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Beneventan Missal – Metropolitan Chapter of the Cathedral City of Benevento and British Library

*Metropolitan Chapter of the Cathedral City of Benevento – British Library –
Artwork/œuvre d'art – Spoils of war/butins de guerre – Conciliation – Institutional
facilitator/facilitateur institutionnel – UK Spoliation Advisory Panel – Deaccession
– Due diligence – Statute of limitation/prescription – Unconditional
restitution/restitution sans condition*

*On 11 November 2010, a 12th Century manuscript, also known as the “Beneventan
Missal”, was returned to the Metropolitan Chapter of the Cathedral City of
Benevento, in Italy. The Missal disappeared in 1943 when the city was occupied by
the Allied forces during World War II. It was bought by a British soldier from a
second-hand bookshop in Naples in 1944, acquired at auction by the British
Museum in 1947 and finally transferred to the British Library in 1973.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted
Solution; V. Comment; VI. Sources.*

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I. Chronology

Spoils of war

- **1939:** The “**Beneventan Missal**” was part of the collection of the **library of the Metropolitan Chapter of the Cathedral City of Benevento** (the “Chapter Library”). This manuscript is made of 290 folios, some of which contain the musical notations of Beneventan chant, written in the 12th century at the Scriptorium of the Monastery of Santa Sophia at Benevento, a city situated some 60 km from Naples.
- **13 September 1943:** The **Chapter Library was damaged by the Allied bombings** and the books were evacuated to an adjoining papal seminary.¹
- **1940:** A reference to the Missal was made in a book on the history of the Chapter Library. However, it is possible that the author did not verify whether the ancient manuscript was actually in the library.²
- **September 1943 – October 1943:** The seminary was seized by the Allies.
- **October 1946:** **Captain D.G. Ash brought the Beneventan Missal to the British Museum** and asked for an expert opinion. He stated that he had purchased it from a second-hand bookseller in Naples in **April 1944**.
- **13 November 1946:** After having examined the Missal, Mr. Collins, the deputy keeper of manuscripts of the British Museum responded to Captain Ash, expressing his **suspicion** that the manuscript was **looted**.
- **24 June 1947:** The Missal was put for **auction** at Sotheby’s and **sold** for 420£ to Bernard Quaritch, acting as an intermediary for the **British Museum**.³
- **1948:** The Chapter Library discovered the Beneventan Missal’s disappearance.
- **1952:** For the first time, the British Museum publicly announced its acquisition of the Beneventan Missal in the *British Museum Quarterly*.⁴
- **1 July 1973:** The Missal was transferred to the **British Library**.
- **1976:** Professor **Virginia Brown**, the leading authority in Beneventan script, informed the Chapter Library that the Missal was located in the **British Library**.⁵
- **7 April 1978:** The Archbishop of Benevento asked the Library to **return the Missal**.⁶
- **1979:** The Director General of the Library **refused to return the manuscript**.⁷
- **November 2002:** The Chapter Library brought the case of the Beneventan Missal before the **United Kingdom Spoliation Advisory Panel**.⁸

¹ Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript Now in the Possession of the British Library (2005), paras. 5, 9.

² *Ibid.*, paras. 10, 41-49.

³ *Ibid.*, paras. 7, 9.

⁴ Tullio Scovazzi, “The Return of the Benev. VI 29 Missal to the Chapter Library of Benevento from the British Library,” *Art Antiquity and Law* (2011): 2.

⁵ Report of the Spoliation Advisory Panel (2005), paras. 3, 23.

⁶ Scovazzi, “The Return of the Benev. VI 29 Missal,” 3.

⁷ Jeremy Scott, “War and Cultural Heritage: Return of a Beneventan Missal,” *Art Antiquity and Law* (2005): 300.

⁸ Scovazzi, “The Return of the Benev. VI 29 Missal,” 4.

- **23 March 2005:** The **Panel recommended** the Secretary of State to amend the existing legislation in order allow for the **restitution of the Missal**. It also recommended that the Missal should return to Benevento on loan.⁹ The latter recommendation failed.
- **12 November 2009:** The *Holocaust (Return of Cultural Objects) Act 2009* was adopted by the Parliament of the United Kingdom. Following the adoption of this Act, **the Chapter Library renewed its claim** to the Spoliation Advisory Panel for the return of the Missal.¹⁰
- **25 September 2010:** The **Panel recommended the return of the Missal** to the Chapter Library.¹¹ The Panel’s ruling was endorsed by the UK Government and accepted by the British Library.
- **9-10 November 2010:** The **Beneventan Missal was handed** to Jeremy Scott, the *pro bono* lawyer representing the **Chapter Library**. An official ceremony was held to celebrate the return of the manuscript to the Archbishop of Benevento.¹²

II. Dispute Resolution Process

Conciliation – Institutional facilitator (UK Spoliation Advisory Panel)

- The Chapter Library discovered that the Beneventan Missal was missing in 1948 but it was only in 1976 that the manuscript was located in the British Library. In 1978, the Chapter asked the British Library to return the manuscript but without success. Consequently, in 2002, they brought a claim to the UK Spoliation Advisory Panel. The Chapter Library turned to the Panel because they would not have won a judicial case. Indeed, under the applicable statutes of limitations, “the British Library’s legal title to the missal [was] [...] impregnable”.¹³
- The Spoliation Advisory Panel was set up on 17 February 2000 by the British Government following the UK commitment to the Principles on Nazi-Confiscated Art adopted at the Washington Conference on Holocaust-Era Assets of 1998 (“Washington Principles”). The mandate of the Panel is to consider claims from anyone who lost possession of a cultural object during the Nazi era, where such object is now in the possession of a UK national collection or a UK museum or gallery established for the public benefit (Art. 3 of the Panel Terms of Reference). The Panel exercises only advisory functions; its recommendations are not binding on any of the parties, including the government; it is charged with evaluating a claim based on both legal grounds and moral issues (Art. 5 and 6 of the Panel Terms of Reference). It may recommend various alternative solutions in favour of the claimant, namely the return of the object, the payment of compensation, and an *ex gratia* payment (Art. 16 of the Panel Terms of Reference).

⁹ Report of the Spoliation Advisory Panel (2005), paras. 3, 78.

¹⁰ Scovazzi, “The Return of the Benev. VI 29 Missal,” 6.

¹¹ Report of the Spoliation Advisory Panel in Respect of a Renewed Claim by the Metropolitan Chapter of Benevento for the Return of the *Beneventan Missal* Now in the Possession of the British Library (2010), para. 8.

¹² Bailey, “The Benevento Missal Returns Home”: L. 15; Scovazzi, “The Return of the Benev. VI 29 Missal,” 6.

¹³ Report of the Spoliation Advisory Panel (2005), para. 3.

III. Legal Issues

Deaccession – Due diligence – Statute of limitation

- The first issue of this case before the Spoliation Advisory Panel concerns the scope of jurisdiction of this body. Article 3 of its Terms of Reference states that its task is to consider claims from anyone who lost possession of a cultural artwork during the Nazi era (1933-1945). As the Panel came to the conclusion that “the missal was spoliated between the time of the bombing in 1943 and its acquisition by Captain Ash in 1944”, the case fell within its jurisdiction.¹⁴ However, the case of the Beneventan Missal has no direct connection with the Nazis: the manuscript did not belong to Jews and there is no evidence that it was looted by German armed forces. Nevertheless, it fell within the jurisdiction of the Panel because its scope of action is solely defined through a period of time.
- The second issue relates to the limitation period. According to English law (the Limitation Act of 1980), title over objects is prescribed six years after the loss. According to the British Library, this limitation period began in June 1947 (when they acquired the book) and expired in June 1953. Therefore, the British Library had no legal obligation to relinquish the manuscript.¹⁵ However, for this limitation period to apply, the defendant in a conversion action must be of good faith. In this respect, the Chapter Library challenged the British Museum’s good faith. It relied on the letter of the deputy keeper of 13 November 1946, which demonstrated that the Museum decided to purchase the manuscript even if it knew that it was looted.¹⁶ Moreover, Captain Ash approaching the British Museum to have an expert opinion about the book was not usual.¹⁷ British Museum responded that the public auctioning of the object was a guaranty of its clean origin. Moreover, the British Library refused to return the Beneventan Missal in 1978 also on the grounds of Section 3(5) of the British Library Act of 1972 and Section 5 of the British Museum Act of 1963, alleging that they precluded the deaccession and alienation of objects such as the Missal.¹⁸
- The Panel was not convinced by the British Museum. First, the Panel affirmed “the possibility that the missal had been looted was so manifest that its provenance should have been further investigated”.¹⁹ Second, the Panel considered that the “terms of the Sotheby’s catalogue [were not] sufficient justifiably to allay the previous harboured suspicion as to the missal’s provenance, judged by the standards of a reasonable Head of Department in a national collection”.

¹⁴ Report of the Spoliation Advisory Panel (2005), para. 52.

¹⁵ *Ibid.*, para. 65.2.

¹⁶ *Ibid.*, paras. 67.1-67.4.

¹⁷ *Ibid.*, paras. 68.1-68-7.

¹⁸ Bailey, “Benevento Cathedral Claims Missal in British Library”: L. 20.

¹⁹ *Ibid.*, para. 69-2.

- Following its Terms of Reference,²⁰ and guided by the Inter-Allied Declaration of 1943 and the Washington Principles, the Panel recommended to the UK Government to amend the legislation to allow the restitution of objects lost during the 1933-1945 period.²¹
- The British Parliament adopted the Holocaust (Return of Cultural Objects) Act in 2009. This provides that seventeen different cultural institutions, including the British Library Board, may transfer an object from their collections if the Panel has recommended its transfer and the UK Government has approved it. However, the claims must relate to events that occurred between 1 January 1933 and 31 December 1945. The Act will expire ten years after it was passed (12 November 2019). On this new legal basis, the British Library was able to return the Missal.²²

IV. Adopted Solution

Unconditional restitution

- On 15 September 2010, the Spoliation Advisory Panel recommended the return of the Missal to Benevento. The Panel's ruling was endorsed by the UK Government and accepted by the British Library.
- The British Library Board had tried to impose some conditions on the return: the recognition of "its curatorial concern for the highest standards of stewardship and for accessibility for research" and an acknowledgement "of the British Library's loss".²³ However, the Panel denied these requests.²⁴

V. Comment

- It is quite surprising that the Holocaust (Return of Cultural Objects) Act of 2009 has been applied for the first time to permit the return of an object that has no direct connection with the Holocaust. This showed the British Government's willingness to allow the return of objects that disappeared during the Second World War by setting aside the evidentiary burden that claimants are expected to fulfil in traditional theft cases.
- Because of the applicable statute of limitation, the claimants in this case probably could not have won a judicial case. However, the Spoliation Advisory Panel, being an extra-judicial

²⁰ Paragraph 9 of its Terms of Reference empowers the Panel to "direct the attention of the Secretary of State to the need for legislation to alter the powers and duties of any institution".

²¹ Report of the Spoliation Advisory Panel (2005), para. 77.

²² The British Library has also recently announced that it will return a wooden panel (the Biccherna Panel) to a Munich gallery based on the Report of the Spoliation Advisory Panel in Respect of a Painted Wooden Tablet, the Biccherna Panel, Now in the Possession of the British Library (12 June 2014). In its report, the Panel refers to the 2009 Act to support its recommendation (para. 33).

²³ Report of the Spoliation Advisory Panel (2010), para. 6.

²⁴ *Ibid.*, para. 7.

- forum, was able to recommend the return of the Missal. It did so by recognizing the moral side of the claim and making it prevailing over the legal side.
- Several other cases handled by the Panel had similar characteristics that the holding institution possessed a valid title and the claimant had a strong moral claim.²⁵ For example, we can cite the “Griffier” case. In this case, the heir of a Jewish couple laid a claim for a Jan Griffier the Elder’s painting which had been part of the Tate Gallery’s collection since 1961. The Panel first accepted that the Jewish family had lost the painting because of a forced sale. Then, it moved to examine the legal grounds for the claim and found that under the Limitation Acts of 1939, the claimant’s title was extinguished and therefore the Tate’s title was unassailable. Nevertheless, the Panel turned to the moral side of the claim and declared itself “persuaded of the moral strength of the case” because the Jewish family’s situation at the time of the sale would fall under the scope of the 1943 London Declaration. Therefore it decided to uphold the case and to grant an *ex-gratia* payment even if it did not identify any grounds for criticising the conduct of the Tate in this matter.²⁶
 - It is important to underline that the strength of the moral claim has lead the Panel to grant the return of contested objects or financial compensation even if it found that the holding institution’s attitude could not be criticized. This is demonstrated in the “Griffier” case, but also by the “Chardin” case.²⁷ As Katja Lubina puts it, “[p]resumably, the criticism of a holding institution on moral grounds would matter in cases where the Panel would decide between compensation to be borne by the museum itself and an *ex gratia* award paid by the Government”.²⁸
 - As Tullio Scovazzi wrote, “the story of the Benev. VI 29 missal is another instance of the present evolutionary trend towards the return of cultural properties to the countries of origin. Moral principles that dictate the return are being progressively transformed into legal rules”.²⁹ This trend seems also to be encouraged by new, alternative dispute resolution modes which allow a higher flexibility to the operators compared to traditional justice. Alongside the UK Spoliation Advisory Panel, other countries have set alternative frameworks to support Nazi-looted art claims. For example, the German Government has established the “Advisory Commission on the return of cultural property seized as a result of Nazi persecution” in 2003, France has created the “Commission for the Compensation of Victims of Spoliation resulting from the anti-Semitic legislation in force during the Occupation” (*Commission pour l’indemnisation des victimes de spoliation*) in 1999, and in the Netherlands a Restitution Committee (The Advisory Committee on the Assessment of Restitution Applications for

²⁵ Katja Lubina, *Contested Cultural Property. The Return of Nazi Spoliated Art and Human Remains from Public Collections*, Maastricht, Published by Katja Lubina (2009): 359.

²⁶ Report of the Spoliation Advisory Panel in Respect of a Painting Now in the Possession of the Tate Gallery (2001), paras. 40-41, 44, 50.

²⁷ Report of the Spoliation Advisory Panel in Respect of a Painting Now in Possession of Glasgow City Council (2004). See also the case of four drawings claimed from the British Museum case: Report of the Spoliation Advisory Panel in Respect of Four Drawings Now in the Possession of the British Museum (2006). On this latter case see: Anne Laure Bandle, Raphael Contel, Marc-André Renold, “Case 4 Old Master Drawings – Feldmann Heirs and the British Museum,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

²⁸ Lubina, *Contested Cultural Property*: 360.

²⁹ Scovazzi, “The Return of the Benev. VI 29 Missal,” 8.

Items of Cultural Value and the Second World War) was established in 2001.³⁰ Finally, it is worth mentioning the Art and Cultural Heritage Mediation Program established in 2011 by the International Council of Museums (ICOM) and the World Intellectual Property Organization (WIPO). As clarified by ICOM-WIPO Mediation Rules, the scope of the mediation procedure is intended to cover disputes relating to ICOM's areas of activities, including but not limited to return and restitution.³¹

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³⁰ For more details on these restitutions committees, see David J. Rowland, "Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences", *Journal fur Kunstrecht Urheberrecht und Kulturpolitik*, 2013, p. 83 ff.

³¹ For more details, see WIPO's website (<http://www.wipo.int/amc/en/center/specific-sectors/art/icom/>). Accessed on July 12, 2014).

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