1. Introduction

The decision to return cultural materials raises not only legal, but also complex ethical and historical questions. These questions are based on the increasing understanding for the need to “remedy historical injustices”. Although not strictly a legal basis for a claim, ethical and historical considerations are essential in dealing with claims for the return or restitution of cultural materials. Recent developments in international cultural heritage law have shown that the return of cultural materials is often undertaken based on non-legal considerations, namely political commitment and diplomatic efforts, as well as the moral acknowledgment of claims by the returning party. As will be demonstrated, moral and historical considerations decisively influence international practices and thereby shape international law. It will be argued that the objective of taking ethical and historical considerations into account within the context of restitution and return might even facilitate restitution outcomes which are more appropriate to the parties’ interests and more result-oriented in practical terms than the mere application of legal instruments.

International legal instruments providing the restitution and return of cultural materials have emerged primarily over the last sixty years and, as preset in international law, do not operate retroactively – such as, for example, in the case of the 1954 Hague
Convention, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention. However, most historical events that have given rise to current restitution claims occurred before the promulgation of such measures. Consequently, enforceable legal action is often not an option – resulting in an unsatisfying outcome both legally and ethically. It is this concurrence of circumstances that has led to a situation whereby ethical and historical considerations merge and which requires the law to consider “remedying historical injustice”. This is particularly applicable in cases in which the removal of a particular cultural object might have been considered as legal at the time of its appropriation, but now fails to comply with present human rights standards such as those that are classified as internationally wrongful acts, including war of aggression and genocide. Therefore, the question of removal and return of cultural materials is placed squarely within the context of the international community’s effort to provide legal protection of cultural heritage and human rights, while also requiring outcomes in restitution matters that are both legally and ethically satisfying. Whereas several restitution claims pertaining to Nazi-looted art have been resolved in recent years, other cases relating to looted cultural objects – during the Armenian massacres, for example – have surfaced only recently. Moreover, other aspects – such as the steady demand of the international art and antiquity market, the general role of public museums and private collectors, as well as the continuing illicit trafficking in archeological artifacts – have become part of the wider restitution debate.

2. A Historical Overview: Rationales for Returning Cultural Materials

Throughout history, cultural materials have not only been the subject of trade, commerce and exchange, but also subject to destruction, theft and plunder. Although the looting of cultural materials was already condemned as early as in the Classical Age,