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Restitution and return of cultural property between negotiation and restorative justice: time to bridge the river

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Abstract

There is a need for dialogue between two perspectives – the negotiated settlement of legal disputes and the use of restorative justice programmes in post-conflict situations – with respect to the recovery of cultural objects displaced in times of war and/or colonial occupation. Although the application of such perspectives led to the recovery of disputed cultural objects, this has mostly been achieved unwittingly. However, the resolution of restitution claims would benefit from a conscious exchange between experts and practitioners of the two approaches. We will summarise cultural property displacement in its practical complexities, briefly discussing problems related to both 'historical' depredations and the current trafficking in cultural objects, with a focus on the current trend towards increased use of criminal law. However, this is a tool that is mostly ineffective in providing a solution for the most heartfelt questions arising from breaking an object's links to its cultural roots. After carrying out an overview of international conventions currently addressing these issues, discussing why these legal instruments oft cannot actually heal the wounds caused by depredations of cultural property, we will illustrate the need for an approach more focused on the 'human' meaning of questions of restitution of objects that are so much more than 'things'.

Keywords: Cultural heritage law, looted cultural objects, return restitution and repatriation, alternative dispute resolution, restorative justice.

1 Introduction

Conflicts and disputes over the preservation, ownership and circulation of elements of the world's cultural heritage are receiving increasing attention from both media and public opinion: the international outcry over the destruction of Palmyra by IS, the amount of attention paid by newspapers to the government-commissioned

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report on the restitution of African cultural heritage currently in French public collections (Sarr & Savoy, 2018) and its (extremely slow) implementation,[1] or the success of the Bern, Bonn, Berlin and Jerusalem exhibitions of and about Hildebrand Gurlitt's cache of artworks and their shady, Nazi-tainted history,[2] are just a few examples of this trend. Current social and political movements, such as Black Lives Matter or the growing public outcry over Canada's long-lived residential school system for First Nations children, are also contributing to draw public attention on previously 'niche' topics, like the questionable acquisition of cultural objects in former colonies and settler states and the ethic standing of many of the major western museums' collections (Hickley, 2020; Shariatmadari, 2019), the need for thorough provenance research not only on new acquisitions, but also, retrospectively, on past ones, the possible restitution of (morally, if not always legally) tainted items and, in general, a rethinking of the broader philosophy of collecting and exhibiting (Ciliberti, Fulcheri, Petralia & Siri, 2020; Hicks, 2020; Murphy, 2016).

From the perspective of law professionals and scholars, one of the 'thorniest' issues is that of the return, restitution or repatriation[3] of cultural objects[4] unlawfully taken from their communities of origin and/or legitimate owners (Herman, 2021). Claims to this effect are growing ever more numerous and are the result of episodes as different as common thefts, clandestine archaeological excavations, illegal export and smuggling of artworks and antiquities, wartime looting and colonial appropriation, and – for reasons that we are going to summarise – they pose a set of complex legal and evidentiary problems that, in turn, make the recourse to tribunals quite often either impossible or ineffective. This explains why,

1 The *Loi relatif à la restitution de biens culturels à la République du Bénin et à la République du Sénégal* was only approved on 17 December 2020 and concerns the restitution of only 27 specific cultural objects. The 'case by case' approach to restitution eventually adopted by the French government and parliament has been widely criticised: see e.g. Harris (2022).

2 *Gurlitt: status report "degenerate art" – confiscated and sold*, Kunstmuseum Bern, 2 November 2017 – 4 March 2018; *Gurlitt: status report part 2: Nazi art theft and its consequences*, Bundeskuntshalle, Bonn, 2 November 2017 – 4 March 2018, Kunstmuseum Bern, 19 April 2018 – 15 July 2018; *Gurlitt: status report. An art dealer in Nazi Germany*, Gropius Bau, Berlin, 14 September 2018 – 7 January 2019; *Fateful choices: art from the Gurlitt trove*, The Israel Museum, Jerusalem, 24 September 2019 – 24 January 2020.

3 The term 'restitution' is used mostly, in legal texts and by scholars, to refer to the giving back of cultural objects unlawfully appropriated, as in the case of theft, pillage and seizing contrary to the laws of war; the term 'return' is usually applied to cultural objects exported contrary to the laws of the state of origin, and to those that left the country under colonial occupation; 'repatriation', instead, refers mostly to cultural objects given back by a central authority to local (possibly indigenous) communities, or to cases implying previous non-belligerent occupation and/or the falling apart of multinational states; finally, 'restoration' is considered the most generic term, encompassing all the previous ones as well as more ambivalent situations (Forrest, 2010; Renold, 2013), and will be used in this meaning here.

4 We will use the term 'cultural object(s)' in preference to other expressions such as 'cultural heritage' or 'cultural property', as, on the one hand, we are focusing on movable items, and, on the other, it better reflects the extremely broad scope of materials of cultural relevance (which include not only artworks, antiquities and other collectibles, but also, e.g., human remains or objects of ethnological interest), while at the same time being neutral about issues of ownership. For a summary of the terminological debate, see e.g. Blake (2015); Forrest (2010); Frigo (2004); Prott & O'Keefe (1992).

in recent decades, the use of alternative dispute resolution techniques has known a great increase (Chechi, 2014; Cornu & Renold, 2010; Renold, 2013, 2020) – paradoxically, at the same time when the international community (as we will see) started relying more and more on criminalisation of offences against cultural heritage.

This article, as well as two related articles (Chechi, 2022; Mazzucato, forthcoming), originates from the realisation that successful negotiations for the restoration of cultural items almost invariably imply an element of creativity (Renold, 2013) and complexity (Cornu & Renold, 2010), as well as specific attention to the parties' satisfaction, including by giving consideration to ethical and moral principles relevant to them (Renold, 2020). This approach, by empowering the involved parties in managing their dispute, and by giving space to their narratives (Braithwaite, 2003; Zehr, 2002), relates, albeit (till now) unwittingly, to a somewhat 'restorative' approach to the terms of the dispute, i.e. the availability to focus more, or at least as much, on the *meaning* of the disputed object for the parties and on what actually *matters* to them, than on the technical terms of the underlying legal questions (Chechi, 2022). On the other hand, we also realised that restorative justice-oriented approaches developed (in particular) in the context of transitional justice (Aertsen, Arsovska, Rohne, Valiñas & Vanspauwen, 2008; Clamp & Doak, 2012), notwithstanding the present lack of direct application to conflicts over cultural items, have the potential to prove *especially* meaningful in such cases (Mazzucato, forthcoming), given the peculiar features of the disputed objects. Therefore, starting with a seminar organised in Milan in 2019,[5] and following with this set of three articles, our purpose is to bring together experts of both fields and introduce a conversation that, we hope, will in time ease the resolution of disputes over cultural objects, while also contributing to the understanding of a highly *symbolic* element of deep social and historical conflicts, which, once included in the scope of broader restorative justice initiatives and programmes, might in turn ease possible paths of reconciliation.

The present article will introduce the reader to an overview of the main features of the art and antiquities market that, even today, enable a quiet coexistence, in galleries, collections and museums, of fully licit and variously 'tainted' cultural objects (Section 2). The specificities of cultural property trafficking will be briefly addressed in order to discuss how and why the focus of national and international lawmakers is presently shifting more and more towards punishment and, more broadly, a criminal law mindset (Section 3). At the same time, the existing system of interrelated international treaties has proven unable to offer a satisfactory solution to historical claims and a viable path to heal the deep wounds caused by depredations of cultural items (Section 4). Finally (Section 5), we will try and introduce the reader to the possibility of infusing a new impetus and exploring new

5 *Alternative dispute resolution e restituzione di beni culturali: prospettiva negoziale e riparativa in dialogo*, Università Cattolica del Sacro Cuore, Milan, 10 July 2019. A further step in this ongoing discussion was the dialogue on 'Restoring Culture: Return and Restitution of Cultural Property' during the EFRJ's virtual symposium *Restorative Justice over Distance*, 21-25 June 2021.

ways forward in the debate over restitution and repatriation by way of embracing a more 'narrative' perspective, infused with an explicit restorative justice approach.

2 The displacement of cultural objects, past and present

Even if trafficking in cultural property is currently a flourishing criminal phenomenon (Alder & Polk, 2007; Blake, 2015; Lane, Bromley, Hicks & Mahoney, 2008; Mackenzie, 2005; Mackenzie, Brodie, Yates & Tsirogiannis, 2020) and therefore the application of alternative dispute resolution techniques and of a restorative justice approach could be of help also in some 'modern' cases of contested objects, we will focus on 'historical' depredations, i.e. the confiscation, pillage or forced sale (or gift) of artworks and antiquities that occurred during times of armed conflicts and/or military occupation and – more specifically – during times of colonial domination (Chechi, 2022), as these cases are rooted in deeper and broader conflicts and, as such, appear to be the most in need of restorative justice awareness (Mazzucato, forthcoming).[6] Nonetheless, the topic appears strictly intertwined with the current structure of the art and antiquities market, which enables the concealment of the illicit (or, at the very least, questionable) origin of cultural objects resulting from said historical episodes, as much as of items coming from recent, and more 'ordinary', crimes (theft, clandestine excavation, illegal export).

The market for movable cultural property is considered a 'grey' one (Bowman, 2008; Mackenzie, 2005; Mackenzie & Yates, 2016), meaning that the trade in art and antiquities is per se licit (contrary to 'black' markets, where prohibited items – such as drugs, weapons, human beings, etc. – are traded contrary to the law), but at the same time it is flooded with objects of unlawful origin (having been stolen, illegally excavated, exported against a legal prohibition, etc.). This peculiar mingling of licit and illicit objects within the same (legal) trade channels (Tijhuis, 2011) is made possible by certain specific features of the cultural property market itself.

A first relevant feature is a quite specific market culture (Conklin, 1994; Mackenzie, 2005; Massy, 2008). Art and antiquity dealers traditionally uphold privacy as a primary value: confidentiality about all parties involved in a deal, as well as about the terms of the deal itself, of the consignment of the object, etc., is deeply ingrained in a practice that was developed when the market for cultural objects was mostly a place for elite buyers (knowledgeable, refined and, of course, rich collectors and professional gallerists and merchants), and does persist also in current times of inexpert customers and financial speculation over art (Adams,

6 Strictly related, but even more complex, are issues of repatriation of human remains, often acquired against the will of local or indigenous communities (or even against the explicit dissent of the interested individual, such as in the case of the 'Irish Giant', Charles Byrne), as part of broader colonial policies of domination and suppression of native populations' identities, and collected as 'scientific' specimens in many western ethnographic or anatomical museums, as such cases involve spiritual, religious and philosophical beliefs, as well as personal and community relationships and specific ethical questions. As it is not possible to give here a full overview of the issue and of its specificities, the reader may refer, among others, to Batt (2021); Ciliberti, Fulcheri, Petralia & Siri (2020); Cornu (2009); Herman (2021); Kuprecht (2014); Murphy (2016).

2017). This culture of secrecy (Mackenzie, 2011; Renfrew, 1999) has contributed to bringing the art market under suspicions of being a friendly place for white-collar and organised criminals wishing to launder criminal proceedings (Adams, 2017; Hardy, 2019, 2020; van Duyne, Louwe & Soundijn, 2015) and, even more, it makes extremely difficult any thorough research on the (lawful or, instead, unlawful) origin of traded items (Mackenzie, 2005; Mackenzie et al., 2020; Ulph & Smith, 2012).

Actually, provenance research has only recently become a possible issue of professional due diligence (Ulph, 2019) in a market that is traditionally fraught with neutralisations and characterised by a no-questions policy about the origins of cultural objects (Mackenzie, 2005; Mackenzie & Yates, 2016). Also very common is a tendency to 'risk-shifting' (Mackenzie, 2011) when it comes to suspicious items (meaning that the merchant will evaluate the risk that the offered object may have an unlawful origin and, based on the assessed risk of being stuck, and possibly caught, with a tainted item, will either buy it – if the risk is considered low – or refuse it – if the risk is considered too high – but will usually *not* consider reporting the suspicious object and/or checking it with the competent authorities). As such, strict object due diligence cannot yet be considered standard practice for the majority of market operators (Mackenzie et al., 2020), and even museums' acquisition policies do not always appear satisfactory under this respect (Gerstenblith, 2019; Mackenzie, 2011).

This 'greyness' of the market is eased by a further structural, as well as historical, feature. Many cultural objects with a fully licit origin, in fact, were acquired in times when no particular care was paid to collecting and/or keeping good provenance documentation[7] and, as such, they may be eventually recirculated with scant accompanying information (Bowman, 2008; Brodie, 2002). Even more, the market is structurally flooded with objects that, albeit of unlawful origin, have become 'legalised' through time, passages of ownership and transit through different countries (with their different legal frameworks), by way of a set of 'locks' that allow their smooth transition from illegality to legality (Tijhuis, 2011), e.g. acquisitive prescription and/or statutes of limitations, purchase by a good faith possessor in a civil law country, etc. (Mackenzie, 2005). Similar to said 'grey' objects are those which were acquired in a questionable way (e.g. as war booty, or as forced donations by colonised populations) prior to the establishment of specific legal prohibitions (either in the form of international treaties or of customary rules). All these cultural objects are traded while lacking – or presenting very scant, fragmentary and hardly accessible – provenance information (Bowman, 2008; Brodie, 2002; Mackenzie, 2005).

In a market where, therefore, the standard for provenance documentation is structurally and customarily low, to conceal newly stolen, looted or illegally

7 The majority of states that assert automatic public ownership for any archaeological finding within their territory only introduced such provisions in the nineteenth or twentieth century; compliance with possible export regulations is considered an issue only from 1972 onwards, i.e. the year when the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property entered into force, even if several states had restrictive rules in place even before that date.

exported items proves extremely easy, as their lack of adequate information will be no different from what is typical also of 'legitimate' cultural objects. Thus, the fruits of historical depredations, whose legal status and current ownership have often become settled (a fact which, as we will see, makes restoration through judicial proceedings basically impossible), nonetheless greatly contribute to muddying the waters in the art and antiquities market, to the benefit of modern traffickers in cultural property (Bowman, 2008; Brodie, 2002; Mackenzie, 2005; Mackenzie & Yates, 2016; Ulph & Smith, 2012).

This intrinsic 'greyness' of the market also contributes to the huge dark figure that is one of the main features of the criminality against cultural heritage (Alder, Chappell & Polk, 2009; Balcells, 2019; Brodie, Doole & Watson, 2000; Calvani, 2009; Durney & Proulx, 2011; Hardy, 2020; Mackenzie & Yates, 2016; Manacorda, 2011; Polk & Chappell, 2019) and that makes official crime statistics (when available)[8] totally unreliable in providing an adequate picture of the scope of the phenomenon. Other structural factors feeding this dark figure include the fact that archaeological looting is oft directed at unrecorded sites (and, anyway, clandestinely excavated objects are, by definition, unknown to authorities and therefore uninventoried), or the fact that, as we are going to discuss, times of armed conflict and/or of social and political unrest favour at the same time the multiplication and the concealment of thefts, pillage, smuggling, etc.

Nonetheless, illicit trafficking in cultural property is mostly considered a worrisome criminal phenomenon, both in terms of the number of affected objects and their economic value, as well as the damage caused to cultural heritage globally (Brodie et al., 2000; Calvani, 2009; May, 2017; Polk & Chappell, 2019; Ulph & Smith, 2012; see also Sargent et al., 2020);[9] it is a phenomenon, besides, mostly characterised by a structural transnational, as well as organised, dimension (Alder & Polk, 2002; Calvani, 2009; Campbell, 2013; Dietzler, 2013; Hardy, 2019; Lane et al., 2008; Mackenzie et al., 2020; Polk & Chappell, 2019; Proulx 2011).[10] These are all features that help explain the rising concern among law enforcement agencies and international organisations, and the current push towards a broader, and more uniform, criminalisation of offences against cultural heritage.

8 Many countries do not record (reported) cultural heritage crimes, as such, but instead file them under corresponding 'common' crime entries.

9 To achieve an approximate but reliable estimate of the actual scope of international trafficking in cultural property, scholars have developed a set of research strategies: see e.g. Brodie, Dietzler and Mackenzie (2013).

10 As clearly illustrated by Dietzler (2013), the organised nature of the trafficking – which involves multiple actors, playing different roles (thieves, diggers, smugglers, enablers, receivers, etc.) in different countries, as well as some form of criminal networking – does not necessarily imply the involvement of organised criminal groups in the stricter, mafia-like, meaning (even if it may occur on occasions). Nonetheless, many of these organised activities do match the definition of 'organised criminal group' set in Art. 2(a) of the UN Convention against organised transnational crime, whose application to these offences is promoted by United Nations Office on Drugs and Crime (UNODC) and other international organisations (Borgstede, 2014).

3 Armed conflicts, cultural property trafficking and the push towards criminalisation

Monuments, artworks and other cultural objects possess a complex, multifaceted and ever-evolving social meaning (Forrest, 2010; Loulanski, 2006), which may include (and variously see prevailing in people's consideration) an aesthetic value, and/or an historical (and more broadly informational) one, but also an economic value, as well as further values related to national and/or community identity, tradition, religious and/or spiritual beliefs, etc. This latter, basically intangible, hard-to-define, but mostly 'human' feature of 'culturality' is what gives these objects their special social significance (Chechi, 2014, 2022; Forrest, 2010; Loulanski, 2006; Munjeri, 2004), and, together with the annexed features of comparative scarcity, status-defining power, social desirability and market value, also contributes to feeding an ongoing relevant illegal trafficking (Mackenzie 2011; Mackenzie et al., 2020). All of this also explains why cultural objects have traditionally been, on the one hand, prized war spoils and, on the other, the target of intentional destruction in times of conflict, especially whenever one of the belligerent parties aims at the moral and/or cultural annihilation of the enemy (Brosché, Legnér, Kreutz & Ijla, 2017; Frigerio, 2019; Frulli, 2020; O'Keefe, 2006; Rossi, 2017).

It was therefore only natural that the first branch of international law to address issues related to the protection of cultural heritage would be humanitarian law. The idea that artworks, manuscripts, books and other culturally relevant items should not be considered legitimate war booty and, in the case they are nonetheless seized, should be given back at the end of the hostilities, made its first appearance in peace treaties in the seventeenth and eighteenth centuries (O'Keefe, 2006; Prott, 2008; Scovazzi, 2009). It also achieved theoretical support in the works of Enlightenment intellectuals such as Antoine Chrysostome Quatremère de Quincy (1815, first published in 1796) and a first broader application after the end of the Napoleonic Wars (O'Keefe, 2006; Prott, 2008; Scovazzi, 2009), eventually finding its way into the first 'codification' of *jus in bello*, i.e. the 1899 and 1907 Hague Conventions concerning the laws and customs of war on land (Forrest, 2010; O'Keefe, 2006; Scovazzi, 2009; Toman, 1996). Besides specifically prohibiting the pillage of any 'property of … institutions dedicated to religion, charity and education, the arts and sciences' (Art. 56), these treaties also forbade any 'destruction or wilful damage' to said property (Art. 56) and required belligerent parties to conduct hostilities so as to 'spare, as far possible' monuments, religious buildings, museums, etc. (Art. 27).

As the two World Wars, with their extensive destruction of monuments and looting of artworks, provided ample evidence of the lack of effectiveness of these international provisions (Forrest, 2010; Keane, 2004; O'Keefe, 2006; Toman, 1996), the newly constituted United Nations Educational, Scientific and Cultural Organization (UNESCO) strived for promoting a stronger treaty protection for the cultural heritage of humankind. A new convention for the protection of cultural property in the event of armed conflict (Forrest, 2010; O'Keefe, 2006; Toman, 1996) came into force in 1956 and rapidly achieved an appreciable number of

ratifications (albeit not by major military powers). However, the widespread loss and pillage of cultural heritage sites that occurred in the 1980s and 1990s, during the Iran-Iraq War, the Balkan Wars and the First Gulf War, prompted once again a critical re-evaluation of the available treaties (Keane, 2004)[11] and, for the first time, a more determined option for criminal punishment of war crimes against cultural heritage (Carstens, 2020; Manacorda, 2011; Maugeri 2008; Visconti, 2021). This new trend was manifested both in the framing of the 1999 Second Protocol to the 1954 Hague Convention (whose Art. 15, listing the acts to be mandatorily made into criminal offences by state parties, specifically covers intentional attacks, destruction and appropriation of protected cultural property, as well as use of said property in support of military action and acts of theft, pillage, misappropriation or vandalism against it),[12] and with the inclusion, within the 1998 Statute of the International Criminal Court (Art. 8, §§ 2.b.ix and 2.e.iv), of a specific war crime of intentional attack against cultural property (Forrest, 2010; Hall, 2018; Keane, 2004; O'Keefe, 2006).

This push towards a broader use of criminal sanctions in the suppression of behaviours harmful to cultural heritage was not, however, confined to international humanitarian law (Boister, 2018; Mackenzie 2009; Manacorda, 2011; Nafziger, 1985; Visconti, 2015, 2021). In 1985 the Council of Europe adopted a convention on offences relating to cultural property (never entered into force for want of the minimum number of ratifications), and in 1990 the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property (which, however, was never developed into an actual convention opened to signature). A relevant input to these efforts was given by a rising international awareness about the scope and harmfulness of the global trafficking in cultural property, but growing concerns over the possible involvement of organised criminal groups in said traffic were also a major contributing factor (it is worth recalling that in 2000 the efforts to negotiate a UN convention against transnational organised crime – UNTOC – came to fruition, and that this treaty rapidly achieved numerous ratifications, given the status of major criminal problem eventually attributed to organised crime since the 1990s: Blake, 2020; Boister, 2018; Schloenhardt, 2015).[13]

11 Meanwhile, some specific provisions for the protection of cultural heritage against damage and destruction during international and non-international armed conflicts were also added to the law of Geneva, namely with Art. 53 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), of 8 June 1977, and with Art. 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), of the same date (Forrest, 2010; Keane, 2004; O'Keefe, 2006; Toman, 1996).

12 According to Art. 21, other offences, including the 'illicit export, other removal or transfer of ownership of cultural property from occupied territory', shall be sanctioned by state parties, which, however, are free to choose between 'such legislative, administrative or disciplinary measures as may be necessary' (see also Boister, 2018; Manacorda, 2011; Visconti, 2021).

13 A few years later, the possibility to add a specific protocol against trafficking in cultural property to UNTOC was also considered but was abandoned once it became clear that negotiations would be too difficult and the possibility to achieve an agreement too small: Manacorda (2011).

At the turn of the century, not only did these concerns increase, but a new worry arose: that of cultural property trafficking being used as a source to finance terrorist groups and armed militias (Campbell, 2013; Hardy, 2020; Hausler, 2018, 2020; Schindler & Gautier, 2019; Visconti, 2021),[14] building further pressure towards a broader use of criminalisation.

Even if hard evidence about the actual scope of the involvement of (mafia-like) organised criminal groups or terrorist organisations is hard to gather and at present lawmakers have mostly to rely on estimates and assumptions (Campbell, 2013; Polk & Chappell, 2019; Proulx, 2011; Sargent et al., 2020; UN Security Council, 2017; van Duyne et al., 2015),[15] several elements appear to justify these concerns, and have provided ground for the adoption of further international initiatives. Amongst these elements is the awareness of the submerged nature of these crimes (Hardy, 2020), coupled with the increasing number of circulating objects coming from countries ravaged by war such as Afghanistan, Iraq or Syria, as well as of recorded episodes of looting in these same areas (Sargent et al., 2020; Schindler & Gautier, 2019). Recent studies also provided convincing evidence of the involvement of individuals connected to terrorist groups in the trading online of these same objects (Al-Azm, Paul & Graham, 2019). The aforementioned initiatives range from the 2017 UN Security Council Resolution 2347 (requiring member states to prohibit and prevent international trade in cultural items under suspicion of having originated from contexts of armed conflict) to the new Regulation EU 2019/880 (introducing a system of controls over cultural property being imported within the European Union from third countries) and, moreover, the new Council of Europe Convention on offences relating to cultural property, adopted in Nicosia in 2017. The latter (Bieczyński, 2017; Boister, 2018; Fincham, 2019; Mottese, 2018), differently from its 1985 predecessor, has just entered into force, on 1 April 2022, proving the increasing trust placed by the international community in the use of criminal law provisions to address the many problems raised by the illicit trade in cultural objects.

Even if penal and suppression treaties include provisions for the seizure, confiscation and restitution of proceeds of crime, including stolen or illegally exported cultural items (Arts. 14 and 19 of the 2017 CoE Convention; Arts. 77 and 93 of the ICC Statute), they are nonetheless destined to be fundamentally ill-suited to provide actual restoration for most of the more 'intangible', but at the same time heartfelt, wounds resulting from the loss of cultural objects (Mazzucato, forthcoming), especially when rooted in deeper and larger political, religious or ethnic conflicts. In addition to the many technical problems their implementation shares with other international tools (problems we are going to summarise in the next paragraph), they face issues typically related to any option for a purely punitive

14 See also UN Security Council Resolution S/RES/1267 (1999) (specifically referred to the Afghan conflict); UN Security Council Resolution S/RES/2195 (2014) (on terrorism in Africa); UN Security Council Resolution S/RES/2199 (2015); UN Security Council Resolution S/RES/2322 (2016); UN Security Council Resolution S/RES/2347 (2017) (on the destruction of cultural heritage armed conflict); Council of Europe Convention on Offences relating to Cultural Property, Nicosia, 19 May 2017, Preamble.

15 See however note 10.

model of justice (Braithwaite, 2005; Mazzucato, 2017; Umbreit & Armour, 2011; Zehr, 1985, 2002), even more when applied to 'transitional' scenarios, where it appears unable to live up to victims' (and citizens') expectations (Nickson & Braithwaite, 2013). Criminal trials are complex and costly, not only in terms of money but also in terms of human resources capable of building a case capable of holding in court; thus, very few offenders, in proportion to the number and seriousness of purported crimes, can ever be actually prosecuted (and even less convicted): for instance, the International Criminal Court addressed its first case of a war crime against cultural property only in 2015.[16]

In criminal proceedings, besides, the focus is necessarily limited to past actions, which are understood in terms of law violations rather than violations of human and 'cultural' relationships, as well as of guilt and blame (passive responsibility), rather than accountability and commitment (active responsibility: Braithwaite, 2006). Thus, the accused will obviously privilege a defensive strategy that makes harder to achieve a shared truth and a sense of closure for victimised individuals and communities; even in case an admission of guilt and apologies were to be offered – as happened in the Al Mahdi ICC trial[17] – they will usually be put down to a self-serving interest to get a milder sentence, and they will mostly feel disproportionate to the collective harm, as well as to the broader political and cultural implications (Frulli, 2020; Lenzerini, 2020; Rossi, 2017), of these kinds of offences.

It is true that international humanitarian law (Moffett, Rose & Hickey, 2020; Vrdoljak, 2020), including the ICC Statute, also allows for rehabilitation measures (such as restoration of damaged and destroyed buildings or commitments to preserve and develop the cultural heritage of the affected group) and symbolic reparations (such as apologies, memorials, commemorations or forgiveness ceremonies), considered 'particularly appropriate to repair harm caused to a community'.[18] But the usual terms of reparation under national criminal jurisdictions will be either restitution of the cultural property (which, however, will be impossible in many cases, not only of wilful destruction, but also of theft or pillage, as looted objects tend to rapidly change hands and will possibly resurface after decades, if at all), or monetary compensation (often incommensurable with the intangible and deepest meanings of the damaged or lost cultural objects).

16 The case concerned the intentional attack (and destruction) of ten historic and religious monuments in Timbuktu, Mali, between June and July 2012, co-perpetrated by Ahmad Al Faqi Al Mahdi, a member of the occupying Ansar Dine forces. Cf. *The Prosecutor v. Ahmad Al Faqi Al Mahdi* 2016 ICC-01/12-01/15-171 (judgment and sentence). A second proceeding including (among others) an indictment under Art. 8.2.e.iv was opened in 2019 (*The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* 2019 ICC-01/12-01/18-461, confirmation of charges and commitment to trial) and is currently (30 August 2022) still ongoing.

17 *The Prosecutor v. Ahmad Al Faqi Al Mahdi* 2016.

18 *The Prosecutor v. Ahmad Al Faqi Al Mahdi* 2017 ICC-01/12-01/15-236, reparations order. Cf. also Novic, 2020.

4 A network of treaties, a tangle of technicalities

Prior to the recent commitment to criminalisation, the international community has long focused on non-penal approaches to, on the one hand, stemming the tide of trafficking and, on the other, easing the restoration of stolen, looted and illegally exported cultural objects (Manacorda, 2011). Besides the mentioned developments in international humanitarian law, this aim was pursued through the adoption of two further treaties, meant to work in a complementary way (Forrest, 2010; Prott, 1996; Veres, 2014), even if their adoption was fraught with difficulties and required as a whole more than thirty years.

The first step was the adoption in 1970, after long and difficult negotiations, of the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (Blake, 2015; Forrest, 2010; O'Keefe, 2007; Stamatoudi, 2011). A public law convention, which entered into force in 1972 and only very slowly achieved ratification by primary market states[19] (e.g. USA in 1983; UK and Japan in 2002; Switzerland in 2003; UAE in 2017), it focuses on minimum common standards of regulation of, and control over, international circulation of cultural objects, placing the heaviest burden on source countries and only marginally addressing issues of return and restitution. These are, in fact, to be dealt with either through ordinary legal actions already provided by local jurisdictions (i.e. without any obligation to make changes to national laws), or through diplomatic channels (Arts. 7.b.ii and 13.c). Even if the latter have yielded a number of satisfactory outcomes over the decades (Clement, 1994; Stamatoudi, 2011), they nonetheless represent a complex, oft politically fraught and usually time-consuming mechanism (Blake, 2015; Forrest, 2010; O'Keefe, 2007).

Actually, problems in dealing with issues (of cooperation, ownership, compensation, etc.) related to restoration of cultural objects had already emerged in the negotiation of the 1954 Hague Convention – so much so that such issues were eventually only partly addressed, and anyway confined to a separate and optional first Protocol (Forrest, 2010; O'Keefe, 2004; O'Keefe 2006) that several states parties to the Convention did not ratify – due not only to the ever existing gap between the interests and positions of source and market countries, respectively, but also to additional conflicts between different principles regulating transfer of ownership of movable (cultural) objects under different legal systems (Blake, 2015; Forrest, 2010).

A further private law treaty was therefore required. Its drafting was entrusted to the International Institute for the Unification of Private Law (UNIDROIT), and finalised in 1995 with the adoption of the convention on stolen or illegally exported cultural objects, which entered into force in 1998 (Blake, 2015; Forrest, 2010;

19 'Market nations' are considered those that are net importers of cultural objects (market states in a strict meaning), or anyway as strong importers as they are exporters, being international hubs of the trade and, oft, friendly jurisdictions in the process of 'laundering' tainted items ('transit countries'), while 'source nations' are understood as countries that are rich in cultural objects and prevalently net (and mostly unwilling) exporters of such. See also Blake (2015); Forrest (2010); Mackenzie (2005); Mackenzie, Brodie, Yates and Tsirogiannis (2020).

Prott, 1997; Stamatoudi, 2011). Even more than the first Hague Protocol, this treaty had a hard time collecting ratifications, quite harder than its public law counterpart (in fact, it currently has only 54 parties, against the 141 of the 1970 UNESCO Convention). Many states are unwilling to access a convention that clearly privileges restitution/return over the rights of current possessors (who, provided they performed due diligence checks while acquiring the cultural object, have the right to receive fair compensation, but will not usually be able to retain the item: Arts. 3.1, 4, 5 and 6). This treaty also provides private and state claimants with direct access to national courts (see also Lalive, 2009; Prott, 2009).

There are, in fact, a set of problems – legal as well as practical – affecting the ability to recover stolen, looted or illegally exported cultural objects through the application of existing international conventions. Firstly, treaties are, of course, only binding on states that ratified them (hence the weakness of the 1995 UNIDROIT Convention), and their application is anyway limited by non-retroactivity rules (Chechi, 2022; Forrest, 2010; O'Keefe, 2007; Prott, 1997; Stamatoudi, 2011). With the sole exception of thefts and pillages that occurred during armed conflicts, for which some customary rules, as such applicable to all belligerent parties (and even neutral states), are mostly considered pre-existing current treaty law (Francioni, 2020; Forrest, 2010; Kowalski, 2009; O'Keefe, 2006), this means that 'historical' depredations, as defined previously, will fall outside the scope of application of international law currently in force. In fact, the Intergovernmental Committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation (ICPRCP) was created in 1978[20] with the specific purpose of addressing questions of restitution or return of cultural objects displaced either due to foreign or colonial occupation or due to illicit trafficking that occurred before the entry into force (for the concerned countries) of the 1970 UNESCO Convention: a task to be pursued by facilitating *ad hoc* negotiations and agreements between states, also by way of conciliation or mediation procedures (Chechi, 2014, 2022; Cornu & Renold, 2010; Prott, 2008; Renold, 2020; Stamatoudi, 2011).

Even when dealing with more recent episodes, however, other problems frequently present themselves (Blake, 2015; Chechi, 2014, 2022; Forrest, 2010; Müller-Katzenburg, 2000; Redmond-Cooper, 1999, 2000; Renold, 2009). They relate, on the one hand, to persisting conflicts of laws and differing applicable rules under national jurisdictions,[21] with all related practical problems (in terms of length and costliness of litigations) faced by claimants forced to address very complex trans-border legal questions. On the other hand, given the long interval (years or, more frequently, decades) between the disappearance of a cultural object and the moment when a claim for its recovery can be brought forth, problems of expiring time limitations[22] and/or intervening acquisitive prescription will often

20 Resolution 20 C4/7.6/5, UNESCO General Conference, 20th Session, Paris, 24 October – 28 November 1978, UNESDOC 20 C/Resolutions + CORR.

21 Even in case they are all parties to the same treaties (with the sole exception of the 1995 UNIDROIT Convention, establishing minimum shared rules for restitution and return claims of an international character): Chechi (2014); Forrest (2010).

22 Even the UNIDROIT Convention provides for a system of time limitations (see Arts. 3 and 5.5).

prevent a success in court, alone or coupled with problems related to missing or lost evidence (about original ownership, actual terms of the contested transfer, possible intervening acquisition by a good faith purchaser, etc.). Besides, when considering tribal cultural objects, further issues may arise with respect to the indigenous community's legal capability to act in court and/or to receive the object (Blake, 2015; Chechi, 2014; Cornu & Renold, 2010; Forrest, 2010; Kuprecht, 2014), which are bound to condemn these claims to failure whenever the group does not benefit from their host state's active support (and even more when the claim is directed against the state itself or anyway a national institution).

Any judicial procedure will also imply further critical issues that are typical of court litigation (Chechi, 2014, 2022), e.g. rigidity of procedural rules (including rules about admissible evidence), limitation of possible outcomes to the exact terms of the claim and of applicable law (and consequently a strict win-lose scenario), problems in having a decision enforced in a different national jurisdiction, publicity of proceedings and consequent lack of confidentiality, and oft also lack of specialised competences by judges. All the problems briefly summarised in this paragraph are enough to explain the ever-growing drive towards alternative approaches to dispute resolution in this field (Chechi, 2014, 2022). But if we also take into account the further layers of social, political and emotional complexity related, in particular, to claims rooted in past conflicts and/or colonial domination (Chechi, 2022), alternative dispute resolution alone will not suffice either, as deeper issues of *justice* are at stake, which require a properly restorative justice approach in order to be adequately addressed (Mazzucato, 2017; Mazzucato, forthcoming).

5 Rethinking the terms of the problem from a 'narrative' perspective: bringing negotiation and restorative justice together

Cultural objects are more than just 'things': their meaning vastly supersedes their aesthetic, informational and economic value; they are, first and foremost, *stories* incarnated, 'testimonies' of a given 'civilisation'[23] (and often of its complex relationships with other civilisations) and, as such, they partake of that intrinsic *narrative* quality that is proper of *human* nature (Cattaneo, 2011) and inextricably related to human *dignity*, which in turn demands respect and mutual recognition (Sennett, 2003). Not only do cultural objects embody a complex path through time and space, from their origin to their current consideration, use and location, but, even more, they dynamically express countless ever-evolving symbolic meanings, with their myriad ever-evolving intersections and cross-fertilisations, that were, are and will be attributed to them by individuals and communities (Loulanski, 2006).

This is why 'to openly speak of restitutions is to speak of *justice*, of a re-balancing, of *recognition*, of restoration and *reparation*, but above all: it's a way to open a path

23 This is also currently the core of the definition of 'cultural property' according to Italian law (legislative decree n. 42 of 22 January 2004, Art. 2.2).

toward establishing *new cultural relationships* based on a reconsidered ethical relation'. This implies, in turn, that 'questions emerging from the idea of restitution are … far from limited to purely legal issues of legitimate ownership. They are just as much political, symbolic, philosophical and *relational* in nature. Restitutions open up a profound reflection on history, memory, and the colonial past' (Sarr & Savoy, 2018: 25, italics added).

To *acknowledge* and *respect* this complex relational and symbolic meaning of claims for restitution – to respect the more intimate 'truth', the unique story and multifaceted human significance, of each cultural object – is therefore, as with any issue of recognition and respect due to the strictly related values of *human* specificity and *human* dignity (Honneth, 1992), to *acknowledge* and *respect* the need for individualised, complex, dialogical solutions: that is, basically, to take a restorative justice approach to each and every dispute over 'problematic' cultural objects.

The experience of alternative dispute resolution applied to claims for the restoration of cultural objects, albeit not immune from its own shortcomings (Chechi, 2020), has already successfully developed a set of creative and flexible solutions, shifting the focus from legalistic issues of ownership to more practical, and emotionally significant, issues of (past, present and future) *relationships* between the parties and the disputed object (e.g. on issues of accessibility, of meaningfulness, of acknowledgement of the past, etc.; see Chechi, 2014, 2022; Cornu & Renold, 2010; Renold, 2020). One good example[24] is the agreement achieved in 2006 between the Swiss Cantons of Saint-Gall and Zurich in their long and bitter dispute over a set of cultural objects displaced during the religious wars of the early eighteenth century (Bandle, Contel & Renold, 2012). Setting aside their legal arguments, the parties, thanks to the mediation provided by the confederation, were able to shift the focus of the negotiation on their mutual – tangible and intangible – interests. Thus, the final settlement included the acknowledgement by Zurich (in turn recognised by Saint-Gall as the legal owner of the items) of the importance of the objects for Saint-Gall's history and cultural identity, a free of charge long-term loan of a number of said objects to Saint-Gall, and the production and donation to Saint-Gall of a perfect replica of a unique cosmographic globe.

A proper restorative *awareness* could enrich this pragmatic and creative approach (Mazzucato, forthcoming) with the conscious and deliberate application of principles and values (Braithwaite, 2002a, 2003, 2006; Umbreit & Armour, 2011; Zehr, 2002) established in decades of theoretical development and practical experience in dealing with deeply felt issues of *justice* attached to the traumatic breaking of human relationships brought forth by interindividual, as well as collective, conflicts (criminal offences, war crimes and crimes against humanity). Standards that include, firstly, non-domination, which implies equal concern for all stakeholders, specific attention to minimising power imbalances between the involved parties, and an equally specific care for the empowerment of all participants, i.e. recognition of their shared humanity (beyond their present

24 See Chechi (2022), for further cases.

conflict) and the possibility, for all people concerned, to have their voices and histories respectfully listened to and considered. An appeal to accountability and, therefore, to *active* responsibility in finding a fair and agreed upon solution, and in implementing it in good faith. A focus on restoring not only the *past* (through restitution, compensation, symbolic reparations, etc.) but also the *future* (by building civic commitment, providing support to the development of new cultural relationships, preventing future injustice – including, e.g., unethical acquisitions – etc.).

Restorative justice is deeply rooted in an ideal of deliberative democracy (Braithwaite, 2002b, 2006) that appears ideally suited to upholding the communal, collective and intergenerational value of cultural heritage and cultural objects and that will not only work in favour of *procedural fairness* of any dispute resolution process in this field but that will also ease a more *nuanced*, dialogical and 'tailored' approach while addressing each specific case and seeking a *shared* and *just* substantive solution to the questions it poses.

A danger that appears very strong in the present and ever-growing political polarisation of the debate over return and restitution is, in fact, that of fomenting two opposite, but equally ideological and oversimplifying, standings.

On the one hand, the 'old' (and market-supportive) idea of a 'cultural internationalism' (Merryman, 1986) appears alive and kicking, being one of the top arguments instrumentally used to dismiss any request for change in the traditional, imperialistic architecture of 'universal museums' (Lewis, 2006; Zakaria, 2018) and, in general, to justify a persisting western dominance over the collection, exhibition and (more broadly) theorisation of cultural heritage and cultural expression (Chechi, 2022; Forrest, 2010; Kuprecht, 2014; Vrdoljak, 2006). This trend appears in stark contrast to the ongoing progressive shift, in the debate about cultural heritage and its protection, from a 'property' framework to a (truly internationalist) 'human rights' framework (Alderman, 2011; Donders, 2020), which conceives the preservation and accessibility of cultural heritage as an integral part of fundamental human cultural rights.

On the other hand, albeit acknowledging that restitution will usually be the fairest and most satisfactory form of reparation of past colonial wrongs (Chechi, 2022), it is worth noticing that a pretence (also, we believe, contrary to said human rights framework) has started surfacing, in public discourse, of pursuing 'total restitution'. This discourse appeals to a certain exasperated (and politically expedient) 'cultural nationalism' (Merryman, 1986) and, moreover, it focuses on the *purely material* act of relocating objects, at the expense of any real attention for possible complex intercultural relationships developed by these same objects through their 'travels' in time and space or even, 'genetically', thanks to fecund hybridisations of cultures (Sarr & Savoy, 2018), and possibly also at the expense of truly meaningful and respectful forms of restitution. A pretence that may as well also appeal to a certain 'demand for purity' typical of western societies (Nussbaum, 2004) which, already conducive to racist and discriminatory policies, may today appear well-suited also to appeasing our bad conscience and eagerness to sweep past wrongs under the convenient rug of an oversimplified purge of museums' collections (still long in coming, it must be said), instead of engaging in the long,

painful and complicated work of addressing these same historical wounds, their long-lasting consequences, and our own active responsibility in their healing.

6 (In lieu of a) conclusion

Any oversimplification of complex issues of restoration of cultural objects, whatever its beneficiaries and intended outcomes, is, at its core, an oversimplification of the very *cultural* meaning of the contested items and, as such, of their *human* significance and of the equally profoundly human, as well as inextricable, net of painful relationships that still entangles former dominators and the formerly dominated. A knot that cannot be simply (and as such *violently*) rescinded – either by denials of overdue restitutions or by simply giving back material objects without an accompanying profound discussion of underlying historical wounds. It needs instead to be slowly, carefully and painstakingly re-elaborated into a new *bond* – unless we wish to remain trapped in a dangerous circle of collective trauma re-enactment (van der Merwe & Gobodo-Madikizela, 2008).

Even taking into consideration the many difficulties (Clamp, 2016) in applying a restorative justice approach to settings characterised by large-scale violence and human rights abuse, like colonial domination and related episodes of cultural property depredations and 'cultural genocide' (Luck, 2018), the narrative and exemplary force of restorative justice (Mazzucato, 2017) appears capable of offering a valuable antidote to the perils just outlined.

In working *with* people *for* people, in giving voice to people's *stories*, in pursuing an ideal *coherence* between fairness of procedure and fairness of outcomes, in upholding values of *active responsibility* and *accountability*, of democratic participation and 'republican' universalism (Braithwaite, 2002b; Braithwaite & Parker, 1999; Braithwaite & Pettit, 1990; Pettit & Braithwaite, 2000), the deepest *human* and *relational* meaning of disputed cultural objects can be brought to the fore and become the real focus of negotiations and deliberations. Taking such a conscious restorative approach to the restitution of cultural objects can prompt a first step in a more complex and longer – and as such certainly more difficult, but also, potentially, more beneficial in the long run – path towards a broader reconciliation and a better cultural understanding between groups and peoples who are, at present, still painfully divided by deep historical, social and cultural hurts (Chechi, 2022; Mazzucato, forthcoming).

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