Restitution of Cultural Properties Trafficked During Colonization: A Human Rights Perspective

Ana Filipa Vrdoljak, University of Western Australia

Available at: https://works.bepress.com/ana_filipa_vrdoljak/22/
Restitution of cultural properties trafficked during colonization:

A human rights perspective

Ana Filipa Vrdoljak
Faculty of Law
University of Western Australia

Introduction:

I am most grateful to be invited to address this UNESCO International Forum on the Return of Cultural Property, organized by UNESCO and the Korean National Commission for UNESCO. The early twenty-first century has witnessed the revisiting and increasingly successful resolution of restitution claims for cultural objects removed during colonization. Likewise there has been a growing appreciation of the relevance and effective implementation of human rights norms globally. The articulation of an overlap between human rights law and claims for restitution of cultural heritage is a more recent phenomenon and is the subject of this paper.

On the occasion of the successfully negotiated return of the Uigwe (the Royal Protocols of the Joseon Dynasty), the Oe-kyujanggak Books and other cultural patrimony to Korea from France and to augment UNESCO and the Korean National Commission’s initiative to foster a network for the return of cultural property, this paper shall cover three broad themes. First, there is a brief description of how international law and the international community has conceptualised claims for restitution of cultural objects removed during colonization prior to the late twentieth century. Second, there is an examination of the redefinition of these restitution requests and colonization generally. And finally, and related to this change is a synopsis of the potential synergies between human rights law and restitution claims.

---

The paper endeavours to highlight the challenge opened up by the negotiation and resolution of these restitution claims for our long-held understandings of the dynamics of colonialism and the role of human rights law in the Asia Pacific region.

Looking back at colonization. Being defined by the past:

The first part of my paper seeks to consider the specific legal context during which the cultural objects the subject of recent restitution claims were originally removed. That is, how colonization has been and is being defined as it relates to cultural property in international law. Before I proceed, I must indicate that this discourse centres almost exclusively on colonization as practised by European powers and their related settler states.

Our understandings of this contextual framework have inevitably defined the parameters of restitution claims. Two clearly discernible narratives can be identified. The essence of which is distilled into the decades-long debate at the multilateral level concerning restitution claims and related treaty negotiations (including the 1970 UNESCO Convention, the Statute of the UNESCO Intergovernmental Committee, and 1995 Unidroit Convention) between the usage of the words ‘return’ by former colonial powers and settler states and ‘restitution’ by newly independent states emerging from formerly colonised territories.²

The narrative developed by European colonial powers from the late eighteenth century onwards through the articulation of modern international law to justify the occupation of foreign lands and peoples is clearly discernible in leading treatises of the period.³ The evolution of this legal narrative related not only to the territory, resources and its inhabitants – but covered their cultural heritage, also. Indeed, the cultural heritage of these territories gradually became an indelible component of central justification for European colonization and the narrative’s argument of its intrinsic benevolence of European colonization – the spread of progress and civilization to these occupied territories.⁴

Yet, the narrative’s articulation in contemporary treaties, betrayed its inherent instability and unsustainability. The earliest provisions contained in treaties of the late nineteenth century, like Article 6 of the General Act of the Berlin Conference, encapsulated the dual nature of colonial


trusteeship: the metropolitan power was required to ‘ameliorat[e]’ the ‘moral and material conditions’ of colonized peoples by imparting the benefits of European civilisation; but also, the metropolitan power was obligated to ensure the application of free trade principles in the territory and equal access to scientific expeditions. As the century progress and this obligation was redefined more explicitly in favour of the inhabitants of colonized territories in the Covenant of the League of Nations and later the Charter of the United Nations, its implicit internal tensions remain manifest through the ongoing loss of cultural patrimony from colonized territories to the collections and collectors of metropolitan centres. Central arguments grounding this ongoing movement of cultural goods had consistently been the legality of such transfers (as defined by the prevailing legal discourse of the leading metropolitan powers) and the notion that given the assumed deleterious economic, social and political circumstances of these territories the cultural objects’ protection and preservation was best ensured in the metropolitan centre. While these arguments defined the custodians of these cultural objects as guardians of the cultural patrimony of humankind – it was clear that these objects remained crucial to the national identity of these former colonial powers.

The countervailing narrative was articulated by newly independent states emerging following decolonization, after the Second World War. Framed within the context of a new international order and elaboration of the right to self-determination which encompassed cultural development, its leading exponents called for the international community to address three broad issues within this rubric: the restitution of cultural patrimony removed during colonization (dealing with the past); a multilateral agreement, realized with the adoption of the 1970 UNESCO Convention (and later, the 1995 Unidroit Convention), to stem the tide of ongoing cultural losses visited by the escalating illicit trade in cultural goods (dealing with the present);
and knowledge and resources transfer for capacity building in the preservation and protection of cultural heritage in these newly independent states (address the future).  

Yet, whilst the narrative propounded by these newly independent states confronted the predominant narrative of the former colonial powers; it was nonetheless framed within the parameters of the international law discourse as defined by the metropolitan powers. This challenge utilized the established linguistic, structural and theoretical premises of the colonial relationship as defined by former colonial powers. Given their century long predominance of the discourse on the international legal (and economic and political) plane – the negative reaction of former metropolitan powers to this confrontation was inevitable.

What was not inevitable was the acceptance broadly by newly independent states of these metropolitan legal conceptualisations of colonization; and the internalisation of this discourse (and often replication) within their own states. It is the legacy of this phenomenon, occurring after independence, which bears investigation today.

Looking forward. Redefining the past:

The restitution claims of newly independent states remained largely unsuccessful for much of the remainder of the late twentieth century. However, it is clear that there has been a shift in the early twenty-first century – with claims for return, resisted for decades by former metropolitan powers, now being successful negotiated. Why this change in attitude?

It is conceived that two important factors which unsettled the prior adherence to accepted understanding of colonization. First, the calcified divisions of the Cold War and its attendant rhetoric was vital to the long-accepted dynamics and perceived legacies of colonialism – often exemplified by debates in international fora like the UN General Assembly and UNESCO General Conference. The dismantling of communist states in Central and Eastern Europe from 1989 not only saw such rhetoric deplete, it also laid bare competing notions of occupation and interpretations of the past. Second, there has been a gradual shift in economic power from former metropolitan powers to countries in the regions previously under their colonial occupation. The decolonization period and its supporting narrative had consistently argued that newly independent states continued to suffer the detrimental legacies of the colonial process, even after obtaining political independence. It was certainly a valid argument – but one that could only be broadly understood within the narrative parameters of colonization as defined by former metropolitan powers. However, the current reversing economic fortunes of protagonist states on all sides render the ongoing sustainability of this conceptualisation questionable.

---

It is for this reason, I would argue, that we are in a moment of flux or transition when it is essential that we look forward by redefining and better understanding the past. That previously accepted truths – including legal truths in domestic and international law – be deliberated and tested. Claims for the restitution of cultural objects removed during colonization provide an important vehicle for dealing with the past in the present. I would list but four areas where this process is already being felt.

First, revisiting and reinterpreting the act of removal of cultural objects from occupied territories to the metropolitan centres during colonization and the continued possession of these items in those collections and institutions. As I mentioned earlier, former metropolitan powers had continually emphasized the legality of the original taking of these cultural objects and this manifested itself in a refusal to countenance any effort at the multilateral level to challenge this premise. This is best exemplified by adherence to the usage of the term: ‘return’, which was deemed ‘neutral’. As opposed to ‘restitution’ loaded as it is in international law terms with state responsibility, internationally wrongful acts and reparations. This terminology marks existing treaties on movable heritage including the 1970 UNESCO and 1995 Unidroit Conventions. It was reinforced by provisions in these instruments explicitly underlining that they would not deal with transfers undertaken prior to their coming into force, a principle integral to the law of treaties. Yet, documents arising from recently negotiated return of cultural objects removed during colonization (including Korea-France, Italy-Libya) being couched implicitly or explicitly illicit nature of the original taking. Indeed, the Libya-Italy negotiations referenced the 1970 UNESCO Convention which came into effect 60 plus years after the removal.

Second, there can be little doubt that there is growing appreciation of the complexities and multifaceted nature of occupation and its ongoing legacies. The opening up of debate on varying forms of occupation, beyond ‘traditional’ colonization or occupation by an external occupier, is leading to broader understandings of European colonization itself. There is a growing awareness that while the Trusteeship Council of the UN may no longer exist, the political, social, economic and cultural dynamics of occupation (in its various forms) continue to operate today not only by foreign powers but within states. The restitution claims of indigenous peoples arguably expose the ongoing impact of this phenomenon. International Law, and particularly human rights norms, as they evolve can play a potentially crucial role in exposing and countering the continuation of the contemporary manifestations of these processes.

Third, as will be elaborate further below, a chief element of the metropolitan narrative was the categorisation of the cultural objects of occupied peoples in legalised notions of ‘property’. Often this conceptualisation has crystallised the gulf in social and legal understandings and


12 Both removals were undertaken by the troops of the respective countries in 1866 and 1913 respectively which brought the takings within the realm of the laws of armed conflict and belligerent occupation.
appreciations of the claimant community and the holding state, of the cultural objects removed during colonization, including between individual ownership and communal, intergenerational custodianship, the divisibility of elements of heritage as tangible (movable and immovable), intangible etc. It is these differing social and legal norms between the holding and requesting communities which has rendered deliberations on the legality of the removal and negotiations for restitution so difficult and apparently insurmountable in the past.

Fourth, I have mentioned that our current historical moment of flux and transition has facilitated a reassessment and reconceptualisation of markers of colonization and occupation more broadly including that occurring within states. Likewise, this has led to a reconfiguration of our understandings of the parameters of the right to self-determination, with the international community gradually sanctioning the right to self-determination inclusive of secession beyond the ‘traditional’ colonial context. Given the consistent tying of this right to determination of cultural development, this reconsideration of the nature and parameters of this right and who are the right-holders remains crucial for any claims for the return of cultural objects removed during foreign occupation. Likewise, these refocusing on acts and policies pursued within states have had an equally reinforcing impact on application of human rights norms such claims.

**Importance of human rights law:**

Culture and cultural heritage is an intrinsic component of the identity of communities and their constituent members. Effective protection and promotion of cultural heritage and diversity is increasingly defined in terms of universal human rights, particularly cultural rights, by international and regional human rights tribunals and bodies, particularly for minorities and indigenous peoples. This development reiterates the integral importance of movable heritage and the detrimental effects of the illicit tracking in cultural objects and imperative nature of restitution claims. In this third part of my paper, I briefly outline the relationship between restitution of cultural material and specific human rights.

Reflective of the UNESCO’s mandate, specialist instruments for the protection of cultural heritage have made oblique and overt reference to respecting established human rights norms. Explicit references to human rights and fundamental freedoms have become pronounced in instruments finalised in the last two decades. The references arise in the preambular recitals and as saving provisions in the substantive text. Article 31 of the Vienna Convention on the Law of Treaties provides that preambular recitals are to be used to interpret the substantive provisions of the relevant treaty. Depending on the specific wording of any reference to human rights and fundamental freedoms in the preamble, the obligations contained within the treaty should be read consistently with these accepted norms. The Universal Declaration on Cultural Diversity in its opening preambular recital reaffirms a commitment to ‘the full implementation of human rights and fundamental freedoms’ enunciated in the Universal Declaration of Human Rights and other

---


multilateral instruments.\textsuperscript{15} It specifically cites the 1970 UNESCO Convention when listing existing UNESCO instruments in the field of cultural diversity and cultural rights.\textsuperscript{16} One of the enumerated Main Lines of Action in its Annex II covers policies and strategies for ‘combating illicit traffic in cultural goods’.\textsuperscript{17}

Likewise several human rights provisions have been interpreted to encompass protection of movable heritage including: the right to property, right to self-determination, right to participate in cultural life,\textsuperscript{18} so-called minority protection, non-discrimination,\textsuperscript{19} right to privacy and family life;\textsuperscript{20} right to freedom of expression including receiving and imparting information and ideas;\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{15} Adopted by the General Conference on 2 November 2001, UNESCO Doc.31C.Annex I
\item \textsuperscript{16} Preamble, para. 4, Cultural Diversity Declaration.
\item \textsuperscript{17} Annex II, Cultural Diversity Declaration.
\item \textsuperscript{20} Art.12 UDHR; Art.17 ICCPR; Art.8 ECHR, Art.V, American Declaration; Art.11 American Convention; Art.18 African Charter.
\item \textsuperscript{21} Art.19 UDHR; Art.19(2) ICCPR; Art.5 ECHR; Art.IV American Declaration; Art.13 American Convention, Art.9 African Charter.
\end{itemize}
right to education and full development of human personality;\textsuperscript{22} and right to freedom of thought, conscience and religion.\textsuperscript{23} I will only detail the first two in my talk today.

**Right to Property**

As I noted earlier the conceptualisation of cultural heritage of colonized communities as property was is often viewed as intrinsic to the colonial process. The right to property as a human right, individually or collectively held, while controversial, is intimately tied to any efforts by states to protect movable heritage and control its transfer. The right to property is enshrined in the UDHR (Article 17), Protocol 1 of the ECHR (Article 1),\textsuperscript{24} American Declaration (Article 21), American Convention (Article 21), and African Charter (Article 15). The right is invariably qualified by the requirements that it shall not be deprived arbitrarily, and the provision of just compensation. Only the European Court of Human Rights has interpreted the application of this right as held by the individual owner of cultural property as against the domestic law of a state for the protection and control of transfer of movable heritage. In *Beyeler v. Italy*,\textsuperscript{25} the European Court of Human Rights was asked to consider the application of Article 1, Protocol 1 ECHR in respect of restrictions imposed by a state party on the transfer of movable cultural property. The case centred on the application of the right to protect as it related to control rather than deprivation through restitution and the like. The Court found that national controls on the transfer of cultural objects was a legitimate aim for the purpose of protecting a state’s cultural and artistic heritage and this complied with Article 1. It also acknowledged that it was a legitimate aim for the state to facilitate public access to cultural objects which were lawfully located in the national territory and belonged to ‘the cultural heritage of all nations’.\textsuperscript{26} The Court did not challenge the requirement of notification of transfers nor the right of preemption contained in the Italian relevant domestic law. However, it noted that applicable provisions of the law must be accessible, precise and foreseeable, that is, they not be applied erroneously or arbitrarily. Accordingly, the private property rights of the applicant prevailed as Italy was unable to satisfactorily justify why it had not exercised the right of preemption when it became aware of the applicant’s acquisition, waiting instead several years when he sought to sell the work, and compulsory state purchase resulted in a significant financial loss to him.

\textsuperscript{22} Art.26(2) UDHR, Art.13(1) ICESCR, Art.2 ECHR, Art.XII American Declaration, Art.1 American Convention, Art.17 African Charter.

\textsuperscript{23} Art.18 UDHR; Art.18(2) ICCPR; Art.9 ECHR; Art.III American Declaration; Art.12 American Convention, Art.8 African Charter. The Human Rights Committee’s General Comment No. 22 defines right to freedom of thought, conscience and religion broadly to encompass a holistic understanding of cultural heritage, including tangible (buildings of worship, ritual objects) heritage: General Comment No. 22, Art.18 ICCPR, 30 July 1993, UN Doc. CCPR/C/21/Rev.1/Add.4, para. 4.


\textsuperscript{26} Ibid., para. 113.
The individual right to property may also collide with the right if it is collectively held. The UDHR explicitly recognised the right to property can be held individually ‘as well as in association with others’ (Article 17(1)). Protocol 1 ECHR refers to ‘natural or legal person’ as the right-holder. While the wording of the African Charter is oblique (referring only to ‘the right’), the American Declaration and Convention through the use of individual pronoun appears to refer to an individual right-holder. However, jurisprudence from the African Commission and Inter-American Court in response to claims brought by indigenous communities, have found that the right to property in their respective instruments includes property held communally.

The collective right to property, including cultural heritage, has been reiterated by the UN Declaration on the Rights of Indigenous Peoples adopted by the General Assembly. As noted above, the Unidroit Convention makes specific reference to and accommodates ‘the cultural heritage of national, tribal, indigenous or other communities’. The drafting and negotiations of the convention was coloured by a number of cases involving indigenous and traditional communities’ heritage which highlighted the inadequacies of existing domestic laws and export controls in addressing such objects. The Inter-American Court has laid down criteria for state’s to assess validly held indigenous and private claims to property, and to determine on a case-by-case basis the ‘legality, necessity and proportionality’ of expropriation of privately owned property as a measure to attaining a legitimate aim in a democratic state. Also, the human rights jurisprudence of the Inter American Court of Human Rights, and increasingly the African Commission, in its broader interpretation of human rights norms, particularly the right to property are able to assess the implications of takings which took place originally during colonization.

**Right to Self-determination**

States imposing export controls on the transfer of cultural goods maintain that they determine what is in the ‘interests of society’ within their territorial boundaries. The push to ensure the effectiveness of such export controls internationally has often been articulated within the context of the right to self-determination including cultural development.

---


28 Arts 1, 11 and 12, UN Declaration on Rights of Indigenous Peoples.

29 UNDROIT Convention, Preamble, para. 3.


Legal recognition of the right to self-determination arrived with the UN Charter in 1945. It incorporates it as an aim and purpose of the new organisation and its member states (Articles 1(2) and 55). The UDHR does not specifically refer to a right to self-determination. However, the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res. 1514 (XV)), provides: ‘All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their [...] cultural development.’ Common Article 1 of ICCPR and the ICESCR, which replicates the wording of GA Res. 1514(XV), made it a legally-binding, ‘human’ right. As noted earlier following GA Res. 1514(XV), several initiatives were promoted as being essential to a people’s cultural development and exercise of the right to self-determination. Among the various demands was a call for the international regulation of the ongoing illicit export, import and transfer of cultural objects, which was finally realised with the adoption of the 1970 UNESCO Convention. The regular GA Resolution on Restitution or Return of Cultural Property to Countries of Origin from 1973 to 2009 have repeatedly reaffirmed the 1970 UNESCO Convention and GA Res. 1514(XV).

UNESCO instruments and UN human rights bodies have gradually enabled non-state groups to have a voice in national and transnational decision-making processes affecting their enjoyment of cultural rights and cultural heritage. The UNESCO Declaration of the Principles of International Cultural Cooperation enunciated principles concerning the right (and duty) of peoples to develop their culture. This link between self-determination and cultural development (including movable heritage) was extrapolated further in multilateral instruments concerning indigenous peoples. International Labour Organisation Convention (No.169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries acknowledges the collective right of indigenous and tribal peoples to preserve and develop their cultural identity. The UN Declaration on the Rights of Indigenous Peoples acknowledges the right of self-determination of all peoples in its preamble; and makes specific reference to the UN Charter and the two International Covenants. Indigenous organisations have maintained that the recognition of their collective right to self-determination is a prerequisite to their full enjoyment of all human rights.

32 Charter of the United Nations, 26 June 1945, in force 24 October 1945, UNCIO XV, 335; amendments by GA Resolutions in UNTS 557.


34 Ibid, paras 61 and 63.

35 GA Res. 3187, 18 December 1973 and GA Res. 64/78, 7 December 2009.


37 See Arts 2(2)(b) and (c), 4, 5, 7, 23, 26-31, ILO 169 of 1989.
including those pertaining to cultural heritage. The draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, presented in 1993, state that the protection of indigenous peoples’ heritage can only be effective if it is based ‘broadly on the principle of self-determination.’ The redraft Principles and Guidelines on the Heritage of Indigenous Peoples, tabled in 2005, stress that indigenous peoples’ cultural heritage must not be exploited without their free, prior and informed consent. This emphasis is reflected in recent UN and UNESCO instruments providing for some measure of participation by indigenous peoples in state decision-making which impacts upon their cultural heritage.

Whilst the 1970 UNESCO Convention does not explicitly make reference to the right to self-determination in its preamble it does recall the provisions of the Declaration of the Principles of International Cultural Cooperation which, as noted above, refers to the right of each state to develop its own culture. Also, UNESCO as an agency of the United Nations and pursuant to its own constitution, and all UN member states are required to adhere to the UN Charter which articulates the principle of self-determination.

**Concluding remarks**

This historical moment of transition exemplified by the changing attitudes to long resisted claims for the restitution of cultural patrimony removed during colonization provides the international community and our region in particular with a chance to review the historical processes of colonization and reflect upon their continuing influence today. Complementing this reassessment is the need for us to reaffirm our efforts to ensure the full and effective implementation and enforcement of universal human rights norms in the Asia Pacific. As the experience of the Inter American and African human rights systems shows jurisprudence from these institutions aids states in dealing with painful pasts as well as current human rights violations. And increasingly the international community is acknowledging the importance of human rights norms to defining and articulating claims for the return of cultural objects removed illicitly including during periods of foreign occupation.

---


41 Including Art.8(j), Convention on Biological Diversity, 5 May 1992, in force 29 December 1993, 1760 UNTS 79; and Art.11(b), ICH Convention.

42 1970 UNESCO Convention, Preamble, para. 1.
Speaker Biography:

ANA FILIPA VRDOLJAK is the author of *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006) and numerous academic articles on international law, cultural heritage and human rights, including ‘Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity’ *European Journal of International Law* (2011). She is currently completing a European Commission funded book project entitled *Law and Cultural Heritage in Europe*. She has taught courses and been invited to present at international conferences on these issues in the Asia Pacific, Europe and North America.

Dr Vrdoljak is a Professor of Law, Faculty of Law, University of Western Australia, Perth and Visiting Professor, Legal Studies Department, Central European University, Budapest. She is a member of the Cultural Heritage Law Committee, International Law Association.

She has been Marie Curie Fellow and Jean Monnet Fellow, Law Department European University Institute, Florence; visiting scholar at the Lauterpacht Centre for International Law, University of Cambridge; Global Law School, New York University, and Faculty of Law, University of New South Wales. She holds a Doctor of Philosophy (in Law) from the University of Sydney.