

6. Longing, Belonging and Owing: How to Untangle Competing Claims over Colonial Cultural Objects?

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Abstract: *This chapter proposes to explore, as a case study, the intergenerational dimension of issues raised by the displacement of tangible heritage during the colonial conquest and occupation. In essence, cultural heritage is intergenerational as it bridges together past and future generations.*

During colonisation, tangible cultural heritage was massively displaced. Western colonial powers took possession of the cultural items created and preserved by colonised people. As a result, present generations are unable to access and experience what should have been their own cultural heritage. This situation has led to a recurring debate on the restitution, or return, of cultural objects acquired during colonisation.

This chapter contributes to this debate by adopting a perspective focusing on generations and historical injustice rather than on the ownership of these objects.

‘Which means that today, what you find
on museum shelves throughout the world is
nothing but trophies and plunder.
And all the African, Indian or Asian
objects that we admire were stolen off corpses.’¹

In essence, cultural heritage is intergenerational as it bridges past and future generations. Present generations have received cultural heritage from previous generations and preserve it to pass it on to future generations, which are not yet born, when the time comes. A continuum is established through cultural heritage between past, present and future generations. What is passed on is not only the tangible aspect of cultural heritage but also the values, intentions, beliefs, memories, worldviews, knowledge and traditions it carries with it. If this transmission is halted or hampered, cultural heritage disappears, and the sense of identity and continuity it supports is lost. Transmission to future generations is, therefore, key to

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1 Eric Vuillard, *Sorrow of the Earth: Buffalo Bill, Sitting Bull and the Tragedy of Show Business* (Ann Jefferson tr, Pushkin Press 2016) 8.

understanding why States, communities and families invest resources to protect buildings, artefacts and cultural practices. Each generation is entrusted by its ancestors with the obligation of caring for this heritage to hand it on to their children. Thus, the duty to protect cultural heritage is owed at the same time to past and future generations. Moreover, cultural heritage forms the backdrop against which creativity flourishes. As the United Nations General Assembly sums it up, ‘the cultural heritage of a people conditions the present and future flowering of its artistic values and its overall development’.²

During colonisation, tangible cultural heritage was massively displaced. Western colonial powers took possession of the cultural property created and preserved by colonised people. Several phenomena have contributed to this displacement. First, cultural objects were seized by violence during colonial conquest as trophies and loot.³ Second, anthropologists and ethnologists who had embarked on scientific expeditions, stole,⁴ bartered, and bought items from the communities they were studying. Scientists believed at the time that they were preserving the tangible manifestations of dying cultures. According to Marcel Mauss, the goal was ‘to collect swiftly the largest quantity possible of objects that could disappear to fill up the museums that were recently born’.⁵ Even so, this collecting ‘frenzy’⁶ not only pursued a scientific purpose since ethnographic missions were also carried

2 UNGA Res 3187 (XXVIII) (18 December 1973).

3 For an account of the looting of the palace of the Asante king Kofi Karikari, see: Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (WW Norton & Co 2006) 115–116; for a presentation of the Maqdala expedition, see: Richard Pankhurst, ‘Ethiopia, the Aksum Obelisk, and the Return of Africa’s Cultural Heritage’ (1999) 98 *African Affairs* 229, 229–232; and on British troops sacking the City of Benin in 1897 and looting its bronzes, see: Dan Hicks, *The Brutish Museums: the Benin Bronzes, Colonial Violence and Cultural Restitution* (Pluto Press 2020).

4 See, for instance, the description of the theft of sacred objects committed by the ethnographer Michel Leiris during the Dakar-Djibouti mission in his book: *L’Afrique fantôme* (Gallimard 1981) 103–104, 156; for a compilation of ethnographers snatching cultural objects, see: Sally Price, *Primitive Art in Civilized Places* (University of Chicago Press 1993) 70–75.

5 ‘Récolter au plus vite la plus grande quantité possible d’objets qui pouvaient disparaître et de peupler les musées qui venaient de naître’, citation translated from French into English by the author from Marcel Mauss, *Manuel d’ethnographie* (4th edn, Payot 2002) 27.

6 Folarin Shyllon, ‘Restitution to Sub-saharan Africa: The Booty and Captivity: A Study of Some of the Unsuccessful Efforts to Retrieve Cultural Objects Purloined in the Age of Imperialism in Africa’ (2015) 20 *Art Antiquity & Law* 369.

out to legitimise colonisation.⁷ Some museums were designed to showcase the power of European States and the bounty of colonial conquests. Once inside the collections of public institutions, objects became part of the cultural property of the colonising State, and their return now requires compliance with deaccessioning procedures.⁸ Finally, once the colonised States became independent, cultural objects continued to flow out of the global South as a consequence of the trafficking of cultural property and the effects of the art market, which favours buyers from wealthy nations.⁹

In the case of sub-Saharan Africa, 90–95 per cent of the cultural heritage has been removed from the continent.¹⁰ For instance, the Royal Museum for Central Africa in Belgium (also known as the Africa Museum) preserves more than 200 000 objects from the cultures of the Congo region, whereas the sum of the national inventories of the States of this area does not exceed 60 000 objects.¹¹ Items (sculptures, artefacts, ritual objects) displaced from colonised territories are currently in the collections of western cultural heritage institutions (libraries, museums, archives) or of private individuals, such as art collectors. As a result, a Parisian, for instance, may experience the diversity of the world's cultural heritage in a single day, while present generations in sub-Saharan Africa are unable to access their own cultural heritage. What is even more unsettling is that collections in the West may include duplicate objects that are never displayed but are stored away. Despite this colonial past, today these institutions carry out an essential role in the conservation and scientific study of the cultural heritage of humanity.

The plunder and misappropriation of these cultural elements have disrupted the transmission of the cultural heritage of colonised people, who are now considered as 'the absent' in the equation of restitution. Present generations are unable to access and experience what should have been their own cultural heritage. Instead of a cultural item being transmitted

7 Benoît de L'Estoile, *Le goût des autres : de l'Exposition coloniale aux Arts premiers* (Flammarion 2010) 77.

8 See for instance, in France, the principle of inalienability enshrined in art 451–5 of the *Code du patrimoine*.

9 Maureen Murphy, 'Éthique et politique de la restitution des biens culturels à l'Afrique : les enjeux d'une polémique' (2019) 2 *Sociétés et Représentations* 260, 267.

10 Alain Godonou, 'Musées, mémoire et universalité' in Lyndel V Prott (eds), *Témoins de l'histoire : Recueil de textes et documents relatifs au retour des objets culturels* (UNESCO 2011) 63.

11 Alain Godonou, 'À propos de l'universalité et du retour des biens culturels' (2007) 70 *Africultures* 114, 116.

from one generation to another, it is the memory of its loss, its absence, that is bequeathed. The void resulting from colonisation has created a growing longing for cultural objects that have been missing for decades. The past has not been forgotten, and it shapes the relationships between nations and people. Restitution is sought in part as a remedy for a people 'to recover part of its memory and identity'.¹² This situation has led to a recurring debate on the restitution, or return, of cultural objects acquired during colonisation, engaging a plurality of actors: States, communities, descendants, cultural institutions (museums, archives, libraries, universities), art dealers, private collectors.

This contribution will not rehash the international legal framework for restitutions,¹³ nor will it delve into the latest developments¹⁴ that took place in the wake of the report authored by Felwine Sarr and Bénédicte Savoy,¹⁵ as there is a bountiful supply of excellent publications on these topics.¹⁶ Rather, it proposes to enter this debate by adopting a critical perspective focusing on generations and historical injustice. One of the pitfalls of this debate is to frame it exclusively as an ownership issue and exclude its intergenerational character. The thesis supported in this paper is thus that

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- 12 In the words of Amadou-Mahtar M'Bow, Director-General of UNESCO, 'A plea for the return of an irreplaceable cultural heritage to those who created it' (1978) 31 *The Unesco Courier* 4, 5.
 - 13 For a presentation in French of this framework in relation to African cultural heritage, see Lily Martinet, 'La restitution du patrimoine culturel africain : règles internationales applicables et pratiques nationales' (2019) 65 *Annuaire Français de Droit International* 675.
 - 14 See, for instance, the *Guidelines for German Museums: Care of Collections from Colonial Contexts* (published in 2018, revised in 2019) <<https://perma.cc/8BXL-5YKT>>; the Guidance on the way forward for colonial collections published by the Dutch Advisory Committee on the National Policy Framework for Colonial Collections: '*Colonial Collections a Recognition of Injustice*' (2020) <<https://www.raadvoorcultuur.nl/binaries/raadvoorcultuur/documenten/adviezen/2021/01/22/colonial-collection-and-a-recognition-of-injustice/Colonial+Collection+a+Recognition+of+Injustice.pdf>> accessed 1 November 2021; the Arts Council England's guide published on 5 August 2022 'Restitution and Repatriation: A Practical Guide For Museums in England'; Ethical Principles for the Management and Restitution of Colonial Collections in Belgium (June 2021) <<https://perma.cc/5PCB-CGAD>> and the Belgian law 'Loi reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour' (3 July 2022).
 - 15 Felwine Sarr and Bénédicte Savoy, *Rapport sur la restitution du patrimoine culturel africain. Vers une nouvelle éthique relationnelle* (2018) <<https://perma.cc/8VYR-JJJ9>>.
 - 16 See as an example Evelien Campfens, 'The Bangwa Queen: Artifact or Heritage?' (2019) 26 *International Journal of Cultural Property* 75.

a shift needs to occur from a legal framework grounded in ownership and property rights focusing on States and cultural objects as assets, to an approach integrating human rights and recognising communities as cultural bearers and items as components of a shared heritage.

To defend this thesis, this chapter will first highlight the conceptual gap between cultural property and cultural heritage (1); it will then reveal the flaws of a framework for restitution designed on a State centric basis (2) and relying solely on ownership (3). With these observations in mind, this chapter will present how the rights of Indigenous Peoples (4) and the recognition of the interest of future generations (5) may help in untangling competing claims over colonial cultural objects and arrive at creative solutions.

1. The Need to Bridge Cultural Property with Cultural Heritage

An analysis of international instruments dealing with culture shows that the term 'generation' is found in connection with cultural heritage and diversity, but that this is not the case in norms adopted for the restitution of 'cultural property' and 'cultural objects'. For instance, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage charges States with 'the duty of ensuring the identification, protection, conservation, presentation and transmission *to future generations* of the cultural and natural heritage'.¹⁷ The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage illustrates this understanding by defining intangible cultural heritage as 'the practices, representations, expressions, knowledge, skills' that are 'transmitted from generation to generation' by communities and groups.¹⁸ The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions states similarly that 'the protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present

17 Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (World Heritage Convention) art 4 (emphasis added).

18 Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (hereafter 2003 Convention) art 2.1.

and *future generations*.¹⁹ Furthermore, the International Council of Museums (ICOM) Code of Ethics for Museums provides that one of the core missions of museums is to pass on to future generations collections ‘in as good and safe a condition practicable’.²⁰ As a corollary, the 1997 United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration on the Responsibilities of the Present Generations towards Future Generations invites present generations to ‘preserve the cultural diversity of humankind’ and to ‘identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to *future generations*’.²¹

In contrast, the term generation is absent from instruments establishing rules for the restitution and repatriation of cultural property and objects, namely the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), and the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects (1995) (UNIDROIT Convention).²² The concept of generation is surprisingly foreign to this branch of international cultural law, which focuses on cultural property and ownership. Intergenerational transmission is completely absent from the scope of these instruments, as they reduce cultural heritage to assets. The term ‘heritage’

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- 19 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311, art 6 (emphasis added).
 - 20 ICOM Code of Ethics (adopted 4 November 1986, revised 8 October 2004) §2.18; see also art 6 of the Recommendation concerning the protection and promotion of museums and collections, their diversity and their role in society (adopted 17 November 2015) which defines heritage ‘as a set of tangible and intangible values, and expressions that people select and identify, independently of ownership, as a reflection and expression of their identities, beliefs, knowledge and traditions, and living environments, deserving of protection and enhancement by *contemporary generations* and transmission to *future generations*’ (emphasis added).
 - 21 Declaration on the Responsibilities of the Present Generations Towards Future Generations (12 November 1997) art 7 (emphasis added).
 - 22 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (Hague Convention); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 24421 UNTS 457.

effectively conveys the process of inheriting from the past material that forms a shared cultural heritage, whereas ‘property’ and ‘objects’ underline property rights. As Lyndel V. Prott and Patrick J. O’Keffe put it:

The fundamental policy behind property law has been seen as the protection of the rights of the possessor. [...] the fundamental policy behind cultural heritage law is protection of the heritage for the enjoyment of present and later generations.²³

Notwithstanding these terminological differences, the taking of cultural property from its community of origin breaks the intergenerational chain of transmission of cultural heritage. For instance, the looting of a ceremonial sculpture will lead to the disappearance of the living heritage (traditional rituals, dances, prayers, songs) associated with it. Issues raised by the displacement of cultural objects during the colonial conquest and occupation undeniably have an intergenerational dimension, which cannot be embraced by an approach based solely on ownership.

Furthermore, the emphasis put on property disregards the social and cultural values that are associated with a cultural object. The ‘translocation’²⁴ of objects, works of art, or artefacts from their context of creation to the West is not only a geographical displacement but also a transformation. In its community of origin, the item fulfils social, religious and symbolic functions, which are entirely lost when it enters the glass case of a museum or when it is commodified on the art market. In the space of the museum, objects are presented as art pieces or as ethnographic items that are displayed for their historical, aesthetic, and scientific value. An everyday object, like a spoon, is transformed by the museum’s space. The cultural institution controls the discourse and interpretation of the object and its access. For instance, the sculpture dedicated to Gou, which is considered by the Fon people as the God of metal and by extension of war, whose protection requires sacrifices, meat, blood, and palm oil, is now exposed as a masterpiece at the Louvre in the Pavillon des Sessions.²⁵ The function of

23 Lyndel V Prott and Patrick J O’Keffe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1(2) *International Journal of Cultural Property* 307, 309.

24 Sarr and Savoy (n 15) 25.

25 Gaëlle Beaujean-Baltzer, ‘Du trophée à l’œuvre : parcours de cinq artefacts du royaume d’Abomey’ (2007) 6 *Gradhiva* 70, 12 and 15.

the sculpture has changed from religious to aesthetic. The social dimension of cultural heritage is set aside in the cultural property paradigm.²⁶

Moreover, the standard-setting instruments in this field are devoid of retroactivity,²⁷ which means that the vast majority of colonial objects plundered fall outside of their scope. Aware of this issue, in 1978 UNESCO tried to complete the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) by creating the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (the Committee). The purpose of the Committee was to facilitate bilateral negotiations for the restitution of 'cultural property', and its mandate includes:

cultural property which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people [...] and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation.²⁸

Despite these honourable intentions, in practice, the Committee has scarcely been involved in the restitution of cultural objects. Less than ten requests have been lodged with it in more than forty years of existence.²⁹ Still, it is worth noting that several of these requests were successful.³⁰

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- 26 For an example of an ethnologist instructing a museum not to clean collected objects to preserve the traces of their social functions and of the sacrifices they were used for, see Valérie Perlès, 'L'expérience de Bernard Maupoil au Dahomey : entre science et engagement, un laboratoire pour l'ethnologie en milieu colonial' (2021) 32 *Gradhiva* 192.
 - 27 It is still important to note that art 15 of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property permits the conclusion of special agreements between parties regarding the restitution of cultural property removed before it entered into force.
 - 28 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UNESCO Reso 4/7.6/5, 24 (28 November 1978) art 3.2.
 - 29 Elisabeth Lambert Abdelgawad, 'Le Comité intergouvernemental de l'UNESCO pour la promotion du retour de biens culturels à leur pays d'origine ou de restitution en cas d'appropriation illégale : un bilan assez mitigé' (2012) 1 *Revue de science criminelle et de droit pénal comparé* 265, 269.
 - 30 UNESCO's website presents the different cases of returns and restitutions that occurred under the aegis of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (see <<https://perma.cc/38LR-5PY2>>).

2. Going Beyond a State-centric Framework

In addition, when ownership lies at the crux of the restitution debate, the conceptual framework is limited mainly to States.³¹ As a result, requests for restitutions become a diplomatic matter that may be integrated into broader policies pursuing, among others, political and commercial agendas. For instance, France likes to ease the conclusion of contracts with restitutions. In 2011, France handed back manuscripts to the Republic of Korea, which were plundered in 1866 and kept in storage at the French National Library. This operation was part of commercial negotiations for the construction of a high-speed French train (TGV) in Korea.³² More recently, in 2019, the sabre belonging to El Hadj Omar Tall was handed over by France to Senegal during a trip made by Edouard Philippe, the then prime minister of France. This trip also provided the occasion for France to sell weapons to the Government of Senegal.³³ Although restitutions may give a positive aura to States and help buff their soft power, unfortunately, States rarely pursue altruistic motives.

In addition, by limiting restitution to inter-State relations, voices of stakeholders, such as Indigenous People, local communities (whose delineation does not always overlap with States' borders), families or Diasporas are silenced. Non-governmental organisations advocating on behalf of Diasporas may support requests for restitution, such as the *Conseil représentatif des associations noires* (CRAN) in France.³⁴ The interests of these different stakeholders are not always aligned with each other. They may also be distinct from national interests. For instance, States may want to promote tourism by displaying returned artworks in museums, whereas communities might prefer to use them to perform traditional rituals. Some communities might wish, for example, to bury some returned items, like funerary objects. In this event, there is a need to balance the interest of humanity to preserve these objects and the respect that is due to the customs and beliefs of source communities. Restitution founded on ownership falls short when

31 The UNIDROIT Convention does mention tribal or indigenous communities (arts 5 and 7), but it has been ratified by only 48 States.

32 Raphael Contel, Anne Laure Bandle and Marc-André Renold, 'Affaire Manuscrits Coréens – France et Corée du Sud' (2013) Plateforme ArThemis – Centre du droit de l'art, Université de Genève <<https://perma.cc/5ZZW-J3BW>>.

33 Héléne Ferrarini and Damien Cuvillier, 'Privée de retour' (2021) 32 La Revue Dessinée 8, 36.

34 Murphy (n 9) 269.

competing claims are made on an item. The question of who is legitimate to represent past generations, is always answered in the same way: States.

This shortcoming may be illustrated by the case of the 2019 restitution of a whip and a bible belonging to Hendrik Witbooi, national hero and chief of the Nama tribes, by the German state of Baden-Württemberg to Namibia.³⁵ The bible and the whip were taken by the German army as trophies during a raid in 1893.³⁶ The objects were then donated to the Linden museum in Stuttgart.³⁷ In 2019, Germany decided to return these items to Namibia, where they would be preserved at first in the National Archives, awaiting transfer to a future museum that will be built in Gideon, Hendrik Witbooi's hometown.³⁸ This decision was challenged by the Nama Traditional Leaders Association (NATLA) and the descendants of Hendrik Witbooi, who strived to be involved in the restitution process.³⁹ The latter used a sentence, which sums up their claim: 'repatriation process, CANNOT BE ABOUT US, IF IT IS NOT WITH US'.⁴⁰ The NATLA argued notably that Namibian authorities were dominated by the Ovambo people and that they were not representative of all the tribes.⁴¹ Furthermore, the restitution was contemporaneous with an action brought on behalf of members and descendants of the Ovaherero and Nama Peoples against Germany in the United States in connection with the genocide of the Ovaherero and Nama peoples.⁴² These circumstances may have influenced the process of restitution. This case highlights the tensions that can be brought by restitution when actors who are linked by their past to a cultural object are excluded from the process, and interests diverge.

Another issue resulting from State-bias is the lack of transparency and publicity of inter-State negotiations. States present the modalities of the restitutions as a *fait accompli* to the public. The opacity of the diplomatic

35 Sandrine Blanchard and Daniel Pelz, 'Retour d'un fouet et d'une bible spoliés en Namibie' (*Deutsche Welle*, 28 February 2019) <<https://perma.cc/65MF-TPHG>>.

36 *ibid.*

37 Katherine Keener, 'German Museum to Repatriate Artefacts Previously Belonging to Namibian Hero' (*Art Critique*, 24 February 2019) <<https://perma.cc/EP8V-9ANK>>.

38 For a detailed account of the restitution, see Reinhart Kössler, 'The Bible and the Whip – Entanglements Around the Restitution of Robbed Heirlooms' (2019) 12 ABI working paper <<https://perma.cc/U5YP-YNT2>>.

39 Blanchard and Pelz (n 35).

40 Kössler (n 38) 2.

41 *ibid.*

42 United States District Court, SD New York. *Rukoro v Federal Republic of Germany*, 6 mars 2019, 363 F.Supp.3d 436.

process allows the Western States to cherry-pick which cultural objects they agree to part with and the ones that they hang on to. In 2020, for instance, France adopted a law to return twenty-six objects to Benin, which were part of the spoils of war when General Alfred Amédée Dodds was in command. Although this is a significant step for France, the sculpture devoted to Gou is not among them despite the request made for its restitution.⁴³ States are not always aware of the cultural significance attached to some objects in the collections of cultural institutions. Items that are not on display but stored away because they are humble or not spectacular may have immense significance for their community of origin.

3. *The Absence of Nuances in an Ownership Framework*

If ownership serves as a guide for restitution, then the issue boils down to whether the object was acquired lawfully or unlawfully. The provenance of the item and its ownership history will be examined to try and identify its rightful owner. This perspective gives rise to hackneyed arguments, such as the plunder of cultural property was perfectly legal, under international law, at the time. As an example, Neil McGregor, Director of the British Museum from 2002 to 2015, argued on the subject of the plunder of Benin City that it was terrible, but that at the time, it was also perfectly legal.⁴⁴ Another point supported by property law is that the possession of these cultural items has lasted for so long, that claims are time-barred or that ownership has been transferred to museums.⁴⁵ These arguments are very unsettling, as they are tainted by bad faith and do not recognise injustices committed in the past.

Furthermore, ownership does not take into account the context of an acquisition or the vulnerability of the original owner, i.e. of the past generation. Even when colonial objects were purchased, doubts may linger as to

43 Loi n°2020-1673 du 24 décembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal, published in the Journal Officiel of 26 December 2020. For an analysis of this law, see Christophe Doubovetzky, 'Les modalités de restitution de biens culturels en question : réflexion à partir de restitutions récentes' (2021) 30-34 *La Semaine Juridique – édition Administrations et Collectivités Territoriales* 1.

44 Corinne Hershkovitch and Didier Rykner, *La restitution des œuvres d'art : solutions et impasses* (Hazan 2011) 70.

45 Lucas Lixinski, 'Axum Stele' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (OUP 2018) 137; Declaration on the importance and value of universal museums (2004).

the lawfulness of their acquisition. The power imbalance between colonised populations and ethnographers was such that it is hard to assess whether consent to sell an item was given by the rightful owner. Sally Price perfectly sums up this asymmetrical relationship:

It is quite another thing, however, when a Western traveller in Africa spots an interesting looking wooden figure and offers to purchase it for a price that represents a negligible amount to the traveller and a large sum to the owner, in this situation, the buyer lacks understanding of the meaning of the object in its native context, the seller lacks understanding of its meaning in its new home, and there is no common ground in the evaluation of the price for which it has been exchanged.⁴⁶

Moreover, Felwine Sarr and Bénédicte Savoy have compared the prices paid by the Dakar-Djibouti mission with those reached in auctions in France. For a certain type of mask, ethnographers would pay seven Francs (the ‘price for a dozen eggs at that time’) even though in the same year, similar items reached an average price of 200 francs at auctions.⁴⁷ ‘In the field of Nazi-looted art, a sale by a Jewish owner to a Nazi official is considered as a “forced sale”’.⁴⁸ Should this position be adopted for colonial objects? In some cases, the nature of the transaction was construed differently by both parties. The ethnographer believed that a sale was taking place, while the community being studied understood that they were establishing a relationship of reciprocity.⁴⁹ For all of these reasons, there is a need to change the conceptual framework for restitution of colonial objects from a paradigm relying exclusively on ownership to one that integrates human rights aspects.⁵⁰

46 Price (n 4) 78.

47 Sarr and Savoy (n 15) 56.

48 Campfens (n 16) fn 34.

49 de L’Estoile (n 7) 159.

50 On the cross-fertilisation between human rights and cultural heritage, see: Ana Filipa Vrdoljak, ‘Human Rights and Illicit Trade in Cultural Objects’ in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity* (Brill 2012).

4. Mainstreaming the Framework Built for Indigenous People

Since the end of the 20th Century, a new understanding of restitution has emerged in the field of human rights, thanks to the fight for Indigenous People's rights. This shift occurred relatively recently in international law with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.⁵¹ This instrument directed States towards, on the one hand, the restitution of indigenous people's 'cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs' and, on the other hand, enabling 'access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms'.⁵² This instrument also recognised the right of Indigenous People to use and control their ceremonial objects⁵³ and to 'maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions'.⁵⁴ The UNDRIP has suffused international law. The Recommendation concerning the protection and promotion of museums and collections, their diversity and their role in society (2015) also invites States to 'take appropriate measures to encourage and facilitate dialogue and the building of constructive relationships between [...] museums and indigenous peoples concerning the management of [...] collections, and, where appropriate, return or restitution in accordance with applicable laws and policies'.⁵⁵

Both instruments go beyond the relationship between States to link cultural objects with the social group that created them. These objects are more than simply movable property as they are the tangible manifestation of the cultural identity of a community. The issue of ownership remains, but it is superimposed to other considerations, such as access and use of

51 See also art 13 of the American Declaration on the Rights of Indigenous Peoples (adopted 15 June 2016) OEA/Ser.D/XXVI.19.

52 United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 September 2007) art 11.2. and 12.2.

53 *ibid.*, art 12.1.

54 *ibid.*, art 31.1.

55 Recommendation concerning the protection and promotion of museums and collections, their diversity and their role in society (adopted 17 November 2015) para. 18; see also UNESCO's Policy on Engaging with Indigenous Peoples (2018) para. 77 (r).

cultural objects to perpetuate traditions.⁵⁶ Gaining back control of these objects realises the right to access and enjoyment of cultural heritage.⁵⁷ Both of these rights are derived from the right to participate in cultural life.⁵⁸ Moreover, this evolution goes hand in hand with the progressive anchoring of cultural heritage in the human rights realm. The preamble of the Convention for the safeguarding of the intangible cultural heritage opens, for instance, with a triple reference to human rights,⁵⁹ which means that this instrument ‘operates’ within a human rights context.⁶⁰ In light of this, instruments adopted for the return of cultural property appear outdated when they exclude human rights from their scope.

Indigenous people have thus gained a special status in international law, grounding claims for access and restitution of cultural objects in human rights law. Under this approach, cultural objects should not be returned because they were unlawfully acquired but because they *belong* to communities that created and preserved them. What matters is no longer how the object was acquired but the meaning it has for a social group and the function it serves. Belonging understands cultural objects as the expression of cultural identity. In this context, the social, cultural and religious functions of the object are taken into account. Under this perspective, continuity may be established between past creators of these items and current stakeholders. The intergenerational nature of cultural heritage is acknowledged.

56 Human Rights Council, ‘Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed’ (21 March 2011) A/HRC/17/38, recommendation g.

57 *ibid.*

58 Several instruments recognise this right at the international and regional levels, see for instance the Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) art 27.1; the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 15.1.a; the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27; the African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 17(2); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (‘Protocol of San Salvador’ (adopted 17 November 1988, entered into force 16 November 1999) art 14.1.a.

59 2003 Convention (n 18), preamble para. 1.

60 Janet Blake, ‘Part II Commentary, the Preamble’ in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020) 24.

From a human rights approach, the applicable law can also incorporate customs and local laws. For instance, the inalienability of a ceremonial object⁶¹ is admitted, meaning that the bond between a social group and its cultural heritage is not broken by its appropriation. This development is particularly interesting as the inalienability of public collections in France has served as a shield for decades to refuse the restitution of cultural objects. In this way, inalienability may become a double-edged sword. Furthermore, by switching from ownership rights to human rights, procedural hurdles, like the statute of limitations or standing, may be overcome.

Human rights law first of all provides procedural principles to handle restitutions, namely free, prior and informed consent, participation, fair, transparent and effective mechanisms. Secondly, it provides forums to discuss the return of cultural objects. Human rights law is able to handle competing claims involving different types of stakeholders: communities, States, and cultural heritage institutions. For instance, in 2018, the Yaqui People, an Indigenous People, submitted a request to the Expert Mechanism on the Rights of Indigenous people to intervene as a facilitator for the restitution of a consecrated ceremonial deer head, the Maaso Kova, which was held by the Swedish National Museum of World Culture.⁶² Because of armed conflicts and deportation in the 19th and 20th Century, the Yaqui People are now divided into the Pascua Yaqui, a group living in the United States as a federally recognised tribe, and the Rio Yaqui living in Mexico. Which of these two groups has standing to claim ownership of the ceremonial deer head? The solution found to this puzzle was the establishment of the Maaso Kova Committee, which was composed of members designated by the traditional authorities of the Rio Yaqui, ‘committee members from the Pascua Yaqui [...] persons who ‘hold position of great importance within’” their culture and cosmivision, and representatives of the cultural societies of the Yaqui people including the Kolensias, which are ‘entrusted with the care of the Maaso Kava’.⁶³ The Committee represented, therefore, secular

61 Expert Mechanism on the Rights of Indigenous Peoples, Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples (21 July 2020) A/HRC/45/35, 3; see also for the inalienability of the Maaso Kava Expert Mechanism on the Rights of Indigenous People, Technical Advisory Note – Repatriation request for the Yaqui Maaso Kova (16 June 2020) 14–15.

62 *ibid.*, 1–17.

63 *ibid.*, 11.

and spiritual authorities from both States.⁶⁴ It agreed that the ceremonial deer head should be returned to the Kolensias, who will then decide ‘where it should come home to finally be at rest’.⁶⁵ In the end, an agreement was reached between the Maaso Kova Committee and the Swedish museum.⁶⁶

The contributions of human rights law to the debate surrounding restitutions should not be limited to a ‘traditional’ or restrictive understanding of Indigenous People adapted to settler States, such as Canada or Australia, and excluding communities in Africa and Asia.⁶⁷ The Expert Mechanism on the Rights of Indigenous People notes in this sense that:

it will be important for indigenous peoples in Africa to have their own interests acknowledged in this process [i.e. the French process to repatriate cultural objects taken from Africa] that seems presently designed to repatriate to national Governments, such as Benin.⁶⁸

Furthermore, the new light shone by human rights on the issue of restitution should benefit other social groups, such as minorities and local communities. There is a need to mesh ownership and human rights law together.

5. *Putting Future Generations at the Heart of the Process*

The dispossession of cultural objects is a hurdle to safeguarding and perpetuating cultural practices, traditional knowledge and traditional cultural expressions. Restitution may revitalise cultural heritage and contribute to a renaissance. Due regard is given in this way to the intangible cultural heritage associated with these objects. Some States submit the return of objects to conservation conditions, which means that their social function may not be restored. For instance, a musical instrument collected by ethnographers and preserved in a sealed glass case, which will never be played again, does

64 Kristen Carpenter and Alexey Tsykarev, ‘Indigenous Peoples and Diplomacy on the World Stage’ (2019) 115 AJIL Unbound 118, 121.

65 Expert Mechanism on the Rights of Indigenous People, Technical Advisory Note – Repatriation request for the Yaqui Maaso Kova (n 61) 11.

66 Carpenter and Tsykarev (n 64) 121.

67 José Martínez Cobo, *Étude du problème de la discrimination à l'encontre des populations autochtones* (vol 5, Ecosoc 1981–1987), para. 379–380.

68 Expert Mechanism on the Rights of Indigenous People, Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples (21 July 2020) 12.

not make sense from a living heritage perspective. Similarly, communities wish to care for their cultural objects, which may, in some cases, be considered living beings. They may want, for instance, to feed masks ritually. Yet, these customs may run counter to one of the primary functions of cultural institutions, which is to preserve and conserve tangible heritage to avoid its deterioration. Fortunately, new collaborative museum practices have emerged to balance these conflicting concerns.

For instance, from 2014 to 2018, the collaborative research project SAWA (Savoirs Autochtones Wayana-Apalai de Guyane⁶⁹) brought together the Wayana and Apalai (Indigenous Peoples of Guiana), researchers and museum professionals.⁷⁰ The communities were not seeking restitution of items, as conservation is impossible because of the humid climate they live in. Items would swiftly rot away. The goal of the project was for communities to have access to recordings, pictures and objects significant to their culture which had been collected since the 18th Century by researchers, travellers, and explorers.⁷¹ All the material and data collected at that time would have disappeared without the intervention of these scientific and cultural institutions.⁷² The aim of the project was twofold: for the communities to repatriate the past to the present by studying the objects and the documents preserved in the institutions and return this cultural heritage to their peoples by granting them access to it.⁷³ Three museums agreed to welcome the team representing the communities: the Musée des Cultures Guyanaises, the musée du quai Branly – Jacques Chirac, and the Bonner Amerikas-Sammlung Museum.⁷⁴ This experience was mutually beneficial since when examining items, the team helped update, correct and complete information in the collection catalogues. In this project, restitution took place in a digital format with the creation of a digital portal designed with the participation of the communities.⁷⁵ Among the first contents chosen for restitution was a collective ritual called ‘Marake’, as the practice of this

69 In English: traditional knowledge Wayana-Apalai of Guiana [our own translation].

70 Valentina Vapnarsky, ‘Des communautés sources aux communautés d’experts’ (2019–2020) 140 *Culture et recherche* 71.

71 *ibid.*

72 Éliane Camargo and others, ‘L’Amazonie amérindienne dans l’ère du numérique : le portail multilingue WATAU’ (2021) 12 *Patrimoines du Sud* 1, 2.

73 *ibid.*, 3.

74 *ibid.*, 15.

75 The portal is accessible at <<https://watau.fr/s/watau-fra/page/accueil>> accessed on 1 November 2021.

traditional cultural expression was diminishing.⁷⁶ Thus, the project was oriented from its inception towards future generations and the transmission of cultural heritage from the past to them.

As in this case, sometimes communities do not demand restitution⁷⁷ but reparation or access to the items and the information collected to maintain cultural expressions and pass them on to future generations. The Conference of the parties to the Convention on Biological Diversity has adopted interesting guidelines in respect of the restitution of information: the 2018 Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge of Indigenous Peoples and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity.⁷⁸ The Guidelines stress the need to develop enduring relationships with Indigenous Peoples and local communities⁷⁹ and to establish a team 'guided by a multi-stakeholder committee'.⁸⁰ One of the purposes the guidelines serve is the 'recovery, revitalisation, and protection of traditional knowledge'.⁸¹ This point is crucial as colonisation, evangelisation, and the expansion of monotheistic religions have destroyed living heritage such as social practices and knowledge and practices concerning nature.⁸² The return of cultural objects will not in itself revive this cultural heritage. Concentrating resources only on property rights while living traditional cultural expressions are dying is truly regrettable. It is as important for future generations to be able to enjoy the creation of past generations as it is for them to be able to extend them in the present and the future. In other words, present generations should be able to view the sculpture handed down to them by their ancestors and also carve new ones.

76 Vapnarsky (n 70) 72.

77 Article 3 of the Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material) lists alternatives to the transfer of cultural material (loans, production of copies, and shared management and control) (adopted 4–8 June 2006, published in 13 International Journal of Cultural Property 409).

78 The Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge of Indigenous Peoples and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity (adopted 30 November 2018) CBD/COP/DEC/14/12.

79 *ibid.*, art 17.d.

80 *ibid.*, art 20.

81 *ibid.*, art 9.

82 Alain Resnais, Chris Marker and Ghislain Cloquet, *Les statues meurent aussi* (1953).

Conclusion

Former colonial powers and cultural institutions are gradually departing from their position that, as guardians of a universal interest, they should keep colonial objects because they have the capacity and better means to preserve cultural heritage. The irony of States having destroyed tangible and intangible heritage through colonisation and deculturation policies imposing material conditions on the return of these objects, such as the construction of infrastructures, is especially cruel. States should stop imposing a European-centred, elitist, turned toward the past conception of cultural heritage to the rest of the world. Restitution should not be perceived simplistically, pushing objects across borders from one State to another. Each case needs to be carefully thought through taking into account historical injustices and the interest of future generations. The current ownership paradigm shaping international law should be complemented with a human rights-based approach to establish continuities in cultures. Although the debate about restitutions concentrates attention on the past, it should not eclipse the present and the future. Most of the cultures that created these beautiful objects have not disappeared despite what ethnographers thought.⁸³ Cultural institutions should open their doors to contemporary art⁸⁴ and crafts from these cultures. For instance, supporting living human treasures programs or artist residencies could help restore know-how and enhance traditional cultural expressions. The space freed in museums by the return of cultural objects could indeed be used to display works produced by present generations.⁸⁵ Lastly, restitution does not account for the decades these displaced objects were exploited. How can present generations repair and testify to the years of absence and the wealth accrued as a result of the taking of this cultural heritage? States and cultural institutions could, in addition to restitution, fund capacity building in former colonised States to preserve and safeguard tangible and intangible cultural heritage and promote creativity. In this way, a process of

83 Still some objects may be orphaned, meaning that their provenance is unknown, or in other cases, entire cultures have disappeared, see for example the presentation of the Nok culture by Polarin Shyllon, 'Negotiations for the Return of Nok Sculptures from France to Nigeria: An Unrighteous Conclusion' (2003) 8 *Art Antiquity and Law* 133.

84 See for instance the exhibit *Magiciens de la Terre* (Centre Culturel Pompidou 1989).

85 Vincent Négri, 'À propos du rapport Sarr/Savoy sur la restitution du patrimoine africain : lecture juridique d'une éthique relationnelle repensée', presentation given at Université Laval on 11 September 2019.

reconciliation going beyond the transfer of tangible heritage should be set into motion.