Symposium
Cultural Heritage in a Post-Colonial World

Used with permission of Author (Speaker)

Artefact or heritage?

Colonial collections in Western museums from the perspective of international (human rights) law

24.09.2018

"One of the most noble incarnations of a people's genius is its cultural heritage. The vicissitudes of history have nevertheless robbed many peoples of this inheritance. They .. have not only been despoiled of .. masterpieces but (were) also robbed of a memory .. These men and women have the right to recover these cultural assets which are part of their being…" [Secr.Gen. UNESCO M'Bow, 1978]

Forty years after this plea and some twenty declarations of the UN General Assembly on the subject later, the future of colonial collections in European museums has become a topic of heated debate. French President Macron set the tone for this with last year's statement that it is unacceptable that Africans have to travel to Europe to learn about their own culture. He announced a policy of restitution of African artefacts.

The return of treasures taken during the era of European imperialism from indigenous communities is a controversial issue. A common response is 'it was legal at the time' and, therefore, not a legal issue. Is that indeed so? In this contribution, I argue that it is not a lack of legal norms that explains this belated discussion, but the asymmetrical application of norms. A human rights law approach, focussing on the *heritage* aspect of cultural objects and their importance for (groups of) people today, offers useful tools to address the intangible interests at stake in such disputes.

Legal norms

Cultural objects have a protected status in international law because of their intangible 'heritage' value to people: objects as symbols of a cultural identity. And it is precisely that identity that is often targeted in looting practices. The Arch of Titus in Rome, depicting the spoils taken after the sacking of the Temple in Jerusalem visualises this. Identity was at stake in Nazi looting practices, and similarly in the colonial context. European powers, for example, justified their presence in Africa by referring to their duty to bring to the 'natives' the 'blessings of civilization'(see the Berlin Conference Act).

That being so, it is remarkable how old the notion is that harming other people's cultural objects is 'uncivilized'. Cicero in his famous Verrines argues for example that, while pillage was allowed, an honourable Roman should show respect for the culture of defeated people. Through writings of Grotius and De Vattel and a series of peace treaties, this notion gained legal importance. The 1815 Treaty of Paris, arranging for the restitution of looted artefacts after Napoleon's defeat, is generally seen as a key moment in this development. This process continued in the 19th century to be codified in the *Hague Regulations concerning the Laws and Customs of War on Land of 1899* prescribing that '*All seizure of [..] works of art or science, is prohibited, and should be made the subject of proceedings*'. Eventually, after massive looting during the Second World War, multilateral treaties were concluded that firmly set the norm that misappropriated artefacts should be returned.

This means that seizure of artefacts in the course of (punitive) military actions at the close of the 19th century may well be considered unlawful by contemporary European standards. However, not all acquisitions can be seen in that light.

As Vrdoljak and Jakubowski propose, return of cultural objects after decolonization better fits in with concepts of state succession and self-determination. After dissolution of the Austrian-Hungarian empire in Europe, for example, cultural objects were redistributed to successor states on the basis of territoriality. In fact, such state practice convinced scholars such as De Visscher and Kowalski after the Second World War that territorial provenance of dispersed cultural patrimony was an emerging (and even customary) rule of international law.

Colonial takings: a *sui generis* category?

And indeed, the 1973 UN General Assembly Resolution 'on restitution of works of art to countries victim of expropriation' seemed promising for former colonies. It linked the return of cultural objects to independence, being a necessary element of the cultural development of new states. The 1975 Dutch-Indonesian agreement to return objects 'directly linked with persons of major historical and cultural importance or with crucial historical events' may be seen in that context.

On the whole, however, former colonial powers did not return colonial collections. Hence, a separation between two scenarios of state succession became the legal reality. Colonial takings were to be discussed as matter of 'return' on moral grounds in the setting of the UNESCO Committee on the Promotion of Return of Cultural Property, as opposed to 'restitution' on legal grounds in the European context. Vrdoljak gives insight in a process where former colonial states acted on the basis of the paradigm that it is in the best interest of civilization for them to be custodians of the material culture of their former colonies. The 2002 *Declaration on the Value and Importance of Universal Museums* may be seen in this light.

A noteworthy exception is a 2008 Italian verdict on the return to Libya of the Venus of Cyrene in which the Italian supreme administrative court held that the right of self-determination of former colonies implicates that cultural objects should be returned.

Evolving norms: soft law and UNDRIP

In the meantime, moral norms regarding possession of contested artefacts changed. Generally, restitution claims are governed by property laws of the state where the object is found that mostly do not support claims based on a loss longer ago. This is increasingly being challenged by instruments that follow a 'softer' (human rights) approach. These soft-law instruments tend to follow a similar pattern and focus on the need for (i) provenance research by museums (telling the story); (i) good faith negotiations with source communities or former owners (dialogue) and (iii) equitable solutions for claims ('fair and just').

For example, the 1998 Washington Conference Principles on Nazi-Confiscated Art follow this outline. These opened the door to claims by heirs of former owners of artefacts looted by the Nazis, in spite of a number of legal obstacles under positive law. In several European jurisdictions advisory committees were set up that assess individual cases on the basis of the 'fair and just' norm, and a recent trend is that courts find ways to honour claims by referral to human rights.

In the case of colonial losses, the 2007 UN Declaration on the Rights of Indigenous Peoples deserves attention. It contains a right of redress with respect to cultural objects taken without the 'free, prior and informed consent' of indigenous peoples and, potentially, would seem to cover involuntary loss by source communities in Africa just as in settler states. Depending on the cultural importance of the specific artefact (think of ceremonial objects) redress may vary from a right to 'access and control' to a right to repatriation.

States are expected to provide assistance – 'effective mechanisms in conjunction with indigenous peoples' – in addressing claims. States might want to consider, in this light, setting up claims procedures, similar to that developed for Nazi-looted art claims.

A key element of this model is its reliance on rights implicated by a continuing human rights violation of *remaining separated* from certain cultural objects. This, as opposed to a focus on the unlawfulness of the *acquisition at the time* in a traditional (property focused) approach. Another noteworthy element is that communities – not states – are right-holders.

State practice

State practice in this field has an ad-hoc character. An example: the 2011 French transfer to South-Korea of scrolls, pillaged during a punitive raid in 1866, as opposed to the 2016 dismissal of a return request by Benin of the Abomey treasures, pillaged from the royal palace during a punitive raid in 1892 and kept in France. Indigenous groups in settler states and countries that gained power over time take the lead. For example, New Zealand supports the return of *Mokomokai* (preserved tattooed human scalps collected as 'exotic' specimens) and these are widely returned. At this moment, in Canada a law is under review introducing a policy of repatriation of indigenous cultural objects from foreign museums where returning museums would receive exact replicas, to be produced by the concerned indigenous groups: international cooperation as a positive side-effect of restitution. And recently, in May 2018, the Berlin state museums returned artefacts that were robbed in the 1880s from gravesites in Alaska (US).

So…

While the problem of looted art may be complex, legal principles *do* exist. Lessons could also be drawn from experiences in the field of Nazi-looted art. One such lesson is that stolen goods 'do not fare well' – certain stories need to be told –, and another is that clear standards and neutral claims procedures are needed if justice is our objective. Otherwise, the field may remain a matter of ad hoc decisions and power-politics.

Evelien Campfens is is a PhD candicate at Leiden University and, between 2002 and 2016, was general secretary to the Dutch Restitutions Committee for Nazi looted art. She is a member of the International Law Association Committee 'Participation in Global Cultural Heritage Governance' and sits on the Board of Trustees of the German Lost Art Foundation.

Cite as: Evelien Campfens, "Artefact or heritage? Colonial collections in Western museums from the perspective of international (human rights) law", *Völkerrechtsblog*, 24 September 2018, doi: 10.17176/20180924-095413-0.