‘A LONG ROAD HOME’


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I first met Lyndel Prott, editor of this remarkable reader on the return of cultural heritage objects, at Marlborough House in London in January 1986, at a meeting of senior law officials to discuss the formulation of a Commonwealth Scheme for the Protection of the Cultural Heritage. My own country, New Zealand, had a particular interest in this topic. It had just lost in the House of Lords a landmark case in which it had attempted to recover the carved doors of a Maori treasure house – unearthed in a swamp in New Zealand; illegally exported; sold to the Swiss collector George Ortiz and ultimately put up for auction at Sotheby’s.¹ New Zealand’s experience was not, alas, unique. Many other countries had lost and continued to lose, much of their cultural heritage, and the existing mechanisms of the law often proved ill-adapted or powerless to secure return. Dr Prott (with her husband and academic collaborator, Dr Patrick O’Keefe) had been retained to draft the Scheme. Her lawyerly but nevertheless passionate commitment to changing both law and attitudes was an inspiration, even if the then British opposition clouded and delayed the adoption of the Scheme.²

Reading this Compendium, I am struck by the intransigence and at times downright hostility which the subject of the return of cultural objects can arouse on both sides of the debate. The ownership and location of the objects of culture can become contested ground in every sense – historical, cultural, legal and moral. But also one cannot fail to be encouraged by the positive change in law, attitudes and actual results which the efforts of Lyndel and many others have achieved in the quarter-century since 1986.

² As the editor notes at p. 416, a Commonwealth Scheme was finally adopted in 1993, but Britain stated that it would not be able to apply it. With effect from 1 Nov. 2002, however, the UK adopted the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 823 UNTS 231 (‘the UNESCO Convention’); UK adoption: 2195 UNTS 443.

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This book does not claim to be a treatise or a commentary on the law in this field. The reader can consult many other excellent works for this purpose. On the contrary, this book has the much broader aim of providing multi-disciplinary insight into the different issues raised by the return of cultural heritage objects. It was produced to mark the 30th anniversary of the establishment of the intergovernmental committee within UNESCO specifically charged with work in this field. It collects and publishes in English a selection of both primary documents and secondary writings on the return of cultural heritage objects from every corner of the globe and from many different view-points. Whether read as a whole, or dipped into, this is a remarkably catholic collection from a cosmopolitan set of distinguished and experienced contributors.

The readings are organised under five parts: (1) history; (2) philosophy and ethics; (3) repatriation in different contexts (war, colonialism, dismembered items, sacred objects, indigenous knowledge, human remains and archives); (4) legal issues and (5) procedures.

For this reader at least, one of the most thought-provoking attributes of the collection is the way in which it juxtaposes commentary from a range of disciplines with actual case-studies of return (often meticulously compiled by the editor from a range of primary sources). Since many claims for return are resolved outside the courts, these accounts of the process of negotiation and delivery help to capture a much broader picture of the growing restitution of cultural objects and its significance. Thus, for example, the account of the return of a Ghost Dance shirt, originally worn by a Native American warrior massacred at Wounded Knee from Kelvingrove Museum in Glasgow to the Lakota Sioux carries a resonance for the case for return that is difficult to convey through expressions of general principle alone. There are many such case studies throughout the book and they make fascinating reading. Many are accompanied by photographs of the objects or of their return – a very valuable pictorial element one might wish had been even more generously used throughout the book.

Some of the most moving accounts in this regard relate to the return of human remains, as to which there are reports relating to return to Africa, Patagonia, Australia and New Zealand. The book records the controversy aroused in France at the decision of the City of Rouen to return to New

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4 Pages 235-241.
Zealand, at the request of Te Papa the National Museum of New Zealand, a toi moko or preserved tattooed head. Securing the return of toi moko has been an important programme of Te Papa, not for purposes of display, but rather because, in the words of the Minister of Maori Affairs: “Maori believe that, through their ancestors’ return to their original homeland, their dignity is restored, and they can be put to rest in peace among their families.” It is therefore encouraging to be able to report that, since the publication of the book, the French Parliament has passed new legislation specifically confirming that Maori heads in French museums cease to be part of their collections so as to facilitate their return to New Zealand.

Important though these specific instances are, one turns to the readings on ethics, law and procedure in order to begin to disentangle the issues of principle so as to formulate the proper response to each of them. Here, the order adopted by the book is intuitively logical. Without agreement on the ethics of return – the principles underpinning the law – we cannot proceed to frame legal solutions. So, too, the editor was surely correct to place readings on the law before procedure. It is the rules of law – and especially established concepts of the transfer of property and limitations on the extraterritorial application of the public law of states in Private International Law – which have the capacity to constrain the return of cultural objects. By contrast, the reform of the law through international co-operation can become an engine of positive change. But the extensive accounts in Part 5 of requests for return which have been resolved by negotiation show that recourse to litigation need not be the sole solution. The law should, if operating properly, provide a framework within which negotiation can take place. But in some instances, such as the return to their original owners of artworks looted by the Nazis, it may well be that changes in the ethical climate alone can effect much greater change than the law.

Nevertheless, as Dr Prott’s illuminating overview reminds the reader, the history of the development of processes for the recovery of cultural heritage objects is, at least in its major milestones, an international legal history. Surveying that history, at least three rather different strands – each embodying their own separate ethical foundations – may be detected: the return of the cultural property as a principle of the law of war; the suppression of contemporary transnational trafficking in cultural heritage objects; and the return of historically collected items from public museums.

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5 Pages 290-294
6 Dr Pita Sharples New Zealand Herald 5 May 2010.
7 Article 1, Loi visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections (No 2010-50, 18 May 2010), J.O. No. 114, 19 May 2010.
8 See pages 152-162
9 Pages 2-18
The genesis of modern Public International Law as a whole is intimately bound up with the development of _jus in bello_ – international humanitarian law. One of the central concerns of the law of war since its inception has been the need to secure cultural property on the battlefield or in occupied territory from destruction or displacement. But, if the pun may be forgiven, antiquity does not guarantee preservation. Indeed, the twin anchor-stones of legal protection in this field, The Hague Convention 1954 and especially its two protocols, have had a grudging reception from many States in the international community, despite near universal accession to their sister Geneva Conventions. The mischief which these instruments were designed to combat remains, regrettably, as pressing as ever. Looting from the Iraq National Museum in 2003 prompted the UN Security Council itself to make its first foray into this field to impose on Member States a mandatory obligation of return. Perhaps it was this renewed experience of the perils of war for cultural heritage that prompted a number of States which have not previously ratified the Hague Convention to consider doing so.\(^{10}\)

However, it is in the second field of contemporary trafficking in cultural property, exemplified by the facts of the _Ortiz_ case, that the most radical legal developments have taken place. The scale of the problem is not to be underestimated. Folarin Shyllon of Nigeria recounts in his article\(^ {11}\) recent examples from Africa, including the looting of terracotta Djenne statuettes from the Niger valley in Mali and the theft of bronze and terracotta figures (valued at US$250 million) from the Ife Museum in Nigeria. Here, the framework treaty, the 1970 UNESCO Convention, whilst widely ratified, has an open-textured character, which admitted widely divergent application in Member States.

Thus, the preparation by UNIDROIT (at UNESCO’s request) of the Convention on Stolen or Illegally Exported Cultural Objects 1995 ranks as a major achievement in laying a solid legal foundation to combat what Pierre Lalive, the distinguished Swiss international lawyer describes in his essay in this Compendium as “[t]his scourge, this continuing scandal, which has assumed unprecedented economic, political and cultural proportions”.\(^ {12}\) Two decades after _Ortiz_, New Zealand was able in 2006 to ratify the UNIDROIT

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10 Japan became a Party to both the Convention and the Protocols with effect from 10 Dec. 2007. The United States of America became a Party to the Convention (but not the Protocols) with effect from 13 March 2009. The United Kingdom has also introduced a Bill before Parliament to enable it to accede to both the Convention and the two Protocols: Cultural Property (Armed Conflicts) Bill 2008. New Zealand became a Party to the Convention with effect from 24 Oct. 2008 and has introduced draft legislation to Parliament to permit it to accede in addition to the two Protocols: Cultural Property (Protection in Armed Conflict) Bill 2008.

11 Pages 369-382.

12 Page 322.
Convention, becoming the first Common Law country to incorporate both the UNESCO and UNIDROIT Conventions together into a single legislative scheme. As Shyllon points out in his essay, it is particularly important that African States, as well as other States that continue to suffer from this form of ‘cultural genocide’, become Parties to these Conventions.

Even outside the treaty framework, it is apparent that there has been a sea-change in judicial attitudes. The reader need only contrast Ortiz with the judgment of the English Court of Appeal some twenty years later in Iran v. Barakat Galleries Ltd to gain the measure of this. The Court there rejected the expansive reading of the rule prohibiting the enforcement of foreign public laws preferred obiter by Lord Denning in Ortiz. It held that Iran could pursue a proprietary patrimonial claim for the return of antiquities unearthed and illegally exported from Iran. It could do so on the basis that Iranian law vested title to such objects in the State. This could be given effect in England, even though the Government had not reduced the objects into its possession in Iran.

Those engaged in the development of new legal techniques for the control of the contemporary illicit trade in cultural heritage objects have been able to make progress in part by constantly emphasising the non-retroactive nature of the reforms. To put it in lay terms, this was about curbs on trafficking and not another forum in which to pursue the debate the return of the Elgin Marbles from the British Museum to Greece.

Once one steps back in time in addressing the third strand, the return of historically acquired objects from public museums, the ground becomes much more deeply contested and it is less easy to see comprehensive solutions. The book devotes considerable column inches to this moral debate before discussing particular cases. Indeed, much of Part 2 is concerned with the ethics of restitution versus the claim to universality advanced in particular by major museums. This Part opens with the transcript of a forum on ‘Museums, Memory and Universality’ hosted by UNESCO in 2007. This brought together representatives of source countries with curators of those major universal museums which have begun to articulate a common position on their importance and value.

For this reader, the most thought-provoking contributions to this debate are

13 Protected Objects Amendment Act 2006 amending s. 10 of the principal Act and adding new ss. 10A-10F; the author served as consultant to the New Zealand Ministry for Culture and Heritage on accession to these Conventions.
14 At page 381.
16 A debate which is summarised in a careful editor’s note with bibliography at pp. 214-216.
17 Pages 116-118.
the extracted portions from books by Elazar Barkan\textsuperscript{18} and Anthony Appiah.\textsuperscript{19} They each try in very different ways to confront directly the moral and cultural forces which lie behind, but which are so often obscured by, the public and political debate on return.

But is restitution necessarily the implacable enemy of cosmopolitanism? The extract from Appiah concludes with the observation that cosmopolitanism “starts with what is human in humanity”. This includes both “the urge to bring these objects ‘home’” and also the human connection “not through identity but despite difference”.\textsuperscript{20} Sometimes the impulse to bring home may provoke a reciprocal cosmopolitan response. It seemed more than a coincidence that, on the very day this review was being completed, it should be announced that the return of a shrunken Maori head from the Museum Volkenkunde in Leiden to New Zealand had led to a Dutch project to commission the carving of a new Maori \textit{waka taua} (war canoe) to be based at the Volkenkunde as a flagship for promoting an understanding of Maori culture in Europe.\textsuperscript{21}

Of course, such a cultural exchange could easily be decried at both ends of the spectrum in the doctrinal debate as inadequate to address the underlying philosophical and policy choices which have to be made. Ultimately only international agreement, underpinned by international law, could secure any more far-reaching attempt to deal with the transfers of the past. But, for the moment, it may be that individual experiences of negotiated co-operation, which disaggregate the ethics of particular types of cases (as the editor has carefully done in Part 3) may produce more understanding and concrete results than the elusive search for more general doctrinal agreement in this most contested third strand of the return of cultural heritage objects.

The enduring virtue of this rich volume is that it does something which is rare in this often polarised field. It makes one question one’s own preconceptions and think about what is really at stake for humanity and for human culture in the long road home.

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\textsuperscript{18} \textit{The Guilt of Nations: Restitution and Negotiating Historical Injustices}, pp. 78-94.

\textsuperscript{19} \textit{Cosmopolitanism: Ethics in a World of Strangers}, pp. 95-109.

\textsuperscript{20} Page 109