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ATHENS

Cultural Heritage and International Law

*An interview with Catharine Titi**

Could you outline the legal framework applicable to the repatriation of cultural artefacts at an international level? How has it evolved over time?

We have three major international conventions that address the repatriation of cultural artefacts. The First Protocol to the 1954 Hague Convention concerns the repatriation of objects removed in times of war and occupation. It imposes on states the obligation to return cultural property removed from an occupied territory or during an armed conflict, and it establishes that such cultural property can 'never be retained as war reparations'. The 1954 Hague Convention and its Protocols are generally considered to be reflective of customary international law.

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is another very important convention for cultural property repatriation. It covers cultural property removed in peacetime and during foreign occupation. Through the convention member states oppose the illicit import, export, and transfer of the ownership of cultural property that each state has designated as important. States undertake to adopt measures to prevent their museums from acquiring illegally exported cultural property and to inform another state when an offer is made of cultural property that has been illegally removed from the latter's territory. States also commit to 'prohibit the import of cultural property stolen from a museum' or a public monument in another state and, should this be the case, they undertake, on the request of the other state, to 'take appropriate steps to recover and return any such cultural property'. States also have the obligation to facilitate 'the earliest possible restitution of illicitly exported cultural property to its rightful owner'; to 'admit actions for recovery of lost or stolen items of cultural property'; and to recognize the right of each state 'to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported' and facilitate its recovery if it has been exported.

The 1970 UNESCO Convention is very important, despite its limitations. As of now, it has been ratified by 143 states, including major art markets, such as the United States, the United Kingdom, France, Japan, and Russia. As its membership increased over the years, the impact of the Convention grew. The Convention has been instrumental in changing attitudes about repatriation, it has been at the origin of the new imperative for provenance research, and it has reduced tolerance towards the acceptance of illegally exported or stolen cultural property.

The third seminal cultural convention is the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The Convention states very clearly that the possessor of a stolen cultural object must return it. For the purposes of the Convention, stolen cultural objects include products of unlawful excavations or objects lawfully excavated but unlawfully retained. The Convention also covers illegally exported cultural objects. According to the Convention, states can request the courts or other competent authorities of other member states to order the return of an illegally exported cultural object. Unlike stolen objects, whose return is not subject to conditions, when a state requests an illegally exported object, it has to show that its removal impairs significantly any one of a number of interests, such as the preservation of the property or of its context, the integrity of complex objects, or the preservation of scientific or historical information. Alternatively, the requesting state can show that the property is culturally significant for it.

The UNIDROIT Convention is more far-reaching in scope than the 1970 UNESCO Convention, but it does not have as yet the former's broad membership. As of this moment, the UNIDROIT Convention has 54 contracting states, but its membership is likely to rise in the coming years: it is a much more recent treaty than the 1970 UNESCO Convention, and treaties need time to build up membership.

The main limitation of these conventions is that, in principle, they are not retroactive, therefore they do not cover cultural property removed before their entry into force. Some of the most heated disputes about cultural property repatriations concern precisely heritage that was removed in the more distant past.

However, international law is certainly evolving, and the conventions have contributed to this evolution of international law. Customary international law has an important role to play. As already mentioned, when it comes to cultural property removed in times of war and, I would argue, also occupation, we have customary international law that requires its repatriation. There is evidence that this rule has existed for a long time. Back in 1815, when British foreign secretary Castlereagh argued in favor of the repatriation of Napoleon's European loot, he declared the French war booty to be 'contrary to every principle of justice, and to the usages of modern warfare'.

In addition, we are witnessing the evolution of customary international law for certain types of removals that took place in peacetime or in colonial times. States around the world are starting to return cultural property that was removed many years ago and there is evidence that this practice is widespread, representative, uniform, and consistent, and it is probably supported by a sense of legal obligation. For example, we are talking about antiquities (including numerous repatriations

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from the United States), mosaics, Nazi-looted items, human remains, historical manuscripts, and now items removed in colonial times, among others.

How would you characterise the role of soft law in this respect?

The line between hard and soft law can be difficult to identify in an area where the law is evolving so rapidly as in the case of cultural property repatriations. We have some important guidelines issued by international organizations, such as UNESCO’s Operational Guidelines for the Implementation of the 1970 UNESCO Convention, or by national ministries that matter in this respect. These can be more or less binding depending on context, the method of their adoption, their form, etc. National and international museum organizations, such as Arts Council England and the International Council of Museums (ICOM), issue guidelines that concern repatriations. Some are modest instruments, others openly encourage museums to seriously consider requests for repatriation. Museums too start to establish internal rules and practices, which sometimes are reasonably open to repatriations. For example, the Smithsonian Institution’s new policy expressly authorizes its museums to return looted or unethically acquired objects. Museums are also increasingly setting in place committees to examine the provenance of their artefacts. We can debate about whether museum practice can be at the origin of hard law obligations, but significantly in such cases what may first appear as soft law goes hand-in-hand with emerging or new legal rules of customary international law.

What are the available dispute resolution avenues for such repatriation claims?

The practical availability of any given dispute settlement avenue depends on the type of object and dispute we are dealing with (public international law, private international law, criminal law...), whether the disputing parties have consented to the dispute settlement, etc.

Negotiations are the most frequently used means of dispute settlement for repatriation claims. Sometimes they can result in bilateral agreements between states or between states and museums. For instance, in the past, Italy signed bilateral agreements with the Boston Museum of Fine Arts, the Metropolitan Museum of Art, and the J Paul Getty Museum in California, following negotiations, in order to obtain antiquities of suspicious provenance held by these museums in exchange for loans of similar cultural objects. The current negotiations between the Greek Government and the British Museum for the Parthenon Marbles also appear to aim to establish some type of exchange or ‘cultural partnership’.

Mediation or conciliation are two further possible dispute settlement options. The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) has its own Rules of Procedure for Mediation and Conciliation and regularly offers its good offices. In 2013, Greece invited the United Kingdom to mediate the

Parthenon Marbles dispute through the ICPRCP. In 2015, the United Kingdom declined the UNESCO offer to mediate. Other repatriation disputes, however, have been successfully resolved through mediation.

Arbitration is another possibility, although it is rarely used in cultural heritage disputes. Finally, recourse to an international court may be possible, always depending on the dispute. For example, the International Court of Justice has decided a small number of cultural heritage disputes, including some with a restitution component. In theory, a regional human rights court may be another option, this is especially the case of the Inter-American Court of Human Rights, but not necessarily of the European Court of Human Rights. In any case, whether a dispute settlement forum is genuinely available depends on the circumstances of the particular case.

Would the conceptualisation of a ‘right to cultural integrity’ facilitate repatriation endeavours?

Absolutely. The right to cultural integrity comes to us from human rights law and is especially conceptualized in relation to indigenous communities. The American Declaration on the Rights of Indigenous Peoples provides specifically for redress through restitution with respect to indigenous peoples’ ‘cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs’. The Declaration is a recent instrument: it was adopted in 2016.

The Inter-American Commission on Human Rights discusses a ‘collective right to cultural heritage’. The Inter-American Court of Human Rights has recognized a ‘concept of property in indigenous communities’, and it has interpreted the right to property, not only as an individual right, but also as a communal right. In addition, the Court treats human rights treaties as living instruments whose interpretation must evolve according to the times. These are important steps for the evolution of the law. In that respect, the European Court of Human Rights lags behind.

Could you illuminate the core of the legal case for the repatriation of the Parthenon Marbles?

The legal case for the repatriation of the Parthenon Marbles relies on a number of distinct grounds. Let’s consider some of them.

There is a widespread assumption that Elgin’s men removed the Marbles having had the benefit of an authorization, a so-called ‘firman’, issued by the Sultan. We can ask whether the Ottoman empire and the Sultan at its head had the legal capacity to transfer an occupied people’s heritage. But let us leave this issue for now. The reality is that we have no evidence that the Sultan did ever intend to transfer property in the Marbles.

There is no evidence that a firman ever existed. The document usually referred to as a ‘firman’ may have been a letter or a set of letters signed by a high Ottoman official, the kaymakam, or deputy Prime Minister, relating to ‘some’ pieces

ΑΦΙΕΡΩΜΑ: ΔΙΚΑΙΟ ΚΑΙ ΠΟΛΙΤΙΣΜΟΣ

of sculptured marble and inscriptions that Elgin's men found lying about on the Acropolis – but it did not authorize the removal of part of the Parthenon's structure, which is what Elgin's men did: they removed part of its structure.

No valid legal transaction took place that could transfer property. Elgin did not obtain the Marbles as a gift, nor did he buy them. He declared that this was 'a transaction so peculiar in itself, and differing entirely from the circumstances attending every other Collection. Here the objects were *not purchased, or got for fixed prices*'. Elgin presented his expenses to the British Government, and indeed these expenses contained no amount for purchase, but they did include significant amounts for bribes, at a time when corruption was an offence in England. In his testimony to a select committee of the House of Commons in 1816, Elgin's right-hand man, Philip Hunt, admitted that Elgin's weekly and monthly expenses 'must have been very considerable, owing to [...] the continued presents that were given to the Turkish officers at Athens'.

And, indeed, the presents were given to the *local* Ottoman officials, those who certainly did not have the authority to part with the Marbles. Having accepted the bribes, these officials were afraid for their lives, in case the central authorities found out. In 1811, the British Ambassador Robert Adair wrote in a letter to Elgin 'the Porte absolutely denied your having any property in those marbles', with the explanation that 'the persons who had sold (*sic*) the marbles to your Lordship had no right so to dispose of them'.

There is an additional reason why the transaction could not be valid. In international law, property in public buildings belongs to the sovereign state in perpetuity. Parts of public buildings are legally immovable. This was confirmed by the International Court of Justice in the *Temple of Preah Vihear* case in 1962, when the Court adjudged that the territory on which the temple stands is Cambodian, therefore Thailand should restore to Cambodia any sculptures, stela, fragments of monuments, sandstone models, and ancient pottery that it had previously removed from the temple or the temple area. For the Court, Cambodia's request for restitution was 'implicit in, and consequential on, the claim of sovereignty itself'.

Finally, as I mentioned earlier, there is an evolution in customary international law, so that it may be necessary to repatriate today objects that have a particular history and cultural significance for the requesting state, irrespective of the law applicable at the time of their removal. The Parthenon Marbles fall squarely within the scope of this nascent rule of customary international law.

How do you evaluate Greece's approach towards the repatriation of the Parthenon Marbles? How would you view the prospect of seeking legal recourse?

Greece has been asking for the antiquities Elgin's men removed from the Acropolis since 1836, a time when most of modern-day Greece was still occupied by the Ottoman empire and the newly-minted state still relied heavily on the good will

of Great Britain for its future. Today, Greece continues to ask for the Marbles and its chances of getting them back are better than they have ever been. In good part, this is because the international context has changed and continues to change. We start questioning the past and what was considered acceptable only a few years ago no longer is.

We have recently seen with the UK prime minister's Rishi Sunak's refusal to meet his Greek counterpart, Kyriakos Mitsotakis, that negotiations are not always possible, and even when they are, there is no guarantee that they will lead to agreement and a solution. The Greek Government is currently negotiating with the British Museum a 'cultural partnership'. This is not a clean repatriation, it is focused on the idea of an exchange of cultural treasures. I understand that the term 'loan' or any indication of 'ownership' would not be part of such an agreement for a 'cultural partnership', if an agreement were to be reached. Stating in any way that the British Museum or the UK Government has ownership of the Marbles would be very dangerous for the Greek claim. The negotiations are secret, so we don't have all the information, and it is difficult to have an accurate opinion. The Greek Government is negotiating with the British Museum, because in the short-term the likelihood of the Marbles returning to Greece is higher than through negotiations with the current Tory UK Government.

However, I would like to stress that this is an interstate matter (of course, the British Museum too is a public museum, a so called non-departmental public body or NDPB, but it is the state that needs to change the law to properly repatriate the Marbles) and that I am confident that the Marbles will return. I think what matters is that the Marbles should return to Greece permanently, all of them, and that Greece won't have to part with other treasures in exchange. Fine if it's a temporary exchange, not fine if it is *ad infinitum* or if other treasures are given as a 'collateral'. It is best not to rush, than to obtain a bad deal.

When it comes to the question of legal recourse, legal recourse is possible – this does not mean that it is also desirable at this moment. Greece could encourage the initiation of advisory proceedings before the International Court of Justice. It has broad support within the UN for the repatriation of the Parthenon Marbles and would likely be able to convince the United Nations General Assembly or the UN Security Council to ask for an advisory opinion. Similarly, UNESCO, as a specialized agency of the United Nations, could be authorized to request an advisory opinion on the topic. While an advisory opinion could not 'order' the United Kingdom to repatriate the Marbles, if the Court stated that it is of the opinion that the Marbles should be repatriated, its opinion would be very 'persuasive'.

That said, any legal recourse comes with risks. For this reason, I think that negotiations are for now the best way forward, because the international legal landscape is changing; as I mentioned, customary international law is evolving. Negotiations are likely to succeed in the near future. I hope

that, when they do, the UK Government passes an act of parliament to formally transfer the Marbles to Greece.

The debate over the Parthenon Marbles is highly interdisciplinary, involving archaeologists, classicists, art historians, museum curators, sociologists, and politicians alike. How does legal argumentation relate to this broader scheme?

It is evidence of the importance of the debate that it is of interest to all these different disciplines. Experts across different fields tend to focus on distinct aspects of the case, presenting different arguments. So far, the debate about the Parthenon Marbles has not truly taken into account the legal arguments. There has been a certain fatalism, an assumption that Greece cannot win the legal argument, because of the passage of time, among other reasons. This is not true, since there is no prescription in international law and objections such as acquiescence, estoppel, or waiver would not succeed – the conditions for their invocation are not fulfilled.

One of the non-legal arguments in favor of repatriation that I consider to be very important is the argument used by archaeologists and classicists focusing on the unity of an ancient monument, the need for all the surviving pieces to be brought together and joined. It is not, as the British Museum claims, that there is ‘a positive advantage and public benefit’ in dividing the Marbles between two museums. There could never be such an advantage. Quatremère de Quincy said it more than two centuries ago: ‘To divide is to destroy.’ The Parthenon is like a huge jigsaw puzzle. Many pieces are missing. It cannot be made whole but its surviving pieces, including fragments of individual statues that have been torn apart, can be brought together. They have a narrative to tell. Separated, they mean little.

While the debate is fascinating, it has also often been used to distract from the real issues in dispute. Law is in many ways simpler: are the marbles lawfully possessed by the British Museum and can they be retained on the basis of international law? If they are lawfully possessed, then it is not necessary for the British Museum to claim that the Parthenon is better off divided in two, half seen in the context of Athenian history and half alongside Egyptian mummies and other contested cultural heritage. But no one can display in one’s home an object belonging to someone else with the argument that half of it should be admired in the context of world history rather than against the backdrop of its own history in the purpose-built new Acropolis Museum in Athens under the shadow of the Parthenon.

Finally, what would be your advice to a student who wishes to pursue a career in international law?

International law is a fascinating field both for academia and practice. One of the reasons for this is that one is not limited to their own national jurisdiction. International law opens up doors in different countries, international organizations, but also other institutions across the globe, and it gives a lot of flexibility. While there are differences between steps towards

becoming an academic and a practitioner, it is generally good for both to aim for academic excellence. I would say, if you are interested in international law, study for a masters degree and then find a topic that is of particular interest to you and do a PhD, become *the* expert on that topic. Publish in English, join an international law society, and get involved in its activities, respond to calls for papers, and attend conferences. Present your work. Publish, and then publish some more. Talk with like-minded people. Consider doing an internship at an international organization. Of course, practice is less academically-intensive, but even there publications count, a PhD counts. The field is competitive, so don’t abandon efforts easily. Good luck!