1. Introduction: The Waurá Indians Collection between Brazil and Switzerland

Cultural heritage is extremely vulnerable. The situations that cause concern and give rise to disputes are diverse and traditionally summed up in two groups. The first relates to the consequences of war and acts of violence. The second group encompasses the disputes arising out of the loss of cultural objects as a result of theft and illicit trade. In addition, one can identify a third group of worrying situations. These relate to cases where the special status of cultural heritage is not recognized. Cultural objects cannot be equated to marketable commodities, because they are the outcome of human creativity and express some form of symbolic meaning distinct from the commercial value that they may possess.

These characteristics are illustrated by the dispute over the collection of Vera Penteado Coelho, a Brazilian ethnologist who assembled a collection representing the material culture of the Waurá Indians, a group settled in the Mato Grosso region, in Brazil. When Penteado Coelho died in 2000, she left instructions in her will that the collection be handed down to the Museum der Kulturen in Basel. Immediately, representatives of the Waurá Indians protested against the exportation of the collection. Likewise, the Museu de Arqueologia e Etnologia at the University of São Paulo claimed the collection because the deceased ethnologist had been employed there and her research had been partly financed by public funds. The Museum der Kulturen did not ignore such remonstration. After a close examination of the facts and lengthy negotiations, the Swiss Museum agreed to donate the collection to the Museu de Arqueologia e Etnologia of São Paulo. This solution helped to prevent the inevitable problems deriving from the fact that part of the collection could not be exported pursuant to Brazilian legislation. The donation
contract between the two museums was finalized in 2003. Representatives of the Waurá Indians and of the Cultural Office of the Department of Presidential Affairs for the Canton of Basel-Stadt also participated in the definition of the terms of the contract of donation. Under its terms a fruitful tripartite cooperation was established. First, the Museum der Kulturen avoided reputational harm that might have erupted had it ignored the claims from the Indians. It also engaged in a partnership with its Brazilian counterpart involving future exhibitions and research projects. Second, the Museu de Arqueologia e Etnologia fulfilled the twofold museological mission to ensure the display of artworks for public enjoyment, education, and research, and to preserve the integrity and unity of a collection from the danger of dispersion. Third, the two museums ensured the protection of the integrity of the collection and of the Waurá Indians’ emotional attachment to it.¹

Two major lessons can be learned from this non-classical restitution case. First, whatever the legal issues involved, it is often the particular nature of cultural heritage that lies at the heart of disputes.² Second, cooperation among States and other stakeholders is essential to resolve actual or potential restitution claims concerning cultural assets. The present chapter will thoroughly discuss both aspects in order to: (i) bring to light the “human dimension” of cultural heritage (Sections 2-3); (ii) discuss whether international courts and domestic tribunals take into consideration such a dimension when dealing with restitution cases (Sections 4-5); and (iii) define the role of cooperation within the realm of cultural heritage (Sections 6-7). The final section (Section 8) will offer some conclusive remarks.

Not all the questions related to the problem of the settlement of cultural heritage disputes can be addressed in the space of one book chapter. Therefore, this chapter will only focus on the issue of the return, restitution and repatriation³ of cultural objects that have been either stolen, illegally confiscated, illegally exported from the country of origin, or otherwise wrongfully expropriated. It will not concentrate on intangible heritage and cultural rights. This paper will dwell on the methods of dispute resolution alternative to classical judicial means (such as arbitration and mediation) only tangentially.

³ For the narrow purposes of this chapter, I will use the terms “restitution”, “return”, and “repatriation” interchangeably. See, however, the categorization proposed by W.W. Kowalski, “Types of Claims for Recovery of Lost Cultural Property”, Museum, no. 228, vol. 57, issue 4 (2005), p. 85.