

# The Settlement of International Cultural Heritage Disputes

ALESSANDRO CHECHI

**OXFORD**  
UNIVERSITY PRESS

**OXFORD**  
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide. Oxford is a registered trade mark of  
Oxford University Press in the UK and in certain other countries

© Alessandro Chechi 2014

The moral rights of the author have been asserted

First Edition published in 2014

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in  
a retrieval system, or transmitted, in any form or by any means, without the  
prior permission in writing of Oxford University Press, or as expressly permitted  
by law, by licence or under terms agreed with the appropriate reprographics  
rights organization. Enquiries concerning reproduction outside the scope of the  
above should be sent to the Rights Department, Oxford University Press, at the  
address above

You must not circulate this work in any other form  
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence  
Number C01P0000148 with the permission of OPSI  
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data  
Data available

Library of Congress Control Number: 2013952015

ISBN 978-0-19-870399-0

Printed and bound in Great Britain by  
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and  
for information only. Oxford disclaims any responsibility for the materials  
contained in any third party website referenced in this work.

# I

## Introduction

### 1. The Imperfect Nature of Cultural Heritage Law

Art and culture hold a deep fascination for humankind. Since time immemorial, tangible cultural heritage has been treasured by States, used by living cultures, exhibited by museums, documented by specialists, collected by individuals, and bought and sold by dealers and auction houses. In spite of this diffuse interest, threats to the integrity and preservation of items of cultural heritage have multiplied in recent times. The destruction of historic buildings, monuments, and cultural objects during armed conflict is one example. In peacetime, artistic treasures are liable to be damaged by human interventions. Various examples remind us of the dangers to which cultural assets may be exposed by large-scale public works undertaken to meet the demands of economic development and population growth. Moreover, illegal trafficking has reached an unprecedented level, whereas the return<sup>1</sup> of cultural objects to their homelands and the unregulated recovery of underwater cultural heritage have become the subjects of heated debates.

Regrettably, the protection offered by cultural heritage law is not entirely satisfactory. The existing conventional instruments are affected by important weaknesses, as they are not retroactive, often not self-executing, and are characterized by broad or vague provisions. Moreover, many rules vary between national legal systems for limitation periods, the assessment of the good faith defence, and the protection of built heritage. What is more, the criminal measures put in place in various States provide for light penalties and, hence, little deterrence for art theft and looting. Nevertheless, the most serious source of the weakness of international cultural heritage law is the lack of or deficiency in enforcement mechanisms. Existing treaties neither offer adequate systems of control to ensure the consistent application of their norms, nor set up any special tribunal. As a result, disputes ought to be settled through political or diplomatic negotiation or, if these fail or

<sup>1</sup> The terms 'return', 'restitution', and 'repatriation' will be used interchangeably. Note, however, the distinction proposed by Kowalski: the remedy of restitution concerns wartime plunder, theft, the violation of national laws vesting ownership of cultural objects in the State and all transfers based on immoral laws in force at the time of the deprivation; repatriation aims to re-establish the integrity of the cultural heritage of a given country or ethnic group in the event of cession of territory or break-down of multinational States; return involves claims for cultural objects taken away by colonial powers or illicitly exported. W.W. Kowalski, 'Types of Claims for Recovery of Lost Cultural Property' (2004) Vol. 57 No. 228 *Museum* pp. 85–102.

are not available, through traditional dispute settlement means, including mediation, arbitration, and litigation before domestic tribunals or existing international courts.

This ad hoc fashion of dealing with cultural heritage disputes is not without consequences. One problem is that the final settlement mostly depends on the choice of the forum and applicable law. This not only entails the risk of the adoption of inconsistent decisions, but also the establishment of harmful precedents. Another risk is that national or international adjudicators,<sup>2</sup> in the absence of formal links, might bring about incoherent and fragmentary development of the law and divergences of interpretation.

Yet, the most serious risk associated with the shortcoming under consideration is that the ‘human dimension’ of cultural heritage—i.e. the special feelings that items of cultural heritage evoke in individuals and peoples because of their symbolic, emotional, religious, and historical qualities—can be overlooked in the course of the adjudicative process. This human dimension is at stake in all cases, whether involving artworks taken by force or deceit or not. For example, the Greeks claim that the Parthenon Marbles held in the British Museum should be returned to Greece because they embody the Greek spirit and connect modern Greeks to their ancestors.<sup>3</sup> In addition, Holocaust-related cases show that for many survivors or their heirs the recovery of what belonged to them or their families before the Second World War is a sacred duty that provides a connection back to the pre-war past.<sup>4</sup> Likewise, many indigenous groups have demanded the return of cultural objects and human remains on the grounds that they constitute essential elements of their identity. The act of depriving these communities of such materials may translate into an intolerable offence for the group as a whole as well as for its members individually.<sup>5</sup>

Indeed, cultural objects have no intrinsic value, in the sense that they cannot be defined solely by their physical characteristics. The values ascribed to them—be they historic, scientific, educational, aesthetic, or financial—depend on the meanings placed upon them by individuals and communities. It is precisely because of these meanings that works of art and antiquities attract the interests of museum-goers, institutions, States, and other stakeholders. For some, cultural objects are repositories of information relating to human history. Others regard

<sup>2</sup> The term ‘adjudicator’ will be used throughout this book to indicate any person or body that is entrusted by one or more litigants to render a decision on a national or international dispute. Being generic, this term can encompass both judicial and non-judicial (or quasi-judicial) dispute settlement means, such as national and international courts and arbitral tribunals, either institutionalized or ad hoc.

<sup>3</sup> G.W. Trampitsch, ‘The Parthenon Marbles from the British Museum and the Greek Claims for Restitution’, <<http://www.culture-and-development.info/issues/marbles.htm>>, accessed 12 September 2013.

<sup>4</sup> J. Anglim Kreder, ‘The Holocaust, Museum Ethics and Legalism’ (2008) Vol. 18 *Review of Law and Social Justice* pp. 1–43, 4–5.

<sup>5</sup> F. Lenzerini, ‘The Tension between Communities’ Cultural Rights and Global Interests: The Case of the Māori *Mokomokai*’, in: S. Borelli and F. Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2012), pp. 157–77.

them as possessing or expressing religious or spiritual qualities. For others, cultural objects are chattels that can be treated as any other commodity in financial terms. Heritage's value is therefore relational.<sup>6</sup> This explains why disputes involving cultural objects are both more likely to arise and more difficult to resolve than in the case of mundane goods.<sup>7</sup>

## 2. Improving Dispute Settlement in the Cultural Heritage Realm

A plethora of contributors has studied the topic of cultural heritage. Among them, there are the authors that have approached this field by offering a multidisciplinary approach, where law, politics, and history combine.<sup>8</sup> Other books provide a detailed analysis of the existing legal regime and of its developments, though with different degrees of elaboration and innovation.<sup>9</sup> The bulk of scholarship, however, focuses on the question of restitution and on other specific issues, including the protection to be granted in time of war, Holocaust-related art, underwater cultural heritage, and indigenous peoples' claims.<sup>10</sup> To the extent that these studies have considered the issue of dispute settlement, they have focused on the roles that means of dispute resolution alternative to litigation play in securing the restitution of stolen or looted art.<sup>11</sup>

As it occurred to me that the question of the resolution of cultural heritage disputes had not been addressed in a comprehensive manner, I decided to investigate this topic. This book provides a systematic examination of all types of disputes relating to tangible items of cultural heritage in order to offer a constructive and imaginative scenario for more effective and coherent systems of dispute settlement. Effectiveness is sought to ensure that the specificities of cultural heritage are taken

<sup>6</sup> L. Lixinski, *Intangible Cultural Heritage in International Law* (Oxford: Oxford University Press, 2013), p. 3. See also S. Harding, 'Value, Obligation and Cultural Heritage' (1999) Vol. 31 *Arizona State Law Journal* pp. 291–354; and J. Ulph and I. Smith, *The Illicit Trade in Art and Antiquities* (Oxford/Portland: Hart, 2012), pp. 13–14.

<sup>7</sup> W.A. Landes and R.A. Posner, 'The Economics of Legal Disputes over the Ownership of Works of Art and Other Collectibles', in: V.A. Ginsburgh et al. (eds), *Economics of the Arts: Selected Essay* (Amsterdam/New York: Elsevier, 1996), pp. 177–219.

<sup>8</sup> See, e.g. A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006).

<sup>9</sup> See, e.g. I.A. Stamatoudi, *Cultural Property Law and the Restitution of Cultural Property: A Commentary to International Conventions and European Union Law* (Northampton: Edward Elgar Publishing, 2011); C. Forrest, *International Law and the Protection of Cultural Heritage* (London/New York: Routledge, 2010).

<sup>10</sup> See, e.g. S. Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge: Cambridge University Press, 2013); B. Schönenberger, *The Restitution of Cultural Assets* (Berne: Stämpfli, 2009); W. Sandholtz, *Prohibiting Plunder. How Norms Change* (New York: Oxford University Press, 2007); R. O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge/New York: Cambridge University Press, 2006); and N. Palmer, *Museums and the Holocaust: Law, Principles and Practice* (Leicester: Institute of Art and Law, 2000).

<sup>11</sup> I. Fellrath Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* (Ardslay: Transnational Publishers, 2004).

into account; coherence is necessary to prevent the same or similar matters from being addressed differently.

The central question lying at the basis of this book is whether an improvement in the manner in which disputes are dealt with may enhance the safeguarding of cultural heritage and the legal framework regulating it. With this in mind, I have consulted a wide range of sources in order to: (1) analyze the substantive and procedural issues involved in the settlement of international disputes concerning tangible cultural heritage with a view to defining the limits of the current legal and institutional frameworks; (2) examine possible solutions, *de lege lata* and *de lege ferenda*, to overcome the existing shortcomings; and (3) explain how and to what extent the principles embodied in existing legal instruments and the rules being developed in international practice by States and non-State entities may contribute to the principled resolution of disputes and to the sound evolution of the law.

The main argument developed in this book is that the stakeholders of the cultural heritage milieu should not rest content with ad hoc decisions, however reasoned they may be, because the safeguarding of the immaterial and symbolic values enfolded in items of cultural heritage requires more than definite and enforceable rulings. It requires that disputes be settled through means that can take into account and reconcile the various moral, historical, political, cultural, financial, and legal issues involved.

As is clear from these premises and purposes, this book will not be limited to legal analysis. One reason is that cultural policy questions cannot be dealt with on rational grounds alone. As it will be shown, cultural heritage has a variety of emotional and symbolic meanings that can be described, but not fully captured, in legal terms. Therefore, this book will also focus on the ethical dimension of the types of dispute under consideration. Such ethical implications stem from, inter alia, the circumstances of the loss and the level of diligence exercised by purchasers. Moreover, the analysis will not be restricted to the law in force, but will look at present evolutionary trends.<sup>12</sup> This approach is necessary to highlight the merits of constructive cooperative relations. Indeed, the various interests associated with cultural assets could be better accommodated through a shift from adversarial processes and the strict application of positive law towards a model that puts greater emphasis on information exchange, consultation, consensus-building, and sharing.

### 3. The Scope of the Analysis

Society generally treats disputes as occurrences that should be avoided. Yet, disputes should not be conceived as a sort of pathology or an anomaly, but as an inevitable and physiological character of any healthy legal system. This is so because

<sup>12</sup> T. Scovazzi, 'Diviser c'est détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties' (2010) Vol. 94 *Rivista di diritto internazionale* pp. 341–95.

the judicial function is not simply the application of existing rules to facts. Rules cannot cover every eventuality and a single contingency may attract the application of multiple legal regimes. Actors argue about which norms apply and what the norms require or permit. The ensuing outcome is the definition or the modification of the scope of application of the norms at stake. Therefore, disputes are motors of normative change. More specifically, dispute settlement processes generate the adjustment of applicable rules; the extension (or reduction) of their scope of application; and the attribution of new content, making them stronger (or weaker), clearer (or less), more specific (or less), more subject to exceptions (or less).<sup>13</sup> Cultural heritage law is not an exception to this pattern. Accordingly, the central thesis of this book is that cultural heritage law may evolve by improving the functioning of dispute settlements means.

Against this background, it is timely to identify the types of dispute that will be analyzed in the following chapters. These are: (1) disputes concerning the restitution of cultural objects removed either during or as a result of war, occupation, or colonization, either from individuals, indigenous peoples, private, or public institutions and, in particular, disputes regarding Holocaust-related art; (2) controversies about the return of objects removed in times of peace as a result of (i) theft from individuals, groups, private, or public institutions, (ii) illicit excavation from archaeological sites (or unlawful retention of licitly excavated relics), (iii) export in contravention of national laws; (3) disputes concerning the restitution of ancestral lands to indigenous peoples; and, finally, (4) controversies regarding the protection of immovable heritage, not only from war-like situations and intentional attacks, but also from non-violent processes, such as the realization of investment projects. The reason why disputes about the return of movable objects and the protection of immovable heritage are treated together is that many cases involve items dismembered from buildings and monuments. Furthermore, the analysis will encompass restitution claims involving materials removed from wrecks and archaeological sites located underwater. This is motivated by the fact that present-day technical progress has increased the accessibility of the heritage lying in the deepest points of the world's oceans.

Two further aspects necessitate clarification. The first is that this research is not confined to disputes between sovereign States litigated before international courts. This should not be surprising, given that international practice shows both that the bulk of the disputes under consideration have been litigated before domestic courts or settled out of court through extra-judicial means, and that more often than not litigants are non-State entities. To be sure, 'intranational' cases<sup>14</sup> are discussed as long as they raise issues of international cultural heritage law. Second, this study adopts a pragmatic approach to the questions of how far back in time it is possible to go with restitution requests and who can or should own cultural objects. On the one hand, in many cases there is no sense in trying to rewrite history and return

<sup>13</sup> Sandholtz, *Prohibiting Plunder*, pp. 3–4, 6 (n 10).

<sup>14</sup> J.P. Fishman, 'Locating the International Interest in Intranational Cultural Property Disputes' (2010) Vol. 35 *Yale Journal of International Law* pp. 347–404.

objects taken in the past. On the other hand, it is argued that a restitution request is legitimate and should not be refused provided that the following cumulative conditions are met: (1) there is evidence that the requested object was removed illegitimately—taken by force, unequal treaty, theft, or deception, even if the law contemporaneous to the removal did not regard such taking as illegal; (2) there is a ‘cultural context’ where it can meaningfully return—such as the patrimony (be it a monument, a site, or a collection) of a natural or legal person, or of a collective group, be it a nation or community within a nation; and where, (i) in accordance with the applicable national legislation, it can be safeguarded—but not necessarily made available to the public or to specialists, or where (ii) it can be used in rituals according to the culture and belief system from which the object came—even if such rituals may lead to its consumption or destruction.<sup>15</sup> In other words, this study does not advocate mass repatriation and the emptying of the world’s great museums. Rather, it supports restitution if this permits reparation for past wrongs and deterrence against present-day looting, illicit excavations, and theft. Obviously, given the changing of national boundaries during the course of history, another problem is that of establishing whether a country can legitimately request restitution. This problem should be dealt with by examining each historic case on its merits on a case-by-case basis, with regard to the people from whom the object was taken, by whom it was made, for what purpose and place it was made, and, finally, the manner of acquisition.

#### 4. Book Structure

This book is grounded on empirical observation of the practice and discusses from the perspective of international law the problems that may affect the resolution of disputes concerning tangible cultural heritage. These problems are identified through a cautious examination of the object (cultural heritage) and of the subjects (stakeholders and adjudicators) that can be involved in these disputes, as well as through an in-depth study of the existing legal framework. On the one hand, this causal analysis approach permits the delineation of the direction in which cultural heritage law might develop. On the other hand, it permits the argument that all stakeholders and adjudicators should wake up to the non-economic values enshrined in cultural assets.

After this introductory chapter, the book is structured in the following way.

Chapter II delimits the scope of the investigation and is divided into two parts. The first part (A) examines the historical insights related to the development of

<sup>15</sup> In this sense, Merryman affirmed that certain movable objects—which he defined as ‘culturally immovable objects’—should not be traded if: ‘1. the culture and belief system from which the object came were still alive; 2. the object was made to be used in religious/ceremonial ways by that culture according to that belief system; and 3. if returned, the object would again be put to those uses’. J.H. Merryman, ‘A Licit International Trade in Cultural Objects’ (1995) Vol. 4 *International Journal of Cultural Property* pp. 13–60, 23.

the interest in art and culture and defines the notions of ‘cultural property’ and ‘cultural heritage’. Then, this part discusses some of the implications of the notions of ‘cultural heritage’ and ‘cultural heritage of humankind’. In addition, it looks at the relationship between culture and human rights in order to illustrate the role that the latter may play with respect to disputes concerning tangible heritage. In effect, various legal developments occurring at both the domestic and international level manifest this symbiosis and clarify that the protection of cultural heritage has become a human rights concern. The second part (B) provides a definition of ‘international dispute’ suitable for the purposes of this research. It then moves from the identification of the chief participants in the cultural heritage milieu to describe the variety and complexity of clashes of interests and types of disputes emerging from the practice.

Chapter III is divided into three parts in order to provide an unavoidable overview of the relevant components of a study concerning the settlement of disputes. The first part (A) describes the domestic laws that may apply to—but also hinder—the adjudication of disputes concerning movable art objects, such as export laws and anti-seizure legislation. Moreover, this part analyzes, through the prism of the treaties adopted under the aegis of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), how dispute settlement procedures are applied to cultural heritage disputes. Finally, this part of the book completes the examination of the existing legal regime with a discussion of the principle of sovereign immunity and the issue of State responsibility. The former issue is of topical importance, given that several recent controversies have prompted the adoption of anti-seizure statutes and, above all, have raised various questions on the legal basis, the scope and limitations of the immunity from seizure of cultural objects belonging to foreign States. The second part of Chapter III (B) analyzes existing judicial and non-judicial arrangements. At the outset, it discusses whether domestic adjudication can constitute an effective avenue for the prevention and resolution of cultural heritage disputes. Then, it moves on to consider the role of international courts. The choice of the tribunals that have been selected for study has not been arbitrary, but based on their actual and potential involvement in the adjudication of this type of dispute. Finally, the role of non-judicial dispute resolution techniques is examined. This survey underlines that mechanisms such as arbitration and mediation possess the necessary flexibility for handling disputes relating to cultural heritage. Part C concludes Chapter III by describing some strategies of dispute avoidance and various examples of cooperation between States and museums.

In order to respond to the research question set forth above, Chapter IV discusses two options. In the first part of the chapter (A), I examine the feasibility of establishing a new international court—or the amendment of the mandate or the structure of one of the existing courts—with an exclusive jurisdiction over cultural heritage disputes. My conclusion is that this does not constitute a feasible option for the time being. In the second part of Chapter IV (B), I look at existing means of dispute settlement and at the process of cross-fertilization. This can be defined as the practice with which adjudicators—whether national or

international, whether judicial or extra-judicial, or whether or not belonging to the same legal system—refer to and borrow decisions from each other in order to cope with the problems posed by the disputes pending before them. This section studies the cross-fertilization of jurisprudence *de jure* and *de facto* and discusses its merits and disadvantages. It questions whether the adoption of this process is compatible with the role of judges and whether the effectiveness and coherence of existing decision-making processes can be improved through a global networking developed autonomously by adjudicators. It concludes that this ‘endogenous’ option can result in shaping an effective and coherent framework for the proper resolution of cultural heritage disputes.

Chapter V examines the substance of this networking. Essentially, it takes stock of the diplomatic, legislative, administrative, and contractual practice of the stakeholders of the cultural heritage realm in order to articulate a set of culture-sensitive rules, which are referred to as ‘common rules of adjudication’. Chapter V begins by explaining the nature and origin of such culture-sensitive rules. It highlights that the common rules of adjudication do not constitute a new category of rules but correspond either to general principles of international law—which are examined in the first part of the chapter (A)—or to domestic and international legal norms in force and principles and standards in formation—which are explored in the second part (B). Next, it is posited that if adjudicators increasingly employ the common rules of adjudication to deal with cultural heritage disputes, a sort of ‘transnational cultural heritage law’ might develop. This new *lex culturalis* may help to affirm legal uniformity by bringing to the fore the uniqueness of cultural heritage and by excluding the uncritical application to cultural heritage-related disputes of the norms enacted for normal business transactions involving ordinary goods. The final part of Chapter V (C) puts forward two—interrelated—proposals to operationalize the common rules of adjudication and hence to foster cross-fertilization. Both proposals are based on factual circumstances and involve UNESCO. Finally, this part of the book deals with the *theoretical* aspect of the circulation of common rules of adjudication through cross-fertilization. Here, I emphasize that the goal of cooperation against the loss of cultural heritage constitutes the basic tenet underpinning the common rules of adjudication.

All this will bring us to Chapter VI, where conclusions are drawn.