principles which would guide the mediation or conciliation because of the diversity of claims.

**Procedural requirements**

However, procedure requirements are naturally more uniform and largely in keeping with common understanding of mediation and conciliation at the multilateral level. These requirements include:

- Formal requirements in respect of making a claim including setting down in writing
- Time limits in responding to claims, appointing mediator or conciliators, and negotiation process
- Obligation to response in good faith to claims by providing a response in the affirmative or if in the negative, outlining the reasons
- The dispute can be referred to mediation or conciliation by a state, however, states may represent the interests of private institutions or individuals on their territory (IGC Rules). The other bodies provide that good faith consideration must be given to claims by indigenous peoples and minorities even if the claim is not supported by their host state.
- If the dispute is referred to mediation or conciliation, a mediator or conciliator shall be appointed by the relevant body or in the case of the IGC Rules by the parties themselves. He or she shall be suitably qualified (legal or non-legal), impartial (with an obligation to declare any conflict of interest) and bound by confidentiality
- Formalised mechanisms for requesting and providing information and documents
- Confidentiality requirements so as not to prejudice future settlement avenues
- (All bodies except the IGC) stipulate that the parties agree to refer the dispute to other avenues of peaceful settlement of disputes (including adjudication) should mediation be unsuccessful or assumed unsuccessful if not finalised within a certain period
- Immunity for the mediator or conciliator
- Provision in respect of costs usually being divided between the parties.

In addition, the IGC, WGIP and ILA stipulate that a centralised registry of the outcome of the claims be maintained by a body like UNESCO to provide information for the public and assist
future claimants and negotiations. This register would augment the Intergovernmental Committee’s existing role of disseminating public information, encouraging the preparation of inventories and technical cooperation.

**Recommendations of the Intergovernmental Committee’s future work:**

It is my fervent hope that the Intergovernmental Committee’s work going forward into the future continues the basic twin purposes which defined its inception: (1) the role of law in protection of cultural heritage; and (2) the promotion of the peaceful settlement of disputes arising in respect of removal and return of cultural objects.

To this end, my recommendations can be grouped under three broad headings:

- Consolidation of the IGC’s mandate in the context of recent developments in international cultural heritage law
- The effective realization of the full range of dispute resolution mechanisms
- Reaffirmation of UNESCO’s aims of promotion of human rights and the rule of law and the progressive codification of international law.

**IGC and other Committees for the Protection of Cultural Heritage**

Although the Intergovernmental Committee was established in 1978, and therefore actually post-dates the foundation of the World Heritage Committee it nonetheless is effectively tied to an earlier era. In the decades since 1970 and 1978, the significant gaps in the legal protection of cultural heritage have gradually been filled by instruments covering sites and monuments, cultural landscapes, underwater heritage, intangible heritage and cultural diversity. While there are still gaps and less than perfect uniformity of protection, nonetheless today we can speak of a body of law known as cultural heritage law.

The success of the World Heritage Convention in the eyes of the international community, states and the public imagination is correctly perceived to be in no small measure due to the innovative architecture for oversight and implementation contained in the treaty: namely, the World Heritage Committee, the Secretariat (the World Heritage Centre) and the Fund. It is not surprising that the drafters of recent instruments in the field borrowed from this tried and tested model. The committees which make up this network which oversees the implementation of these various instruments have a significantly different mandate and powers to that of the Intergovernmental Committee. They arise from their respective treaties, whereas the Intergovernmental Committee is independent of any treaty.
While recognizing the uniqueness of the role of the Intergovernmental Committee, for the sake of effective and uniform application of the law and efficient operation of the UNESCO’s resources, the mandate and powers of the Intergovernmental Committee should be amended to be more closely aligned with those of these other committees.

Of the developments ushered in by the World Heritage Convention, those that are particularly pertinent in the protection of moveable cultural heritage and which have been recognized since the adoption of the 1970 UNESCO Convention:

- Elaborating upon the Operational Guidelines enabling States Parties and other entities to clearly understand the principles and mode operation of the committee. It also provides for transparency, uniformity, and the ability for the committee (and various instruments relating to movable heritage) to adapt to changing circumstances within the limits of its mandate.\(^{21}\)

- Role of non-governmental organizations like the International Council of Museums, ICCROM and/or the International Law Association which have had a history of providing expert advice to UNESCO in the field of movable cultural heritage. Like the WH Committee, these bodies could provide independent expert advice to the Committee, Secretariat and Member States on the implementation of the relevant instruments. Such advice may go not only to implementation but also future reform of the Committee, OGs and relevant treaties. They would provide a degree of independence and transparency.

- Data collection via a public register. While the preparation of lists (or inventories) for the full range of cultural heritage to be protected may be problematic, it is a practice has an established history in the area of movable cultural heritage. The World Heritage List and Heritage in Danger List have proved extremely successful in raising the aims and objectives of the World Heritage Convention in the public mind. Equally, the WH Committee have stressed that the fact that a property is not listed does not detract from its significance and need for protection. The same position should be fostered in respect of movable heritage. As noted above, international non-governmental organizations have recommended that UNESCO maintain a public register of restitution claims and their outcome and encourage member states to maintain inventories of collections. Public access to this register and inventories will raise public awareness of the issues related to removal and return of cultural objects and facilitate claims and their resolution.

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\(^{21}\) I am grateful to Prof Lyndel Prott for pointing out that the Committee already had a set of Operational Guidelines in existence.
• The maintenance of a fund through compulsory contributions in line with other cultural heritage conventions.

• Consolidation of the role of the Secretariat in the World Heritage Centre. In recognition of the growing appreciation of the holistic understanding of cultural heritage (and the inseparability of tangible and intangible, movable and immovable) and its protection, the concentration of expertise, and limited resources of UNESCO, it is realistic that the role of the secretariat to the Committee be further streamlined with the other secretariat roles that UNESCO undertakes for cultural heritage treaties.

**Full range of dispute resolution mechanisms**

While the preceding recommendations acknowledge the common purpose and range of similar objectives of the various cultural heritage instruments and their committees, the distinguishing characteristics of the Intergovernmental Committee must also be addressed. The Committee was established to seek peaceful settlement of disputes arising from the removal and return of cultural objects.

To this end, the full range of peaceful settlement of dispute measures accepted generally by the international community, including (and not excluding) judicial settlement should be made available.²² It is fair to acknowledge that litigation is often time-consuming, expensive, and adversarial. However, since the push in modern international law to adhere to the rule of law there has been the twin movement toward codification and effective avenues of dispute resolution. The establishment of permanent forums for arbitration and judicial settlement were keystones in these developments. Therefore, it was not extraordinary to find provisions in early inter-war draft instruments prepared by the League of Nations on repatriation of cultural objects concerning arbitration and referral to the Permanent Court of International Justice.²³

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²² Article 33, UN Charter: ‘The parties to any dispute...shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice....’

²³ Article 7 of the Draft International Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest Which Have been Lost or Stolen or Unlawfully Alienated or Exported (First draft, 1933) provided:

Should any dispute arise between the HCP as to the interpretation or application of the present Convention, and should it be impossible to reach a satisfactory solution of such dispute through diplomacy, it should be settled in accordance with the provision in force between the Parties with reference to the settlement of International disputes.

Should no such provisions exist between the Parties to the dispute, the latter shall be submitted to an arbitral or judicial procedure. Failing agreement upon the choice of some other tribunal, the Parties shall, at the request of any one of them, submit the dispute to the PCIJ if they are all parties to the Protocol ...of if they are
was not unusual for the 1919 peace conference to sanction a committee of Jurists to arbitrate claims between countries following the First World War; nor for the Allied powers to establish tribunals to hear the claims of individuals whose property including artworks had been confiscated during (and before the war).

After a significant lull for almost half a century following the Second World War, there has been a resurgent recourse to the use of international and regional arbitration and courts in the last two decades. This growing acceptance of and adherence to compulsory adjudication is manifestly important to the development and implementation of international law and the effective operation of the rule of law.

Disputes concerning the removal and return of cultural objects, in all their diversity should not be excluded from the rule of law. They should not be excluded from the possibility of judicial adjudication.

It is also important to recognize that various national legal systems have sought to complement judicial adjudication of disputes with alternative dispute resolution mechanisms. We should heed the lessons being learned from these developments for two reasons. The international community has always emphasized the full range of dispute resolution mechanisms from good offices, enquiry, mediation, conciliation, arbitration to judicial adjudication. Each one of these avenues has undergone a renaissance in recent years, the inclusion of mediation and conciliation in the IGC’s statute is one example. In addition, the importance of fostering, maintaining and strengthening relationships for the protection of cultural heritage, in particular movable heritage, has been repeatedly reaffirmed. Less adversarial modes of dispute settlement are conducive to ensuring this aim.

Finally, perhaps we should revisit the need for a binding international instrument which sets out the basic principles which would cover all claims for the restitution of cultural objects and establish a basic framework for the dispute resolution mechanisms to apply these principles. Soft law instruments like declaration of principles and guidelines serve a purpose especially, as it has been the practice in UNESCO, as path along eventual acceptance of a binding instrument and it is certainly better than a vacuum. However, a binding legal instrument would level the playing field of parties, and provide a measure of certainty.

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not all Parties to the Protocol, they shall submit the dispute to a Court of Arbitration constituted in accordance with the Hague Convention of 1907 for the Peaceful Settlement of International Disputes.

Replicated in the 1936 draft in Article 18 and Article 14 in the 1939 Draft which was not adopted because of the outbreak of war.
At a time when there is a greater emphasis on and acceptance of multilateralism, the questions of removal and return of cultural heritage should be considered in this context. It is necessary to appreciate a claim, to understand bilateral negotiations within the broader framework of depleting cultural diversity. The public’s consciousness has been lit in respect of the impact of environmental changes on biological diversity – it is time that we redoubled our efforts in ensuring that there is greater awareness that these some forces of technological, economic and social changes are having a devastating impact on the rich heritage of humanity.

While it is certainly important to resolve restitution claims on an individual basis – it is equally if not more important to understand their role within this broader context.

Conclusions
As the United Nations’ specialist agency in the field of culture, UNESCO has a unique role to play in the attainment of this goal. As so many international non-governmental agencies have reiterated, the relationship between UNESCO and the Intergovernmental Committee should be affirmed and deepened. When this task is being undertaken it is important that the participants recall the guiding aims and purposes of UNESCO outlined in its constitution: the protection and promotion of human rights and the rule of law and the commitment to the progressive codification of international law. Accordingly, I would like to conclude my communication with the twin developments which I referred to at the start. The questions of the removal and return of cultural objects can only effectively (and legitimately) be considered in the context of promoting the role of law and peaceful settlement of disputes. Our forebears of the last century were aware of this to a greater and lesser degree. However, it is our opportunity, indeed our responsibility to reaffirm our commitment to these goals.
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