Alper Taşdelen

The Return of Cultural Artefacts

Hard and Soft Law Approaches

Springer

The Return of Cultural Artefacts

Alper Taşdelen

The Return of Cultural Artefacts

Hard and Soft Law Approaches

Springer

Alper Taşdelen
Hannover, Germany

ISBN 978-3-319-44059-0 ISBN 978-3-319-44060-6 (eBook)
DOI 10.1007/978-3-319-44060-6

Library of Congress Control Number: 2016953674

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer International Publishing AG Switzerland

To my beloved parents

Preface

The legal regulation regarding the return of cultural artefacts transferred in times of peace is a relatively new phenomenon and far from being concluded. It is still an ongoing process involving various stakeholders, ranging from states to individuals, with different and often contradicting interests. Moreover, the actors involved often dispute about objects that have been transferred in a colonial context or at a time not covered by any existing and enforceable legal regime. Hence, from a legal point, the return of cultural artefacts is an area presenting many challenges. At the same time, this lack of enforceable rules with regard to a great number of disputes is the very reason why this field is strongly affected by moral claims, personal persuasion and ethics in general.

This intermingling of law and ethics as well as the cultural dimension of the subject matter is the reason why it is so fascinating to me. It allows me, as someone with a background not only in legal studies but also in cultural sciences, to combine the skill sets of both disciplines.

Luckily for me, with the Interdisciplinary DFG Research Unit on the Constitution of Cultural Property at the University of Göttingen, Germany, I found the perfect place to pursue this interest of mine and realise this PhD project, in the realisation of which many persons have played their part.

First and foremost, I wish to thank my doctoral supervisor, Prof. Dr. Peter-Tobias Stoll, for his superb supervision and for giving me the leeway to pursue my own path. I would furthermore like to take the opportunity to thank him not only for supporting this thesis and all the other projects I had over the years, such as studying abroad, but also for the 6 years I had the pleasure of working for him, ever since I started as a student assistant at the Institute for International Law and European Law of the University of Göttingen, Germany. With his fatherly, unformal and humorous yet professional nature he has always created and maintained a pleasant work climate and been an inspiring example. I have learned many things from him on both a professional and personal level.

Special thanks are also due to Prof. Dr. Regina Bendix, Spokesperson of the Interdisciplinary DFG Research Unit, and Prof. Dr. Brigitta Hauser-Schäublin,

Co-Project Director of my sub-project, for their support and the fruitful discussions we had. Their (socio- and) cultural-anthropological perspective and input has expanded my horizon, especially furthered my understanding of the role of the actors involved, and contributed to this work at hand. I want to thank Prof. Dr. Brigitta Hauser-Schäublin in particular for the opportunity to participate in the field studies conducted in Thailand and Cambodia in February 2013. It is not everyday that a lawyer has the opportunity to be in the field and experience the issue he is engaged with and its challenges firsthand. This trip was quite some experience and I will keep it in good memory, not least because of the amicable and productive atmosphere.

I also owe many thanks to all the colleagues and fellow PhD candidates of both the Interdisciplinary DFG Research Unit and the Institute for International Law and European Law. The fruitful discussions I had with them and their ability to keep me motivated were well appreciated. I wish to thank the fellow PhD candidates of the Interdisciplinary DFG Research Unit, in particular, for contributing to my comprehensive understanding of the subject matter by opening my eyes to the working methods and approaches of their respective disciplines.

Further thanks are due to the E.W. Kuhlmann Foundation, the German Research Foundation (Deutsche Forschungsgemeinschaft; DFG) and Springer for making the publication of this book possible.

Last but not least, I am most thankful to my family; my sisters Esra and Rima, and my dearest parents Gülbahar and Yüksel Taşdelen. Throughout the course of my education, be it this thesis, the LL.M. programme I have completed or the admission to the New York State Bar, they have always supported me without any reservations and with an unfailing patience. I know that it has not always been easy for them and I am deeply grateful for having them.

Washington, DC, USA Alper Taşdelen
4th July 2016

Contents

Abbreviations

EC	European Community
EFTA	European Free Trade Association
EU	European Union
GR	Genetic Resources
ICJ	International Court of Justice
ICOM	International Council of Museums
ICPRCP	Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation
ILA	International Law Association
INTERPOL	International Criminal Police Organization
IP	Intellectual Property
LUAB	Uniform Law on the Acquisition in Good Faith of Corporeal Movables
OIM	Office International des Musées
Roerich Pact	Treaty on the Protection of the Artistic and Scientific Institutions and Historic Monuments
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law/Institut International pour L'Unification Du Droit
Washington Treaty	Treaty on the Protection of Movable Property of Historic Value
WIPO	World Intellectual Property Organization

Chapter 1
Introduction: Cultural Property vs. Cultural Heritage

Abstract Throughout history cultural objects have attracted the attention of mankind for numerous reasons: In times of war, they have been looted as trophies, to pay troops, or to further humiliate the enemy. In times of peace, they have been not only subject to clandestine excavations but also served as gifts for foreign dignitaries and were objects of trade. In recent centuries, they also became objects of scientific interest. While some of these activities have long been illegal, such as clandestine excavations, others have only become illegal with the passing of time, such as the looting of an enemy's cultural treasure. Some continue to be legal, for instance, the legal trade in cultural property, whereas others, even though they still may be considered legal in a strict sense, raise moral issues, such as the transfer of artefacts from colonies to the colonial powers in former times. The example of cultural objects transferred in colonial times has brought about many claims for the return of these cultural artefacts and these claims have given rise to disputes. This book analyses how the international community tries to resolve the issue concerning the return of cultural objects transferred in times of peace by employing different instruments. The Introduction lays the foundation for an understanding of the general problems the international community is confronted with in its endeavour by highlighting the various positions of the major actors, the ideological concepts they employ and how these are reflected even in the use of terminology.

Cultural objects have been significant to mankind throughout history, and remain so today. Cultural artefacts are unique manifestations of intellectual creativity imbued with, among other attributes, aesthetic and/or spiritual value.[1] Because of this, they have attracted the attention of men for many reasons.

Looting and even the destruction of the cultural property of one's enemy were common, and until recent centuries, accepted practices.[2] Pillaging served many purposes; taking spoils of war as trophies, paying troops, and further humiliating an enemy catered to both practical and political needs.[3] However, appropriating

[1] Cf. Stumpf (2003), p. 41.

[2] Ehlert (2014), p. 15; Thorn (2005), p. 23; Zimmerman (2015), p. 15; cf. also Isakhan (2016), p. 268.

[3] Cf. Hartung (2005), pp. 11–12.

A. Taşdelen, *The Return of Cultural Artefacts*, DOI 10.1007/978-3-319-44060-6_1

artefacts of the enemy also served to obtain his (spiritual) power, which was believed to be embodied in certain objects.[4] But, cultural objects not only changed hands in the context of war. Valued for their aesthetic beauty, such items served also as gifts for foreign dignitaries, were objects of trade,[5] and naturally, subject to clandestine excavations.[6] In more recent times, cultural heritage has furthermore become the object of scientific interest.[7] As can be seen, there have been many reasons—both legal and illegal—why cultural objects have been relocated throughout the centuries.

While some of these causes remain illegal, such as clandestine excavations, others have become illegal with the passing of time, including the looting of an enemy's cultural treasure.[8] Some practices continue to be legal, for instance, the legal trade in cultural property, whereas others, even though they still may be considered legal in a strict sense, raise moral issues.[9] This is particularly true for cultural objects transferred from the territory of colonies by their former colonial powers during their dominion. Though no binding legal obligation exists for the former colonial powers to return these objects, few today would deny that colonial occupation was wrong. However, this admission subjects the transfer of cultural property by the colonial powers from their territories to moral doubts.[10]

The transfer of cultural objects in colonial times has brought about many claims for the return of cultural property and these claims have given rise to disputes. However, such disputes not only involve cultural heritage relocated in former times. With the increasing demand for cultural artefacts on the international art market,[11] particularly in the United States of America, the United Kingdom, Japan, France, Sweden, and Switzerland,[12] clandestine excavations, theft, and illegal exports of cultural property remain a serious, if not greater problem than ever before. Today, the worldwide illicit trafficking of cultural objects is at a comparable level to the illicit trade in weapons and drugs.[13] A fact that should not be completely surprising given that all three are heavily intertwined and the illicit trafficking of

[4]Dagens (1995), pp. 20–21.

[5]Cf. http://www.festival.si.edu/past-festivals/2002/silk_road/istanbul_treasure.aspx.

[6]Cf. Veres (2013–2014), pp. 94f.

[7]Cf. Davis (2011), p. 168.

[8]Cf. Stumpf (2003), pp. 39ff.

[9]Cf. Roodt (2015), p. 69.

[10]A related area in this context is the issue of Nazi-looted cultural objects. Even though claims for restitution are barred by time limitations, there is a strong moral imperative to return the objects. Cf. on this issue for instance Woodhead (2014), pp. 113–142.

[11]Wessel (2015b), p. 16; cf. Gerstenblith (2013), p. 9; cf. also Zimmerman (2015), p. 15.

[12]Cf. Forrest (2010), pp. 136f.

[13]Nafziger and Paterson (2014), p. 13; cf. also http://www.unesco.org/new/en/brussels/areas-of-action/culture/illicit-traffic-of-cultural-properties/.

cultural objects plays a significant role in financing terrorism[14] and in organised crime.[15]

The international community has become increasingly aware of the disputes over the return of cultural objects and, for some time now, has undertaken efforts to address the problem. However, there are two opposing camps making the process of finding a solution to this issue complicated; on the one hand, there are those countries, including former colonies, which suffer from the illegal exploitation of their cultural objects. On the other hand, there are those states, generally including former colonial powers, which have amassed major collections of foreign cultural heritage with somewhat dubious provenance themselves or which host museums and private collectors with such collections.[16] These states also generally have a lucrative market in the trade of cultural property.[17] The former colonial territories, as one would expect, advocate a comprehensive duty to return cultural objects, including items transferred in the past.[18] The latter states almost universally consider such demands as excessive and not only a threat to their national collections and those of museums as well as private collectors located within their borders,[19] but also a danger to the principle of free trade in cultural property and for their art markets.[20] In addition, they are concerned by the fact that such obligations would affect their legal system,[21] since these would render their legislation concerning time limitations and the protection of bona fide purchasers inoperative or at least impair it.[22]

Furthermore, both parties employ ideological concepts to support their opposing viewpoints. The source states refer to the theory of cultural nationalism, which argues that cultural objects are primarily national heritage, since they are part of the national identity and community.[23] In addition, this point of view reasons that having the items in their place of origin allows understanding them within their social, historical, and cultural context, which is of more value than looking at them isolated in a glass box within a museum.[24] The market states, on the other hand, invoke the concept of common heritage or cultural internationalism, which argues that cultural objects are the common heritage of mankind and do not primarily belong to one single nation. Making them accessible to as large an audience as possible as well as protecting and preserving them for future generations is of

[14]Wessel (2015b), p. 16; cf. also Amineddoleh (2014), p. 732. See further on the linkage of illicit trafficking of cultural property and financing terrorism Tribble (2014).

[15]For the connection of illicit trafficking of cultural objects and drugs see Yates (2014), pp. 23ff.

[16]Cf. Polk (2013), pp. 111f.

[17]Cf. Slattery (2012), p. 842.

[18]Cf. Roussin (2008–2009), p. 570.

[19]Cf. Nafziger and Paterson (2014), p. 16.

[20]Cf. Forrest (2010), pp. 136f.

[21]Cf. O'Keefe (2007), p. 9.

[22]Cf. Veres (2013–2014), pp. 104ff.

[23]Cf. Roehrenbeck (2010), p. 190.

[24]Cf. Woodhead (2011), p. 54; cf. also Gerstenblith (2012), p. 625.

central importance to this view.[25] Furthermore, supporters of this theory argue that bringing them to 'foreign' museums has saved them from destruction,[26] that these museums are better suited to preserve these objects[27] and—themselves contradicting the idea of common heritage[28]—that these cultural objects have also become part of the heritage of the countries whose museums have cared for them[29] or even assumed world heritage status.[30] In addition, this view emphasises the importance of cultural exchange, since it benefits the cultural life of all mankind and promotes mutual respect and appreciation.[31] This plays into the hands of market states as they advocate the free trade of cultural objects.[32]

This dichotomy in positions is also reflected in the terminology: firstly, with regard to the subject matter itself and, secondly, when it comes to claiming back cultural objects. While different terms are actually in use to refer to the subject matter itself, such as (cultural) artefacts, (cultural) patrimony, and cultural objects, two terms are predominant in both the literature and practice: cultural property and cultural heritage. Though all terms are, in general, used interchangeably, the latter two are not as neutral as the former ones and have particular connotations. Cultural heritage emphasises the linkage and emotional bond between certain items and their source nation,[33] whereas cultural property stresses the aspect of ownership and the fact that cultural objects are material goods which can be traded as any other goods.[34] By doing so it prioritises the interests of right holders over those of society.[35,36] However, even though the United Nations Educational, Scientific and Cultural Organization (UNESCO) remains faithful to its philosophy and consistently employs the term cultural property to refer to cultural objects and in other cases both terms are basically used synonymously, today the term cultural heritage has become widely predominant—at least in the literature.[37]

In reference to the claims, a similar picture has emerged. Both in practice and literature, a variety of terms is used interchangeably: repatriation, restitution, return, recovery, and so forth. Here again, there is a small difference in connotation.

[25]Cf. Roehrenbeck (2010), p. 190.

[26]Cf. Wessel (2015a), p. 103; Cf. Gerstenblith (2012), p. 624.

[27]Slattery (2012), p. 836; cf. also Shyllon (2013), p. 136.

[28]Same Shyllon (2013), pp. 138f.

[29]Stamatoudi (2011), p. 23.

[30]Cf. Mugabowagahunde (2016), p. 156.

[31]An idea also found in Paragraph 2 of the Preamble of the 1970 UNESCO Convention.

[32]Cf. Forrest (2010), p. 166; cf. also Nafziger et al. (2014), p. 406. See further on the controversy how to address matters of cultural heritage in context of the World Trade Organization Schnelle (2016), pp. 101ff.

[33]Cf. Roussin (2008–2009), p. 570; cf. also Shyllon (2016), p. 55.

[34]Cf. Woodhead (2011), p. 56. On the financial significance of cultural property cf. further Graham (2014), pp. 319–338.

[35]Vadi and Schneider (2014), p. 6.

[36]For further elaboration on the distinction and interaction of property and heritage see Fincham (2010–2011), pp. 641–683.

[37]Cf. Nafziger and Paterson (2014), p. 12.

While repatriation, recovery, and return are neutral terms, with return maybe being the most neutral, restitution is linked with wrongfulness. Its use emphasises that some wrong has occurred that has to be corrected. However this having been said, it has to be highlighted that there is still no uniform use of terminology at this point in time.[38]

Nevertheless, despite this polarisation and inconsistency in the use of terminology, the international community has managed to adopt a set of rules applicable to disputes concerning the return of cultural objects and to create certain instruments to address them. The present research analyses how the international community tries to resolve the issue concerning the return of cultural objects by employing different instruments. For this purpose it examines in particular the instruments adopted, including their genesis, and how they interact. However, the research is limited to the controversial issue of cultural objects transferred in times of peace and leaves out the topic of objects transferred in times of war for which a comprehensive legal framework of general acceptance is already in place.[39]

References

Amineddoleh L (2014) Protecting cultural heritage by strictly scrutinizing museum acquisitions. Fordham Intellect Prop Media Entertain Law J 24:729–781

Chamberlain K (2013) War and cultural heritage: a commentary on the Hague Convention 1954 and its two protocols, 2nd edn. Institute of Art and Law, Leicester

Cunliffe E, Muhesen N, Lostal M (2016) The destruction of cultural property in the Syrian conflict: legal implications and obligations. Int J Cult Prop 23:1–31

Dagens B (1995) Angkor: heart of an Asian empire. Thames & Hudson, London

Davis T (2011) Supply and demand: exposing the illicit trade in Cambodian antiquities through a study of Sotheby's auction house. Crime Law Soc Change 56:155–174

[38]Cf. Stamatoudi (2011), pp. 14–19.

[39]The key legal instruments with regard to the transfer of cultural artefacts in times of war are the IV. Hague Convention respecting the Laws and Customs of War on Land of 1899 and 1907 and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts with its two protocols of 1954 and 1999. The IV. Hague Convention of 1899 and 1907 was the first multilateral treaty on a global level that contained with Article 3 of its Annex a legal basis to reclaim cultural objects transferred in wartimes in violation of the convention. Its regulations have already become international customary law. The 1954 Hague Convention, on the other hand, was the first international treaty that was solely devoted to the protection of cultural property in times of war. However, regulations relevant for the protection of cultural objects during war and for their return afterwards can also be found in other international conventions. Article 33 (2) of the IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance, constitutes a prohibition to pillage.

For a general overview on the law concerning the return of cultural artefacts transferred in times of war cf. Hartung (2005). For further information on the 1954 Hague Convention see O'Keefe (2011) and Chamberlain (2013).

For a contemporary example of the ongoing destruction of cultural heritage in times of war see Cunliffe et al. (2016), pp. 1ff.

Ehlert C (2014) Prosecuting the destruction of cultural property in international criminal law: with a case study on the Khmer Rouge's destruction of Cambodian heritage. Martinus Nijhoff Publishers, Leiden

Fincham D (2010-2011) The distinctiveness of property and heritage. Penn State Law Rev 115:641-683

Forrest C (2010) International law and the protection of cultural heritage. Routledge, London

Gerstenblith P (2012) Art, cultural heritage, and the law: cases and materials, 3rd edn. Carolina Academic Press, Durham

Gerstenblith P (2013) Models of implementation of the 1970 UNESCO Convention: can their effectiveness be determined? In: Prott LV, Redmond-Cooper R, Urice S (eds) Realising cultural heritage law: festschrift for Patrick Joseph O'Keefe. Institute of Art and Law, Builth Wells, pp 9–25

Graham J-L (2014) Art exchange? How the international art market lacks a clear regulatory framework. In: Vadi V, Schneider HEGS (eds) Art, cultural heritage and the market: ethical and legal issues. Springer, Heidelberg, pp 319–338

Hartung H (2005) Kunstraub in Krieg und Verfolgung: Die Restitution von Beute- und Raubkunst im Kollisions- und Völkerrecht. De Gruyter, Berlin

Isakhan B (2016) Heritage under fire: lessons from Iraq for cultural property protection. In: Logan W, Craith MN, Kockel U (eds) A companion to heritage studies. Wiley Blackwell, Chichester, pp 268–279

Mugabowagahunde M (2016) African indigenous heritage in colonial and postcolonial museums: the case of the Batwa of Africa's Great Lakes Region. In: Logan W, Craith MN, Kockel U (eds) A companion to heritage studies. Wiley Blackwell, Chichester, pp 146–159

Nafziger JAR, Paterson RK (2014) Introduction. In: Nafziger JAR, Paterson RK (eds) Handbook on the law of cultural heritage and international trade. Edward Elgar, Cheltenham, pp 1–18

Nafziger JAR, Paterson RK, Renteln AD (2014) Cultural law: international, comparative, and indigenous. Cambridge University Press, Cambridge

O'Keefe PJ (2007) Commentary on the 1970 UNESCO Convention, 2nd edn. Institute of Art and Law, Leicester

O'Keefe R (2011) The protection of cultural property in armed conflict. Cambridge University Press, Cambridge

Polk K (2013) The trade in antiquities: is it time for additional approaches to reducing destruction and theft? In: Prott LV, Redmond-Cooper R, Urice S (eds) Realising cultural heritage law: festschrift for Patrick Joseph O'Keefe. Institute of Art and Law, Builth Wells, pp 111–120

Roehrenbeck CA (2010) Repatriation of cultural property – who owns the past? An introduction to approaches and to selected statutory instruments. Int J Leg Inf 38:185–200

Roodt C (2015) Private international law, art and cultural heritage. Edward Elgar, Cheltenham

Roussin LA (2008-2009) The trade in antiquities: heritage for sale? ILSA J Int Comp Law 15:569-572

Schnelle MA (2016) Der Abwanderungsschutz von Kulturgütern im Lichte der Freihandelsordnungen von AEUV und GATT. Nomos, Baden-Baden

Shyllon F (2013) Museums and universal heritage: right of return and right of access for Africans. In: Prott LV, Redmond-Cooper R, Urice S (eds) Realising cultural heritage law: festschrift for Patrick Joseph O'Keefe. Institute of Art and Law, Builth Wells, pp 133–144

Shyllon F (2016) Cultural heritage and intellectual property: convergence, divergence, and interface. In: Logan W, Craith MN, Kockel U (eds) A companion to heritage studies. Wiley Blackwell, Chichester, pp 55–68

Slattery AJ (2012) To catch an art thief: using international and domestic laws to paint fraudulent art dealers into a corner. Villanova Sports Entertain Law J 19:827–871

Stamatoudi IA (2011) Cultural property law and restitution: a commentary to international conventions and European Union law. Edward Elgar, Cheltenham

Stumpf E (2003) Kulturgüterschutz im internationalen Recht unter besonderer Berücksichtigung der deutsch-russischen Beziehungen. Peter Lang, Frankfurt am Main

Thorn B (2005) Internationaler Kulturgüterschutz nach der UNIDROIT Konvention. De Gruyter, Berlin

Tribble J (2014) Antiquities trafficking and terrorism: where cultural wealth, political violence, and criminal networks intersect. In: Monterey terrorism research and education program. www.miis.edu/media/view/37908/original/illicit_antiquities_networks_final_1.pdf. Accessed 25 April 2016

Vadi V, Schneider HEGS (2014) Art, cultural heritage and the market: legal and ethical issues. In: Vadi V, Schneider HEGS (eds) Art, cultural heritage and the market: ethical and legal issues. Springer, Heidelberg, pp 1–25

Veres Z (2013-2014) The fight against illicit trafficking of cultural property: the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Santa Clara J Int Law 12:91-114

Wessel G (2015a) Das schmutzige Geschäft mit der Antike: Der globale Handel mit illegalen Kulturgütern. Ch. Links Verlag, Berlin

Wessel G (2015b) Nachschub für einen gigantischen Markt: Raubgrabungen zerstören das kulturelle Erbe der Menschheit. Politik und Kultur 16

Woodhead C (2011) Cultural heritage principles and interference with property rights. Cambrian Law Rev 42:52–68

Woodhead C (2014) Redressing historic wrongs, returning objects to their rightful owners or laundering tainted objects? 21st-century UK remedies for Nazi-era injustices. Int J Cult Prop 21:113–142

Yates D (2014) Displacement, deforestation, and drugs: antiquities trafficking and the narcotics support economies of Guatemala. In: Kila JD, Balcells M (eds) Cultural property crime: an overview and analysis of contemporary perspectives and trends. Brill, Leiden, pp 23–36

Zimmerman O (2015) Die Zerstörung, der Raub und der illegal Handel mit Kulturgut: Besitz von Raubkunst muss gesellschaftlich und rechtlich geächtet werden. Politik und Kultur 15

Chapter 2
The Classical Approach: International Treaties—Part I

Abstract International treaties are not only a source of international law; they are also a classical means to regulate matters of concern to the international community. Hence, it is not surprising that the international community's first approach to resolve the issue concerning the return of cultural objects was to rely on an international treaty. This approach was further encouraged by the fact that issues surrounding cultural artefacts were generally perceived as national or state affairs. This chapter focuses on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the first international agreement for times of peace on an international scale exclusively devoted to the regulation of the return of cultural objects. After an overview of the first endeavours of the international community to enact such an agreement and the historical developments leading to the adoption of the treaty along with the challenges that had to be overcome in the course of the negotiation, the convention is analysed in depth. Its purpose, scope and regulations are broken down in the light of the convention's genesis and the different actors' positions with an emphasis on the rules concerning the return of cultural objects. Finally, the relevance as well as the strengths and weaknesses of the treaty are more closely scrutinised.

2.1 First Steps

Faced with the issue of cultural objects transferred from their countries of origin and respective disputes, the international community first tried to solve the matter in a classical manner by adopting international treaties. In fact, the first international treaty which provided a legal basis that could be employed to reclaim cultural property dates back to the beginning of the twentieth century, namely the 1907 Hague Convention IV with respect to the Laws and Customs of War on Land, a revised version of the 1899 Hague Convention II. Article 3[1] of this treaty allows states to claim back cultural objects removed from their territories. However, the

[1]Article 3 of the 1907 Hague Convention IV with respect to the Laws and Customs of War on Land: "A belligerent party which violates the provisions of the said Regulations shall, if the case

A. Taşdelen, *The Return of Cultural Artefacts*, DOI 10.1007/978-3-319-44060-6_2

treaty regulates warfare and hence its provisions are only applicable to cultural objects that have been transferred in the course of war.[2]

It was not until 1970, almost three quarters of a century later, with the adoption of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property that an international treaty providing a legal basis for reclaiming cultural property illicitly trafficked in periods of peace came into effect. This seemingly late adoption, however, cannot be blamed on a lack of efforts to regulate the matter. Not only had several states enacted laws protecting their cultural patrimony in the late nineteenth century,[3] but the matter was also approached, due to the international character of the illicit trafficking of cultural property,[4] on an international level. In 1932 the General Assembly of the League of Nations decided to address the issue and delegated the Office International des Musées (OIM) to prepare a draft convention on the return of either lost or stolen cultural artefacts.[5]

In 1933 the OIM presented its first draft,[6] which could not be adopted due to the reluctance of, in particular, the Netherlands, the United Kingdom, and the United States of America.[7] The United States of America, for instance, criticised the draft as it would require domestic courts to enforce the laws of foreign countries.[8] In order to make the draft more acceptable for these states and increase its likelihood of being adopted, in 1936[9] and 1939[10] the OIM prepared two further drafts,[11] each with a narrower scope. The three drafts not only varied with regard to the cultural property covered, but also differed in the state parties' obligations regarding the return of such cultural artefacts.

While the first draft encompassed all tangible objects of artistic, historical, and scientific character, the second draft restricted the scope to tangible objects of a specific paleontological, archaeological, historical or artistic nature. The third draft narrowed the scope still further to only those tangible objects of specific paleontological, archaeological, historical or artistic nature that are the property of or in the possession of either the state or a public entity and, in addition, are inventoried as part of a national collection.[12]

---

demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.".

[2]Cf. Baufeld (2005), p. 87.

[3]Stamatoudi (2011), p. 31; Siehr (2011), p. 94.

[4]Vogel (2010), p. 1149.

[5]Raschèr (2000), p. 50.

[6]OIM (1939a), pp. 51f.

[7]O'Keefe (2007), p. 3.

[8]Vrdoljak (2008), pp. 112f.

[9]OIM (1939b), pp. 69ff.

[10]OIM (1939c), pp. 78ff.

[11]Cf. Vrdoljak (2008), p. 115.

[12]Cf. Weidner (2001), p. 230; Odendahl (2005), pp. 173f.

The drafts show a similar increasingly restrictive tendency in regard to the obligations of state parties concerning return. According to the first draft, any transfer of property from the originating state was void if the stated objects had reached the territory of the receiving party by breaching national export regulations of the state of origin. This regulation was abandoned in the second draft.[13] The third draft narrowed the state parties' obligations further by acknowledging claims for return only for cases in which the objects had been transferred to the territory of the receiving party by breaching regulations of the state of origin which are enforced by penalty.[14]

In addition, the third draft re-regulated the role of the bona fide purchaser. While according to the first draft the bona fide purchaser had a claim for compensation only in case the state of origin had not informed the OIM of the loss and the OIM had not made it public,[15] the third draft permitted the respondent state to make the return conditional on compensation for the bona fide purchaser.[16] Unfortunately, with the outbreak of World War II the negotiations came to an abrupt end and none of the drafts were ever adopted.[17]

The 1930s are, however, not only of great relevance for the emergence of a global regime of return for periods of peace due to the drafts of the OIM, but also because of the Treaty on the Protection of Movable Property of Historic Value (Washington Treaty)[18] that was adopted on 15 April 1935 and entered into force on 17 July 1936.[19]

Even though the Washington Treaty is only a regional treaty of the Pan-American Union,[20] its significance lies in the fact that it is the first multilateral treaty explicitly devoted to cultural property removed during peacetime.[21,22] Unlike the Pan-American Union's Treaty on the Protection of the Artistic and Scientific Institutions and Historic Monuments (Roerich Pact)[23] of the same day, which due to is limitation on immovable cultural property could only regulate the protection of cultural heritage,[24] the

[13]Cf. Odendahl (2005), p. 174.

[14]Cf. Schaffrath (2007), p. 11.

[15]Cf. Weidner (2001), p. 229.

[16]Cf. Odendahl (2005), p. 174.

[17]Cf. UNESCO Doc CUA/115, 14.04.1962, p. 3.

[18]Printed in Hudson (1941), pp. 51ff.

[19]von Schorlemer (1992), p. 270.

[20]The Pan-American Union is the predecessor form of the Organization of American States, a regional organisation that can be traced back to 1889. For further details on the Organization of American States and its history see http://www.oas.org/en/about/our_history.asp.

[21]Cf. Pabst (2008), p. 60; Hönes (2006), p. 166.

[22]Nonetheless, Article 8 of the Treaty also contains a war-related regulation prohibiting the treatment of cultural property as spoils of war.

[23]Printed in Hudson (1941), pp. 56ff.

[24]Cf. von Schorlemer (1992), p. 270.