DEMOCRATIZING RESTITUTION: TRUSTS AS AN EQUITABLE APPROACH TO COMPETING CLAIMS ON CULTURAL HERITAGE OBJECTS

BRITTA REDWOOD*

As formerly colonized states began to win their independence in the mid-twentieth century, a growing chorus of voices called on museums in London, Paris, Berlin, and other European cities to return objects taken during the colonial period. Having largely ignored these requests until recently, museums throughout Europe and the United States have begun negotiating returns of these objects to their rightful owners. There is a growing recognition among Western cultural institutions that continuing to hold cultural heritage objects taken under conditions of coercion or violence is morally untenable. More recently, some scholars have argued for a human rights approach to the restitution of cultural heritage objects through the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In practice, however, restitution negotiations are typically bilateral and mediated not by the communities with deep cultural or spiritual links to these objects, but by states. If the state represents the interests of the peoples vis-à-vis cultural heritage objects incompletely, unpredictably, or poorly, even voluntary restitution efforts become complicated. This complexity has arisen in the case of the Benin bronzes and the Banjarmasin diamond, both of which have multiple potential claimants, including non-state claimants—each with a demonstrable, compelling connection to the objects. Until now, Western museums have balked at the complexity of these questions and have used these difficulties to delay the return of contested objects. But this response is unjust.

This Article proposes the establishment of trusts to manage the restitution of cultural heritage objects with multiple potential claimants. Trusts separate legal title from the benefits of ownership, making it possible for multiple and varied claimants (states, distinct cultural

* Assistant Professor, Benjamin N. Cardozo School of Law. Previously Assistant Professor at the Seton Hall School of Diplomacy and International Relations and Interim Director of the Movement Lawyering Clinic and the Thurgood Marshall Civil Rights Center at Howard University Law School.

groups, individuals) to enjoy the benefits of ownership while also requiring them to engage in joint decision-making about how a given object will be managed (e.g. loans, exhibitions, sales). The creation of democratic trusts also allows museums to remove and transfer illicitly acquired objects immediately while simultaneously empowering all legitimate stakeholders to exercise collective control and authority over restitution objects.

I. INTRODUCTION

A generation ago, the most prominent museums in Europe and the United States argued that they were uniquely positioned to claim ownership of cultural heritage objects from around the world because they alone could adequately conserve and exhibit them. In so

doing, the argument went, they were preserving them for all humanity.[1] Museums extended this argument even to objects that had been looted or transferred involuntarily during the colonial period. In the view of these museums, these objects did not need to be returned because cultural property was universally valuable, and belonged to all mankind.

The past twenty years have seen a major transformation in the attitudes of museums, cultural institutions, and governments regarding cultural heritage objects that were illicitly acquired during the colonial period. This fundamental shift in how museums view their missions and collections has several causes. First, as newly-independent states across Africa and Asia achieved political autonomy from European states in the mid-twentieth century, they were eager to recover aspects of their cultural heritage,[2] which prove especially important in the establishment or crystallization of a national identity. Second, the anthropology of globalization, which has recently developed and which investigates the movement of goods, ideas, and peoples around the globe with the help of ethnographic and historical data, is animated by the idea that things have a "source community."[3] Third, the demands of newly independent states for cultural heritage objects reflect the international legal norms around cultural heritage that formed in the latter half of the twentieth century. While the nineteenth century was characterized by widespread looting of cultural artifacts by non-Western nations—often on the notion that looting was

---

1. Declaration on the Importance and Value of Universal Museums, signed by the directors of 18 major museums, including The Art Institute of Chicago, the Bavarian State Museum, the State Museums of Berlin, the Cleveland Museum of Art, the J. Paul Getty Museum in Los Angeles, the Solomon R. Guggenheim Museum in New York, the Los Angeles County Museum, the Louvre Museum in Paris, the Metropolitan Museum of Art in New York, The Museum of Fine Arts in Boston, the Museum of Modern Art in New York, The Opificio delle Pietre Dure in Florence, the Philadelphia Museum of Art, the Prado Museum in Madrid, the Rijksmuseum in Amsterdam, the State Hermitage Museum in Saint Petersburg, the Thyssen-Bornemisza Museum in Madrid, and the Whitney Museum of Art in New York, published by the International Council of Museums in 2004.

2. Camille Labadie, *Decolonizing Collections: A Legal Perspective on the Restitution of Cultural Artifacts*, 49-2 IFOCOM STUDY SERIES 132, 134 (2021).

3. *See* Brigitta Hauser-Schublin & Lyndel V. Prott, *Introduction: Changing Concepts of Ownership, Culture, and Property*, *in* CULTURAL PROPERTY AND CONTESTED OWNERSHIP: THE TRAFFICKING OF ARTEFACTS AND THE QUEST FOR RESTITUTION 1, 2 (Brigitta Hauser-Schublin & Lyndel V. Prott, eds., 2016) (defining "source community" as the community that produced the artefacts when they were collected. The authors point out that the notion of a "source community" can be complicated by the passage of time and cultural and demographic changes that have occurred within a particular place since the object was collected).

permissible to defray the costs of waging just war, explicit laws[4] against such looting would not emerge until the twentieth century. However, these laws are non-retroactive, and the applicability of early twentieth-century treaties to non-European states is debated.[5] In a sense, calls for restitution of cultural heritage objects taken during the nineteenth and early twentieth centuries seek to extend present-day legal norms backward in time. Although the actual number of instances in which cultural heritage objects have been returned to their countries of origin is relatively modest,[6] the ubiquity of calls for restitution and the number of museums considering it demonstrate the extent to which the rhetoric around rights to cultural heritage objects has changed in the last half-century.

The restitution of cultural heritage objects—in the handful of cases in which it has taken place—is often carried out under the auspices of states and on a voluntary basis rather than a legal one. The second half of the 20th Century saw the introduction of a number of multilateral instruments (often accompanied by domestic enacting legislation) that prohibit the illicit trafficking and facilitate the return of

4. The Hague Conventions of 1899 and 1907 prohibited the illicit confiscation of art objects, as well as private property. See Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 56, Oct. 18, 1907 (prohibiting "[a]ll seizure of, destruction or willful damage done to… works of art…" and stipulates that seizure or destruction "should be made the subject of legal proceedings."). These norms were most significantly expanded upon by the 1954 Hague Convention of the Protection of Cultural Property and the 1970 Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, which prohibit the export of artifacts from occupied territories and require states parties to enact domestic legal regimes to address the illicit transfer of cultural heritage objects, respectively.

5. The Hague Conventions of 1899 and 1907 apply to situations of declared armed conflict between recognized states. However, prior to independence, the colonized territories were not generally recognized as states by Western powers. They therefore could not be parties to these Conventions and, ironically, were seen as outside the scope of the protections offered by these Conventions.

6. Open Restitution Africa, a project that provides open-access information about the restitution of African cultural heritage objects, estimates that fewer than 1000 cultural heritage objects have been returned to Africa. *Open Restitution Africa Homepage*, Open Restitution Africa, https://openrestitution.africa (accessed October 16, 2025). Alternatively, Felwine Sarr and Bénédicte Savoy estimate in their groundbreaking 2018 report commissioned by the French government that "over 90% of the material cultural legacy of sub-Saharan Africa remains preserved and housed outside of the African continent." Felwine Sarr and Bénédicte Savoy, *The Restitution of African Cultural Heritage: Toward a New Relational Ethics*, 2018, *available at* https://www.unimuseum.uni-tuebingen.de/fileadmin/content/05_Forschung_Lehre/Provenienz/sarr_savoy_en.pdf.

stolen or looted cultural heritage objects.[7] Unfortunately for would-be claimants, however, the non-retroactivity of these instruments, the complicated interplay of domestic and international law, and the hurdles posed by statutes of limitations and prescription periods mean that they are left without legal recourse to pursue restitution through domestic courts or international tribunals. Therefore, the question of restitution and the practicalities of carrying it out are generally relegated to the realm of diplomacy, often with the involvement of foreign ministers and ministers of culture.[8] The fact that these negotiations occur outside of judicial scrutiny or involvement also makes them hyper-flexible, and the timelines and conditions of restitution can be approached in an ad hoc way that takes into consideration the interests of the parties and the nature of the particular cultural heritage objects at issue.[9]

This flexibility is often welcome. For instance, agreements between the State of Italy and U.S. museums provided for the restitution of Italian art objects that had long been part of the collections of U.S. museums. The agreements stipulated that title to the objects would be transferred to Italy even as the U.S. museums continued to possess certain of the objects on loan.[10] Instead of owning them, the U.S.

---

7. *See e.g.,* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Hague Convention]; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (establishing multilateral frameworks addressing illicit trafficking and restitution of cultural property).

8. For example, German foreign minister Annalena Baerbock and German minister for culture and media Claudia Roth were both involved in the negotiations for the return of Benin bronzes to Nigeria. Their interlocutors were the Nigerian foreign minister Geoffrey Onyeama and information minister Lai Mohammed. All four were present at the handover of the treasures in Abuja in 2022. *See Germany Hands Over 20 Looted Benin Bronzes to Nigeria*, Reuters (Dec. 21, 2022, at 6:23 pm ET), https://www.reuters.com/world/germany-hands-over-20-looted-benin-bronzes-nigeria-2022-12-20/ (reporting on the 2022 restitution ceremony in Abuja attended by Nigerian and German officials).

9. *See* Angela Saltarelli & Martina Natali, *Looted Art: Good Practices and New Trends in Ensuring Restitution*, INT'L BAR ASS'N, https://www.ibanet.org/article/AC6D516C-01CA-4F2C-8748-A0E752DAAE92 (last visited Nov. 23, 2025) (stating that "[t]he use of non-judicial remedies makes it possible to reconcile all the interests that come to light in specific cases, which can only be guaranteed by means of flexible instruments.").

10. *See, e.g.*, Cass Cliatt, *Princeton University Art Museum and Italy sign agreement over antiquities*, PRINCETON U. (Oct. 30, 2007), https://www.princeton.edu/news/2007/10/30/princeton-university-art-museum-and-italy-sign-

museums were able to continue to exhibit them through long-term loan programs.[11] The bilateral, semi-diplomatic nature of these negotiations may work well for situations in which the communities of origin are adequately represented by the minister of culture or foreign minister who negotiates on their behalf. However, in situations in which there is a conflict or even just disagreement between a particular community of origin and the government that would negotiate on its behalf—such as when the community of origin is a minority or Indigenous Community with limited political power or influence—the ad-hoc, bilateral model is less than ideal.

Section II of this Article examines the challenges inherent in the restitution of objects that have overlapping or conflicting claimants via two case studies. The first focuses on the so-called Benin bronzes, which were taken from the Benin kingdom in present-day Nigeria and have made their way to major museums throughout the United States and Europe. The second focuses on the Banjarmasin diamond, which was taken from a Sultanate in present-day Indonesia. The most appropriate recipient of both the Benin bronzes and the Banjarmasin diamond is contested, and this contested status has slowed or halted the process of restitution, even as Western museums have displayed an eagerness to repatriate these objects.

Section III of this Article proposes the use of trusts to administer the restitution of cultural heritage objects with competing claimants. By introducing a wedge between legal title and the incidents of ownership, trusts allow multiple and varied claimants to enjoy the benefits of ownership of the cultural heritage object and to take part in decisions about its management. In this proposal, all legitimate claimants to a given cultural heritage object are represented by trustees who must agree by consensus or majority about how cultural heritage

---

agreement-over-antiquities (detailing an agreement between Princeton University and Italy whereby Princeton transferred the title to eight objects, four of which remained on loan to the Princeton University Art Museums for four years). *See also Getty and Italian Ministry of Culture Sign Agreement in Rome for the Return of Objects*, GETTY (Aug. 1, 2017), https://www.getty.edu/news/getty-museum-and-italian-ministry-of-culture-sign-agreement-in-rome-return-objects (detailing an agreement between Italy and the Getty in which the Getty transferred title to 40 objects, and which contains provisions for "broad cultural collaboration that will include loans of significant art works…").

11. Italy concluded bilateral agreements with certain U.S. museums, including the Metropolitan Museum of Art in New York, the Museum of Fine Arts in Boston, the Princeton University Arts Museum, and the John Paul Getty Museum of Los Angeles that allow Italy to retain ownership rights over cultural property, but allows the United States institutions access to the objects through loans or by means of exchanges and traveling exhibitions. *Id.*

objects should be managed—whether, for instance, they will be loaned or rented to museums, where they will be exhibited and for how long, and whether there are circumstances under which they can be sold for a profit. When museums transfer legal title to trusts, they relinquish their illicitly acquired title to heritage objects and make it possible for groups with historical connections to the object to enjoy the multifaceted benefits of formal ownership over it.

Section IV briefly considers the political implications of creating such trusts, as well as possible criticisms that might be levied against them. Chief among these criticisms is that this Article's proposal requires museums to make foundational determinations about who qualifies as a legitimate claimant for a cultural heritage item. These determinations, in the context of a restitution trust, will shape future access, ownership, and authority over these objects. While clear restitution claims by singular claimants (states or peoples) should be honored directly, without the establishment of a trust, this Article addresses the more complex cases in which no multiple claimants exist, especially when these claimants have differing levels of power. The Article's proposed trust-based framework empowers non-state actors and communities to participate in the decision-making process regarding relevant cultural heritage objects on equal terms with states. By providing a structured alternative to the status quo—in which museums continue to hold contested or potentially contested objects—the Article proposes a practical path to restitution in even the most difficult cases.

II. CONTESTED CULTURAL HERITAGE OBJECTS POSE UNIQUE CHALLENGES TO RESTITUTION

A. Case Studies of Contested Objects

1. Competing Claims on the Benin Bronzes

Calls for restitution of the Benin bronzes are longstanding and have been made by the Nigerian State, representatives of the Edo people, and even Black Americans who have a relationship to these objects through their enslaved ancestors. The "Benin bronzes" refer to a group of brass and bronze sculptures, which include elaborate cast relief plaques, commemorative heads, human and animal figures, objects of royal regalia, and personal ornamentation. They were created starting in or before the 1500s in the African kingdom of Benin, home of the Edo people. Many of these objects were commissioned by the royal family to be included in ancestral altars of past Oba (kings) and Queen mothers, or to decorate the royal palace. The bronzes offer

special insight into the historical record of the Kingdom of Benin, including its political and social history and its relationship with the surrounding polities.[12]

The road to alienation began in 1892, when the British Vice-Consul Henry Gallwey succeeded in convincing Oba (King) Ovonramwen, the ruler of the Benin Kingdom, to sign a so-called protective treaty that gave Britain the right to trade freely without being hindered by protective monopolies being imposed by local rulers; these provisions often required local rulers to lift custom duties on British goods. These treaties also contained provisions stipulating that Britain would handle the Kingdom's external affairs.[13] Scholars speculate that the Oba did not understand that the treaty entailed forfeiting the tribe's independence, in part because the document was badly translated, and in part because the limitation on the Oba's power clashed utterly with the traditional concept of the supernatural authority of the king.[14] Perhaps for these reasons, the Oba did not change his behavior—continuing to interfere with the purported free-trade rights of the British by imposing tariffs and granting monopolies within his own kingdom. The British sent a Deputy Consul General to request the Oba abide by the treaty. The Oba, who was involved in important annual rituals, requested that the visit be postponed. The Deputy Consul General ignored this request and proceeded with the visit. Surprised, the Benin attacked the British, which triggered a dispatch of 1,200 British marines to the kingdom.[15] The soldiers occupied the palace and seized its treasures. According to the British perspective of the time—which dominated Western accounts of the objects into the 1990s[16]—the removal of the bronzes was warranted as a seizure to defray the high costs of the British pursuit of war against the Benin after the Oba resisted. To the Edo, it was an episode of illicit looting.

---

12. *Benin Bronzes,* THE BRITISH MUSEUM, https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/benin-bronzes (last visited Nov. 23, 2025).

13. *See* BARBARA PLANKENSTEINER, *The Benin Treasures: Difficult Legacy and Contested Heritage, in* CULTURAL PROPERTY AND CONTESTED OWNERSHIP: THE TRAFFICKING OF ARTEFACTS AND THE QUEST FOR RESTITUTION 133 (Brigitta Hauser-Schublin & Lyndel V. Prott eds., 1st ed. 2016) .

14. Charles O. Osarumwense, *Igue Festival and the British Invasion of Benin 1897: The Violation of a People's Culture and Sovereignty*, 6 AFRICAN J. OF HIST. & CULTURE 1, 4 (2014).

15. *Id.* at 5.

16. *See e.g.*, William Fagg, *Benin: The Sack that Never Was*, in Flora Kaplan (ed.): IMAGES OF POWER: ART OF THE ROYAL COURT OF BENIN, pp. 20–21. New York: New York University Press (1981).

Following the skirmish, prominent chiefs were tried and sentenced to death, and the Oba was exiled. To this day, February 18, 1897, is remembered as the end of a glorious past, occasioned by the loss of the royal treasures that symbolize the illustrious history of the Benin kingdom.

By the twenty-first century, the Benin bronzes had made their way to 160 museums around the world, with the largest collections located in the British Museum and the Ethnological Museum in Berlin. After being looted from Benin city, the British forces passed some of the bronzes to Queen Victoria, but sold others for profit in West Africa, and to private collectors in England and elsewhere in Europe. The 160 museums who have come to hold the bronzes acquired them in different ways, often through purchase or as donations. However clear it has become that the objects were originally looted, some museums have chosen to focus on the legitimacy of the more recent transactions or purchases that brought the objects into their collections.[17]

Formal calls for restitution began in the 1970s and were inspired by Nigerian independence in 1960, a peaceful process that nevertheless coalesced public opinion against Britain as national identity crystallized.[18] These efforts toward restitution were unsuccessful, but calls emerged again in connection with the Centenary celebrations in 1997 commemorating the 1897 defeat and subsequent collapse of the Benin kingdom. This time, the Oba came forward as the main claimant.[19] Museums with collections of Benin bronzes remained unreceptive. In 1997, the Glasgow Museums refused to restitute any of their 22 Benin pieces. Their justification for keeping the bronzes were representative of the arguments of other Western museums at the time. The Glasgow Museums director argued that its collection included only a handful of Benin pieces of minor quality, but that its modest collection played an outsized educational role in introducing three million

17. A spokesperson for the Metropolitan Museum of Art in New York, for example, emphasized the fact that many of the bronzes had entered the Met's collection as gifts "in the 1970s and 1990s by individuals who acquired them on the art market." *Global survey: where in the world are the Benin Bronzes*, THE ART NEWSPAPER (Apr. 29, 2021), https://www.theartnewspaper.com/2021/04/29/global-survey-where-in-the-world-are-the-benin-bronzes.

18. *See* Barbara Plankensteiner, *The Benin Treasures: Difficult Legacy and Contested Heritage*, *in* CULTURAL PROPERTY AND CONTESTED OWNERSHIP: THE TRAFFICKING OF ARTEFACTS AND THE QUEST FOR RESTITUTION 133, 141 (Brigitta Hauser-Schublin & Lyndel Prott eds., 2016) (discussing the original calls for restitution in the 1970s).

19. *Id.* at 142.

people each year to the culture of the Benin.[20] The Director also pointed out that similar items already exist in Nigeria, so the added value of restituting its collection would be insignificant for Nigeria and detrimental to Scotland. Further arguments that Nigerian museums lacked sufficient security were proffered on the logic that returning items to Nigeria made them especially vulnerable to theft.[21]

As calls for restitution continued into the 2010s, museums throughout the West have become more amenable to the idea, often for distinct but overlapping sets of reasons. A number of items have been returned from Germany and France to Nigeria amidst much fanfare. In 2022, as German Foreign Minister Annalena Baerbock and cultural commissioner Claudia Roth traveled to Abjuja to attend a ceremony in which the ownership of more than 1,000 objects was transferred from Germany to Nigeria and brought back around of those objects in the cargo hold of a government plane. "We are here to right a wrong," Baerbock said, standing alongside a display of many of the items.[22] Baerbock communicated Germany's commitment to co-finance the Museum of Western African Art,[23] a museum scheduled to open in late 2025 in Benin City, Nigeria. It is meant to be the new home of the returned artefacts. The Smithsonian Museum in Washington, D.C. also held a repatriation ceremony in October 2022, in which museum officials from the U.S. Smithsonian National Museum and the National Gallery of Art transferred ownership of twenty-nine Benin bronzes to Nigeria's National Commission for Museums and Monuments.[24] Other institutions in the U.S. and U.K. made pledges to return the objects following these high-profile repatriations, but at least some of the planned returns were halted by

---

20. Memorandum from the Glasgow City Council ¶ 2.5.3 (Apr. 2000) *in* SELECT COMMITTEE ON ANIMALS IN SCIENTIFIC PROCEDURES, MINUTES OF EVIDENCE, 18 May 2000, HC 371-II (UK).

21. *See* Plankensteiner, *supra* note 16, at 142 (summarizing of arguments adopted by the Glasglow Museum's working group on the subject, adopted on the recommendation of archaeologist Frank Willett).

22. Stuart Braun & Rosalia Romaniec, *Germany returns looted Benin Bronzes to Nigeria*, DEUTSCHE WELLE (Dec. 12, 2022), https://www.dw.com/en/germany-returns-looted-benin-bronzes-to-nigeria/a-64165962.

23. Philip Oltermann & Eromo Egbejule, *Restitution row: how Nigeria's new home for the Benin bronzes ended up with clay replicas,* THE GUARDIAN (Oct. 12, 2025), https://www.theguardian.com/news/ng-interactive/2025/oct/12/restitution-row-how-nigerias-new-home-for-the-benin-bronzes-ended-up-with-clay-replicas.

24. *Remarks from the Benin Bronzes Repatriation Ceremony*, AM. ALL. OF MUSEUMS (Nov. 18, 2022), https://www.aam-us.org/2022/11/18/remarks-from-benin-bronzes-repatriation-ceremony.

questions as to who would hold ultimate title over the objects once they arrived in Nigeria.[25] Meanwhile, the Benin Dialogue Group was established, which is described by one member institution as "a multilateral collaborative working group that brings together museum directors and delegates from Austria, Germany, the Netherlands, Sweden, and the United Kingdom with representatives of the Edo State Government, the Royal Court of Benin, and the Nigerian National Commission for Museums of Monuments."[26]

In the summer of 2023, Nigeria's outgoing president, Muhammadu Buhari, announced that he had transferred the ownership of the looted bronzes to a single person, the Oba Ewuare II, king of the Edo people.[27] Oba Ewuare II is a direct descendant of the ruler from whom they were originally stolen. Prior to the President's statement, many of the negotiations about the return of the Benin bronzes had happened at a bilateral level—between representatives of the Nigerian government and Western governments or museums. Although the Oba is still revered, the Edo people also have an elected leader, Godwin Obaseki. Obaseki has a difficult relationship with the Oba, given their competing spheres of influence—the Oba's influence is historical and traditional, and Obaseki's more contemporary and political. Tension between these figures has played out in a jockeying over the Bronzes. Obaseki was instrumental in creating the infrastructure that would have received the returned objects and the Edo Museum of West African Art where they were set to be displayed.[28] At the repatriation ceremony attended by Annalena Baerbock in 2022, ministers of the Nigerian government and Edo State officials were present, but the Oba was absent.[29]

---

25. *See* Macdonald Dzirutwe, *Return of Benin Bronzes delayed after Nigerian President's Decree*, REUTERS (May 10, 2023), https://www.reuters.com/world/africa/return-benin-bronzes-delayed-after-nigerian-presidents-decree-2023-05-10 (noting that a British university postponed the return of more than 100 Benin Bronzes to Nigeria after the Nigerian president named a royal ruler as the owner and custodian of all returned Benin Bronzes).

26. *Benin Dialogue*, MARKK MUSEUM OF HAMBURG (Aug. 12, 2020), https://markk-hamburg.de/en/benin-dialogue.

27. Dzirutwe, *supra* note 25.

28. Godwin Obaseki established the National Commission for Museums and Monuments (also called the Museum of West African Art "MOWAA" trust), which received financial support from European governments at least partially based on the expectation that the MOWAA would be a home to the Benin Bronzes. Samuel Reilly, *How to make a new museum in Nigeria*, THE APOLLO MAG. (Oct. 24, 2024), *available at* https://apollo-magazine.com/museum-west-african-art-mowaa-benin-city-nigeria.

29. Braun & Romaniec, *supra* note 22.

The Oba, meanwhile, denounced Obaseki's project as illegitimate, pledging to construct a separate museum to house the returned artefacts.[30] This disagreement played out publicly,[31] attracting the full attention of the relevant cultural institutions and governments, and the particular criticism of European observers who were skeptical of restitution in the first place.[32] The president's 2023 announcement, in the words of the Oba, "laid [the issue] to rest."[33] In the wake of the announcement, the trustees of the Museum of West African Art, which had been explicitly positioning itself as a home for the Benin Bronzes, has had to pivot and reframe its regional role, focusing on West African art in general instead of the Bronzes in particular.[34] Questions remain about where the Benin Bronzes that are due to be repatriated will ultimately be displayed, and when.[35]

More recently, descendants of enslaved people in the United States have made claims to the Bronzes as well, arguing that their creation was indelibly bound up with the slave trade. These critical voices first emerged in the late 1990s, following the Centenary commemorations of the fall of the Benin Kingdom.[36] The scholar Moyo Okediji introduced the argument that the metal used to cast the objects at issue originated from brass rings that were used to pay for enslaved people who were trafficked by the Edo. This argument relies on a notion of property and ownership unsupported by traditional notions of property law but nevertheless makes a strong moral case about the relationship of Blacks in the diaspora to these West African objects. It has gained modest traction among activists in the diaspora, who have inserted themselves into the already complicated discussion of how

30. Channah M. Norman*, Benin Bronzes Highlight Complexity of Repatriation Decisions*, Shook, Hardy & Bacon Website, October 2025, *available at* https://www.shb.com/intelligence/publications/2025/q4/norman-benin-bronzes.

31. Braun & Romaniec, *supra* note 22.

32. Dzirutwe, *supra* note 25. *See also* Brigitta Hauser-Schublin, *War das der Sinn der Restitution*?, FRANKFURTER ALLGEMEINE ZEITUNG (May 5, 2023), https://www.faz.net/aktuell/feuilleton/debatten/benin-bronzen-werden-privatbesitz-des-oba-war-das-der-sinn-18872272.html (observing that the Benin Bronzes would become "private property" and demonstrated the "how misguided the hasty return by German museums was").

33. *Artefacts: Benin king notifies Netherlands govt of federal govt's gazette*, PREMIUM TIMES (Apr. 24, 2025), https://www.premiumtimesng.com/news/more-news/594838-artefacts-benin-king-notifies-netherlands-govt-of-federal-govts-gazette.html.

34. Reilly, *supra* note 28 .

35. Oltermann & Egbejule, *supra* note 23.

36. *See, e.g.*, Moyo Okediji, *On Reparations: Exodus and Embodiment*, 31 AFRICAN ARTS 8, 8–10 (1998) (making the argument that "it is the progeny of those whose bodies were sold to pay for the raw materials" of the objects "who deserve the works.").

and to whom the Benin bronzes should be returned.[37] Most recently, these activists have resisted the return of the bronzes from the United States to Nigeria on this basis.[38] In light of the messiness of these competing claims, the momentum and fanfare that attended the return of these objects from Europe to Nigeria in 2022 has all but evaporated.

2. The Banjarmasin Diamond as War Booty

The Banjarmasin diamond is an exceptionally large stone that sits in a display case in Room 1.17 of the Rijksmuseum in the Netherlands. The text that accompanies the diamond begins with the sentence: "This diamond is war booty." The diamond has been displayed at the Rijksmuseum since 2013, but it has been in the Netherlands for far longer. It has become symbolic of the complicated and difficult history of all the objects that were shipped from the Netherlands's colonies to the metropole in the 19th Century.[39]

The diamond originates from the Indonesian portion of the island of Borneo, the former home of the Sultanate of Banjarmasin, an Islamic kingdom of small-time agricultural workers and river

---

37. The Restitution Study Group, founded and directed by activist Deadria Farmer-Paellmann, has advocated that the Smithsonian and other U.S. museums should retain the Benin Bronzes in their collection because they have material links to the U.S. diaspora. More specifically, Farmer-Paellmann argues that the bronzes were created with metals that the Benin kingdom obtained through its sale of enslaved persons for sale on the U.S. market. Farmer-Paellmann brought suit against the Smithsonian on the theory that a restitution of the Bronzes to Nigeria would entail a violation of the Smithsonian's duty to maintain these objects in trust for the American people. The lawsuit was ultimately dismissed because it was deemed moot when the relevant bronzes were transferred to Nigeria; the court also indicated that if it had not been dismissed for mootness, it would have faced serious standing questions. Nevertheless, the lawsuit has been an important part of a public advocacy campaign spearheaded by Farmer-Paellmann to raise awareness about the Benin Kingdom's role in the slave trade. Farmer-Paellmann v. Smithsonian Institution, No. 22-cv-2559, 2023 WL 4350787 (July 5, 2023); *Litigation*, RESTITUTION STUDY GRP., https://rsgincorp.org/litigation (last visited Oct. 22, 2025).

38. *See, e.g.*, Deadria Farmer-Paellman, *Afrodescendants Claim Rights to Benin Bronzes –They Beling to All of Us*, CAMBRIDGE J.L. POL. & ART (May 1, 2024), https://www.cjlpa.org/post/afrodescendants-claim-rights-to-benin-bronzes-they-belong-to-all-of-us (arguing that returning the Benin Bronzes solely to Nigeria excludes Afrodescendant communities in the Americas who claim cultural and spiritual ties to the objects and therefore a right to be consulted or share in their restitution). The U.S. Supreme Court subsequently denied cert in the Restitution Study Group's claim, *see Farmer-Paellmann v. Smithsonian Inst.,* 145 S. Ct. 356 (2024), likely for the same reason the D.C. Circuit Court denied the Restitution Study Group's claim—the case was moot because the bronzes had already been transferred.

39. Klaas Stutje, *The Diamond from Banjarmasin: A Story in Facets*, 70 RIJKSMUSEUM BULL. 341, 341 (2022).

merchants.[40] The Sultanate was advantageously located along several major trade routes and had a regionally significant diamond mine.[41] Its central location also put it in contact with the Dutch almost as soon as the Dutch East India Company ("VOC") appeared in the region.[42]

The conflict that gave the Dutch their entry into the affairs of the Sultanate arose in 1852, when the first son of Sultan Adam and heir to his throne died without any clarity about who would succeed him. There were three contenders, and the Dutch favored Tamjidillah, who was wildly unpopular with the Banjarese people.[43] When the Sultan died in 1857, the Dutch favorite was immediately installed, sowing discontent that ultimately led to widespread uprisings two years later. In response, the Dutch colonial government sent a military commander and large numbers of troops to try and wrest control from the Banjarese aristocracy by occupying the palace and demanding public declarations of loyalty from the members of the nobility and other high-level officials. Finally, local Banjarese leaders demanded the abdication of the unpopular Tamjidillah as a condition of lasting peace. Ironically, it was the Dutch governor commissioner, Colonel A.J. Andresen, who ended up pressuring Sultan Tamjidillah to abdicate, explaining that he was unpopular with the people because of his un-Islamic behavior and the fact that he had ascended to the throne in a manner that did not accord with customary law.[44] Sultan Tamjidillah, whose personal safety depended on the continued protection of the Dutch, had little choice. He abdicated his position, and gave up "all the state ornaments belonging to the throne," including the diamond.[45]

While the rest of the Sultan's regalia was sent to the Batavian Society for Arts and Sciences, a forerunner of the present-day Museum Nasional in Jakarta, the diamond was set aside separately and sent to the Netherlands.[46] It had been noticed by the Dutch decades earlier and had made its way into stories about the Sultan, who reportedly always wore it around his neck. The size of the diamond alone

---

40. Vera D. Damavanti, *The Political Economy of Banjarmasin's River Landscape during the Sultanate Period (1526 – 1860)*, *in* RIVER CITIES IN ASIA: WATERWAYS IN URBAN DEVELOPMENT AND HISTORY, 91–92 (Rita Padawangi, Paul Rabé & Adrian Perkasa eds., 2022).

41. *Id.*

42. *Id.* at 95.

43. Stutje, *supra* note 39, at 344.

44. *Id.* at 346 .

45. *See id.* at 347–50 (citing The Hague National Archives, Inv. No. 428, Minutes of Board meeting, no. 93, 20 December 1869).

46. Suzanne van Leeuwen & J.C. Zwaan, *Banjarmasin Diamond: War Booty from Borneo in Amsterdam*, 38 J. GEMOLOGY 662, 662 (2023).

made it rare—it was over 70 karats. Taking possession of the stone, local Dutch authorities thought that it should either be given to the king as a personal gift or remain the property of the Dutch state. After much discussion, the decision was made to send the diamond to the Museum of Natural History in Leiden as property of the state. However, the museum turned it down, lamenting that it did not have sufficient capabilities to guard the valuable stone.[47] The next plan for the diamond was to sell it to add to the credit balance due from the Dutch East Indies to the Netherlands. However, given its "unusual shape and reduced clarity,"[48] Dutch authorities decided to cut the diamond before putting it to market to make it more attractive to prospective buyers. The uncut diamond was valued at 300,00 guilders. After it was cut, the enormous stone was reduced from 70 karats to just under 38 karats. Even more disappointingly, the cut revealed that the diamond was not clear, but had a yellow tint that reduced its value to 50,000 guilders. The reduced value led Dutch authorities to call off the sale and send it to the Rijksmuseum in Amsterdam in 1888 since the cut and clarity rendered its historical value greater than its market value.[49] The status of the diamond—and whether it was worth selling after all—continued to be discussed for decades. It did not receive an inventory number at the Rijksmuseum until 2000 and was not exhibited until 2013. It took more than 150 years for the Bajarmasin diamond to make it from the Sultan's hands into the Rijksmuseum, and by then it had been reduced to half its size.

Despite the Rijksmuseum's openness about the status of the diamond as "war booty," it remains in Amsterdam. Contemplating restitution is difficult because potential claims on the diamond are manifold; they include the Indonesian state, the Sultanate of Banjarmasin, which was reestablished in 2010, and the descendants of the Sultan himself. While no formal claims have been made, museum experts in the Netherlands—because of their expertise on the history of the diamond—are aware of these potentially overlapping or conflicting claims. Despite a willingness to recognize that the diamond was looted and to make restitution, sensitivity to the complicated, overlapping claims of various groups, and indeed the lack of a clear and eager

47. *See id.* at 663 (citing a letter from the Minister of Internal Affairs to the Minister of the Colonies from 1862).

48. *See* Stutje, *supra* note 39, at 350 (citing The Hague National Archives, Inv. No. 869, Report 16 September 1869, no. 29, including copy of minutes from 25 June 1859).

49. *Id.* at 350.

recipient of restitution, likely gives them pause.[50] Unlike the Benin bronzes, which have lasting cultural relevance and have been highly valued on the market, the Banjarmasin diamond has great symbolic value but not necessarily contemporary cultural resonance. It seems likely that many objects have this in common with the Banjarmasin diamond; they were removed from a cultural and political context that no longer exists. While overlapping groups or polities would have claims to the diamond, none has yet invoked these claims.

B. Cultural Heritage Objects as a Unique Category of Property

Beginning in the twentieth century, legal scholars began to describe property not as a right to a thing but instead as a bundle of rights that exist between and among persons, and which may vary with the context and with respect to the object in question.[51] The scholar A.M. Honoré identified several "incidents" of ownership—rights that accrue to the owner and that are good against the world.[52] These include: the right to possess; the right to use (so long as that use is not harmful to other members of society); the right to manage; the right to income; the right to capital (which includes the rights to consume, waste, and destroy); the right to security (immunity from expropriation); the right

---

50. *See, e.g.*, Mandira Nayar, *The Netherlands has chosen to publicly acknowledge its bloody past*, THE WEEK (June 26, 2022), https://www.theweek.in/theweek/cover/2022/06/18/the-netherlands-has-chosen-to-publicly-acknowledge-its-bloody-past.html (discussing an interview with Maritine Gosselink, Director of the Mauritshuis Museum, in which she discusses the return of the Bajarmasin diamond: "Just to give it back without discussing it with the many stakeholders

51. Wesley Hohfeld is often attributed with formulating property as a bundle of rights. *See* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial* Reasoning, 23 YALE L.J. 16, at 46-47 (1913) (not using the phrase "bundle of sticks" but explains in this article the rights and duties that attached to someone who is said to have personal property in a tangible object). This conception of property took hold and was expanded upon by many scholars. *See, e.g.*, Arthur L. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922) (not citing Hohfeld, but stating that "'property' has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities."); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOKLYN L. REV. 681, 696 (2014) (detailing the reliance of Harry A. Bigelow, who began to author the First Restatement on Property in 1926, on Hohfeld's ideas). *See* Anna di Robilant, *Property: A Bundle of Sticks or a Tree?* 66 VANDERBILT L. REV. 869, 871 (2013) (discussing the dissemination of the "bundle of rights" approach to property law in common law jurisdictions in the early twentieth century).

52. A.M. HONORÉ, Ownership, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed. 1961).

to alienate, and; the transmissibility of these rights in perpetuity. Owners are also subject to certain liabilities and restrictions. An owner can lose her interest in an object in cases of debt or insolvency, for instance. Although these rights can be subject to certain restrictions (one cannot use one's property in a way that harms others or negatively impacts the value of others' property), another important feature of traditional accounts of property is the "sole and despotic dominion" it allows the owner to exercise over external objects, often "in total exclusion of the right of any other individual in the universe."[53] But the collective social interests in cultural heritage objects make it seem inappropriate that a single individual should exercise total control—including the right to use, alienate, or destroy.

Cultural heritage objects are meaningful and valuable primarily in a collective context or in relation to a collective. Accordingly, the maximalist, individualist ownership rights afforded to individual owners of other kinds of objects are usually restricted when it comes to cultural heritage objects, and—in the view of many—appropriately so. Property scholar Margaret Radin emphasizes two types of property in her thinking. The first type is fungible, commodifiable, and subject to commercial exchange—that is, most kinds of property we seek to purchase, acquire, or sell. The second type of property is essential to self-construction and is in Radin's view, therefore, "market inalienable" or non-commodifiable.[54] Property of this second type is integral to what Radin calls "human flourishing," and flourishing is, in turn, deeply connected to conceptions of personhood. The idea of personhood is "committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people."[55] Radin places the body in this category, arguing against the notion that organs, sexual services, and fertility should be commodified and market-alienable.[56] Other scholars have extended Radin's thinking to Indigenous Lands and resources, arguing that such objects are entitled to legal protection because they are integral to group identity and the survival of Indigenous People.[57] Without

---

53. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, OF THE RIGHTS OF THINGS 2 (1766).

54. Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850.

55. *See also id.* at 1885 (distinguishing freely-given gifts from market exchanges).).

56. *Id.*

57. *See, e.g.*, Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 725, 749–53 (1997) (discussing whether Radin's argument can be extended to the ownership of property by groups); MARY ANN GLENDON, RIGHTS

reference to Radin, several countries seem to have adopted this principle to collections of cultural heritage objects or cultural patrimony, prohibiting the deaccessioning of state-owned cultural heritage objects. Deaccessioning is the process museums undertake to formally remove objects from their collection, including by transferring or repatriating them. French law, for example, states that "[t]he collections of the museums of France are imprescriptible."[58] Romanian law, similarly, states that "public assets of the State or the territorial-administrative entities[] are inalienable, imprescriptible and exempt from seizure."[59] While British law allows for deaccessioning in certain instances, but only when specifically set out by law, the British Museum policy on deaccessioning stipulates that Trustees "do not have the power to sell, exchange, give away or otherwise dispose of any object vested in them and comprised in the Collection" unless the objects is a duplicate or it is found to be "unfit" or "not of benefit either to scholars or the general public."[60]

The notion that cultural heritage objects have a unique status that necessitates their protection from alienation and commodification is linked to the belief that these objects deserve significant public resources for their conservation and safeguarding. Cultural heritage objects enjoy specific legal protections from destruction, above those afforded to other kinds of property. The destruction of cultural heritage objects during armed conflict is a serious violation of international humanitarian law.[61] During peacetime, cultural heritage objects must be

---

TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 176 (1991) ("We have much to learn from [N]ative Americans who have long known that there is a way in which the land owns us, even as we pretend to own the land, and that we ignore that fact at our own peril.").

58. Code du Patrimoine [C. patr.] [Heritage Code] art. L451-3 (Fr.), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006845667.

59. 2000. Law no. 182 of 25th of October 2000 regarding the protection of the movable national heritage. (Rom.)

60. *See British Museum policy – De-accession of objects from the collection*, THE BRITISH MUSEUM, https://www.britishmuseum.org/sites/default/files/2019-10/De-accession_Policy_Nov2018.pdf (last visited Nov. 23, 2025) (must be read alongside The British Museum Act of 1963, which is the governing instrument of the Trustees of the British Museum).

61. *See* Hague Convention (IV) with Respect to the Laws and Customs of War on Land, arts. 27, 56, Oct. 18, 1907, 32 Stat. 2277, T.S. No. 539 (prohibiting "seizure of, destruction, or willful damage done to institutions of [cultural] character, historic monuments, [or] works of art and science); *see also* the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, art. 4.3, May 14, 1954, S. Treaty Doc. 106-1; 249 U.N.T.S. 216 (creating a duty for contracting parties

carefully inventoried, and their movements must be monitored to prevent illicit export and transfer. States must "set up within their territories one or more national services... for the protection of cultural heritage," including "scientific and technical institutions...required to ensure the preservation and presentation of cultural property."[62]

Industry guidelines also exist not only as to how cultural heritage objects should be treated, but about *who* should own them. In 2002, museums across Europe and North America signed the Declaration on the Value and Importance of Universal Museums. The "universal museum" is one that "serve[s] not just the citizens of one nation but the people of every nation."[63] On this view, museums play a special role as guardians of a common human heritage. These museums include a vast array of objects across geographies and time periods. According to universal museums proponent and scholar Tiffany Jenkins, it is in the context of the "wider, richer framework of relationships" that any given object is especially able to "take on an elevated meaning."[64] In other words, there is a special benefit conferred on cultural heritage objects when they are part of a vast collection. This argument contends that museums and cultural institutions are best suited to own these objects because museums are places "where they can be cared for, studied, and shown to the world."[65]

In tension with that view is the notion that it is not universal museums that are best suited to own cultural heritage objects, but *peoples*. Human rights law recognizes the right to take part in cultural life, and a 2007 UN Declaration acknowledges the rights of Indigenous Peoples to "maintain, protect, and have access in privacy to... their ceremonial, cultural objects."[66] This latter instrument, especially, articulates a notion of cultural heritage property that is in tension with the paradigm of individual ownership and complete ownership rights upon which classical property law is premised.

This Article considers contested cultural heritage objects, but the special status of cultural heritage objects in property law applies broadly to all such objects. The remainder of this Subsection

---

to "prohibit, prevent, and… put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property").

62. United Nations Educational, Scientific and Cultural Organization [UNESCO], *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, art. 5, ¶¶ 1, 3 (Oct. 12, 1970).

63. 2002 Declaration on the Universal Museum.

64. TIFFANY JENKINS, KEEPING THEIR MARBLES: HOW THE TREASURES OF THE PAST ENDED UP IN MUSEUMS, AND WHY THEY SHOULD STAY THERE 123 (2016).

65. *Id.*

66. UNDRIP, Art. 12 (1).

examines how multilateral treaties that address cultural heritage objects fail to provide a basis for historical restitution claims. It further explains that the most promising basis for restitution claims is based not in the property regime that governs cultural heritage objects, but in human rights law.

1. Existing Treaty Law is an Insufficient Basis for Restitution Claims

Cultural heritage artifacts have enjoyed special status and heightened protections since the Treaty of Paris was signed in 1815. Signed after Napoleon's defeat, that treaty provided for the restitution of artifacts plundered by his armies to their original sovereign states.[67] Cultural heritage objects continued to be granted special protections in subsequent nineteenth-century treaties and protocols regulating the laws of war.[68] Protections for cultural heritage objects would eventually be included in the Hague Conventions of 1899 and 1907, which prohibited "all seizure of works of art of science" and required that any illicit confiscation be the "subject of proceedings."[69] These protections were further strengthened after the Second World War, when Nazis carried out a widespread and sophisticated program of looting from both individuals and institutions. Allied focus on restitution of these objects began even before the conclusion of the war. In 1943, the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control explicitly allowed for the invalidation of illicit transfers or dealing in stolen objects.[70] By 1954, the first multilateral convention focused explicitly on the protection of cultural heritage objects came into effect, framing the value of cultural heritage objects as universal. The preamble of the Hague Convention stipulated that "any damage to cultural property, irrespective of the people it belongs to, is a damage to the cultural heritage of

67. Second Treaty of Paris, 20 November 1815.

68. In 1874, fifteen European powers articulated the need for prohibitions on looting and the confiscation of heritage objects in a precursor to the Hague Conventions, the Project of an International Declaration concerning the Laws and Customs of War, Brussels (27 August 1874), *see* art 8. The International Law Institute included a similar prohibition in its 1880 publication *The Laws of War on Land.*

69. Convention (II) with Respect to the Laws and Customs of War on Land art. 56, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention (IV) with Respecting the Laws and Customs of War on Land, art. 28, 47, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.rules 28 and 47 of the 1907 Hague Convention.

70. *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*, Jan. 5, 1943, 8 Dept. St. Bull. 21, ¶¶ 4–6.

all humanity, because every people contributes to the world's culture."[71]

The 1954 Hague Convention and its predecessors provided for the protection of cultural heritage objects during armed conflict. These multilateral treaties applied between and among the countries that signed them—which, prior to decolonization, included primarily European countries, independent countries in Latin America, and sometimes the United States.[72] These treaties did not apply to much of the Global South; prior to decolonization, these countries lacked sovereignty and could not sign treaties or meaningfully participate in the creation of mainstream international law.[73] This began to change in the 1960s when newly independent states began to call for the return of cultural heritage objects that were taken during the colonial period. Critics from newly independent countries claimed that museums in Europe and the United States were stockpiling "good quality objects from the four corners of the world" while at the same time refusing to exhibit them to the public.[74] Another critic criticized these Global North institutions for taking ownership of objects that "remain[] inalienable from the colonized country."[75]

During the early decades of independence, the United Nations—where newly independent states enjoyed a plurality—became a site of advocacy for restitution. In 1973, the President of Zaire made a speech before the General Assembly calling for the restitution of cultural heritage objects to Africa, the absence of which was the cause of cultural poverty. "These works, which were acquired for nothing, have increased in value so much that none of our countries has the material

---

71. 1954 Hague Convention, *supra* note 7.

72. Notably, the United States did not sign the 1954 Hague Convention until 2009. However, the United States was an early signatory to the 1899 and 1907 Hague Conventions.

73. Third World Approaches to International Law Scholars have examined these inequalities in international law-making with great insight. *See, e.g.*, ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005) (making, among others, the argument that international law-making arose through colonial and imperial encounters and therefore tended to subjugate non-Western communities); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. LAW REV. 3, 60-64, (2006) (describing the forces that shape the culture of international law); Makau W. Mutua, *What Is TWAIL?*, 94 Proceedings of the ASIL Ann. Meeting 31 (2000) (describing the ways in which, according to the author, international law allows the West to subjugate the Third World).

74. *See* Pilippu Hewa Don Hemasiri de Silva, *Sri Lanka*, 31 MUSEUM INT'L 22, 23 (1979) (describing the rich collection of Sri Lankan cultural objects in storage).

75. Tayeb Moulefera, *Algeria*, 31 MUSEUM INT'L 10, 11 (1979).

means to recover them."[76] Three years later, the Organization of African Unity adopted the Cultural Charter for Africa, which stated that cultural domination during the colonial era had "led to the depersonalization of part of the African peoples" and had "falsified their history."[77] During the 1970s, the UN General Assembly adopted a number of resolutions that condemned the removal of cultural heritage objects as "a result of colonial or foreign occupation"[78] and called for their return.[79] Unfortunately for these formerly colonized countries, however, UN Resolutions are not binding international law.[80]

Meanwhile, clashes between newly independent states over the fate of cultural heritage restitution were reflected in the acerbity of the negotiations of the Convention on the Means of Prohibiting and Protecting the Illicit Import, Export and Transfer of Cultural Property. Unlike previous multilateral treaties, this Convention protected cultural heritage during peacetime. It also represented a shift in thinking about cultural heritage objects as "universal" to considering them as fundamentally connected to a *particular* people. Article 2 of the 1970 Convention recognizes that the "illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin."[81] The Convention stresses the importance of consensual methods of acquisition.[82] The controversy between newly independent states and established states concerned the temporal application of the treaty. Newly independent states and their allies saw the 1970 Convention as an opportunity to create an international mechanism to effectuate the return of cultural heritage objects. The states that were in possession of those objects, by contrast, did not want the treaty to apply retroactively. Instead, these states wanted to confirm the validity of historical

---

76. U.N. GAOR, 28th Sess., 2140th plen. mtg. at 15, U.N. Doc. A/PV.2140 (Oct. 4, 1973).

77 .Organization of African Unity [OAU] Cultural Charter for Africa pmbl. at 2, ¶ 5 (July 5, 1976).

78. *See* GA Res 3187 (XXVIII) (Dec. 18, 1973), Restitution of works of art to countries victims of appropriation, preambular para. 8 .

79. G.A. Res. 3391 (XXX), ¶ 2, Restitution of Works of Art to Countries Victims of Expropriation (Nov. 19, 1975).

80. *See, e.g.,* James Leslie Brierly, The Law of Nations 54 (Andrew Clapham ed., 7th ed. 2012) (discussing Statute of the International Court of Justice art. 38(1) and the sources of modern international law).

81. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 2(1), Nov. 14, 1970, 823 U.N.T.S. 231.

82. *Id.* at Art. 4 (c), (e).

acquisitions.[83] Ultimately, the Convention did not address unjust past acquisitions. The only reference in the Convention to this priority of newly independent states is Article 15, which allows states to negotiate the terms of restitution of cultural property acquired before the Convention entered into force, but only by a special (and separate) agreement. The 1970 Convention is unhelpful, therefore, for restitution claims of objects acquired during the colonial past. Subsequent multilateral treaties that sought to protect against illicit trade or export of cultural heritage objects, including the UNIDROIT Convention of 1995, likewise exclude the matter of colonial expropriation. While Article 10(3) of the UNIDROIT Treaty states that non-retroactivity does not *legitimize* any illegal transaction that occurred in the past, the treaty nevertheless fails to provide a mechanism for redressing it.

2. The Right to Restitution under International Human Rights Law

Because of the limitations and non-retroactivity of treaties directly related to cultural heritage objects, advocates and scholars have begun to look increasingly toward international human rights law principles to undergird restitution claims. Human rights law focuses not on what is prohibited and permitted vis-à-vis cultural heritage objects, but instead on the rights of the people who comprise the objects' cultures of origin. This legal regime frames illicit acquisitions of cultural heritage objects as violations of the fundamental rights of peoples rather than as property crimes or violations of the law of armed conflict. The Human Rights Council has recognized that illicit theft and smuggling of cultural property undermines the full enjoyment of cultural rights.[84] Cultural property, the U.N. Special Rapporteur in the Field of Cultural Rights has noted, is a vehicle for and an embodiment of

---

83. *See* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 844–45 (1986) (describing the "cultural nationalism" that animated negotiations over the 1970 UNESCO Convention, and the reluctance of "market nations" with large collections of cultural heritage objects from elsewhere to become parties to the Convention); *see also* Mark B. Feldman, The UNESCO Convention on Cultural Property: A Drafter's Perspective, Remarks at a Panel Organized by the International Law Section of the American Bar Association (Apr. 15, 2010), https://culturalpropertynews.org/wp-content/uploads/2017/11/BILL-Mark-Feldman-The-UNESCO-Convention-on-Cultural-Property-A-Drafters-Perspective.pdf (noting that negotiations over the 1970 Convention centered on its non-retroactivity, with market states opposing any application that would unsettle pre-Convention acquisitions sought to be reclaimed by newly independent states).

84. H.R.C. Res. 37/17, Cultural Rights and the Protection of Cultural Heritage (Mar. 22, 2018).

collective identity and fosters links to a shared past.[85] It is the right to full access to and engagement with a collective, historically-rooted identity that conveys a special status to cultural heritage objects.

These arguments are based on two legal instruments: The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). These instruments work together to articulate the harm caused by the alienation of cultural heritage objects from their communities of origin and a corresponding right of redress.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976 and has over 170 States Parties, recognizes the universal right of all persons to "take part in cultural life." It obligates states under the U.N. charter to respect and observe this right. Separation from cultural heritage objects—no matter when the acts of looting or theft took place—interferes with the right of a people to take part in cultural life and therefore constitutes an ongoing harm. Even though the UNESCO Convention and those like it do not apply retroactively, the Committee on Economic, Social and Cultural rights, which is charged with the progressive interpretation ICESCR, has interpreted the treaty to include the right of Indigenous Peoples to "maintain, control, protect and develop their cultural heritage."[86] ICESCR, however, does not provide for or even recognize a right of redress.

While the ICESCR and other multilateral treaties recognize the right to self-determination, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is unique in that it recognizes and enumerates the rights of Indigenous Peoples, people who have been historically poorly represented (or downright persecuted) by states. This puts the Resolution in contrast with traditional international law, which, for the most part, recognizes states as primary rightsholders.[87] Demands for restitution made by a nation state to another nation state or to national museums (such as the demand for the return of the Elgin Marbles made by the Greek government to the

---

85. *See* Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Report of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/HRC/31/59 (Feb. 3, 2016).

86. COMM. ON ECON., SOC. & CULTURAL RTS., *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 37, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

87. *See, e.g.,* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 105 (9th ed. 2019).

British museum[88] or the demand by the Turkish government that France return the tiles from the tomb of Sultan Selim III[89]) are appropriately asserted by governments. Governments, in these cases, are reliable and zealous advocates for cultural heritage objects that they view as belonging to the nation. But Indigenous Peoples, who may live within or between states, tend to be imperfectly or poorly represented by states, or have legitimate and historically rooted reasons to distrust that the state will carry out their interests adequately. An Indigenous People in State A may not trust the government of State A to adequately advocate for the return of their cultural heritage objects from State B, and may be loath to see those objects—even if returned—placed in a national museum in State A. This is especially true if the group in question has ongoing spiritual or cultural ties to the object. For this reason, it is unwise to depend on traditional international law, which foregrounds states and states' rights, to adequately represent the interests of Indigenous Peoples. Non-Indigenous minorities, such as the descendants of enslaved people in the United States who feel a connection to the Benin Bronzes, arguably, face many of the same structural challenges.

International human rights law provides an alternative framework to states as primary rights-holders. It instead recognizes individuals as rightsholders under international law and creates a framework for individuals to demand that their rights be respected by states.[90] Human rights treaty law overwhelmingly conceives of rights as cognizable on an *individual* level. For the most part, ICESCR conceives of rights this way. Article 15 of ICESCR, especially as interpreted by the Committee on Economic, Social, and Cultural Rights in its General Comment no. 21, arguably presents an exception. Still, human rights law, with its overwhelming focus on individual rights violations and demands, is ill-suited to contend with rights to cultural heritage, which are cognizable on a collective basis rather than an individual one.

Insofar as many of the instances of restitution that have taken place so far involve national authorities, UNDRIP provides an

---

88. For more on the circumstances of the removal of these cultural heritage objects and the demands made by Greece, *see, e.g.,* David Rudenstine, *Trophies for the Empire: The Epic Dispute Between Greece and England Over the Parthenon Sculptures in the British Museum*, 39 CARDOZO ARTS & ENTERTAINMENT L. J. 377 (2021).

89. *See* Merve Stolzman*, Turkey Rules: Cultural Heritage Protection Efforts Explained*, IT'S ART LAW BLOG (Mar. 26, 2018), https://itsartlaw.org/cultural-heritage/turkey-rules-cultural-heritage-protection-efforts-explained (observing that between 2003 and 2016, Turkey recovered 4,269 cultural artifacts from abroad).

90. *See, e.g.*, Crawford, *supra* note 87, at 111 (discussing individuals as subjects of international law and the notion that "human rights… arise against the state, which so far has a virtual monopoly of responsibility.").

important alternative framework for considering peoples that tend to be imperfectly or poorly represented by nation states, or who have reasons to distrust that the state will carry out their interests adequately. The UNDRIP is not binding law because it does not have the status of a treaty, but it was adopted by 144 states as a U.N. General Assembly Resolution, signaling that its principles may constitute customary international law.

As a resolution focusing on Indigenous Peoples, UNDRIP acknowledges collective rights. These rights may not necessarily map onto nation-states as political units. Notably, Article 11 of the UNDRIP recognizes the rights of Indigenous Peoples "to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature."[91] The manner in which Article 11 is drafted—and especially the right to "revitalize" cultural traditions—acknowledges without stating explicitly the fact that many Indigenous Peoples have been subjected to conditions in which their cultural traditions have been repressed or forbidden and that they have been alienated from their cultural heritage objects.

UNDRIP, adopted by the General Assembly more than sixty years after the ICESCR entered into force, provides the right of redress that was missing from the 1966 Covenant. Article 11 goes on to require that States "provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous Peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions, and customs." In requiring that states provide redress for stolen cultural heritage objects, Article 11 does two groundbreaking things: First, it highlights the possible dichotomy between the laws of the culture or political entity that took the objects and the culture they were taken from. And second, it requires that regimes of restitution be developed in conjunction with the affected communities.

Article 11 of UNDRIP also challenges the modus operandi of how cultural institutions and states have dealt with restitution to date. Article 11's inherent rejection of the validity of the laws under or by means of which cultural heritage objects were taken in favor of the

---

91. G.A. Res. 61/295, art. 11, *United Nations Declaration on the Rights of Indigenous Peoples* (Sept. 13, 2007).

"laws, traditions and customs" of the communities of origin is a rebuke to the notion that cultural heritage objects were rightfully or lawfully taken as spoils of war upon defeat. This notion is hinted at in the *Declaration on the Importance and Value of Universal Museums*, which states that "objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era."[92] The fact that it was not technically unlawful to pillage cultural objects from defeated peoples because the Eurocentric international legal regime of the time did not explicitly prohibit it is not sufficient under UNDRIP to justify continuing to hold such objects outside their communities of origin. Article 11 further requires that measures for restitution be developed "in conjunction with Indigenous Peoples." The preference of many states or museums to deal exclusively with other sovereign states as interlocutors contravenes this requirement. The importance of this requirement is evident, especially in cases like that of the Benin bronzes, where the stated plans of the Nigerian President for the Benin bronzes are in direct tension with plans to return the Bronzes to the Nigerian state and to display them in a specially-created museum in the Edo region—to say nothing of the more recent competing claims on certain of the bronzes from the descendants of enslaved people in the diaspora.

Two years before UNDRIP was passed, the U.N. General Assembly passed a resolution with a lengthy but descriptive title: the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles").[93] The Basic Principles provide another helpful legal framework for thinking about the rights of peoples to seek restitution for cultural heritage. The Basic Principles require states to "provide effective remedies to victims, including reparation"[94] and access to justice "irrespective of who may ultimately be the bearer of responsibility for the violation."[95] The Basic Principles recognizes victims as a category that applies to collectives, stipulating that "victims are persons who individually or collectively suffered harm...."[96] Furthermore, the Basic Principles provide that gross violations of human rights or serious

92. *See* Declaration on Universal Museums, *supra* note 1.

93. G.A. Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Dec. 16, 2005) [hereinafter *Basic Principles*].

94. *Id.* ¶ 3(d).

95. *Id.* ¶ 3(c).

96. *Id.* ¶ 8.

violations of international humanitarian law have no statute of limitation.[97]

Section IX of the Basic Principles sets out the kinds of reparations that are due after a gross violation of international human rights law or a serious violation of IHL. Alongside rehabilitation, satisfaction, compensation, and guarantees of non-repetition, Section IX identifies restitution as one of the five pillars of reparations. There is no universal agreement on what constitutes a "gross violation" of human rights, but most definitions[98] feature harm to the body (such as extrajudicial killing, torture, rape, and sexual violence) or curtailment of liberty (such as apartheid or enslavement). On this basis, it seems unlikely that the illicit acquisition of cultural heritage objects would constitute a "gross violation" of human rights law for the purposes of the Basic Principles. However, what constitutes a "serious violation of international humanitarian law" is arguably broader.[99] Serious violations are set out in the Fourth Geneva Convention, and include a number of enumerated harms against persons, as well as "extensive... appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".[100] Additional Protocol I to the Geneva Convention, which extends the protections of the convention

---

97. *See, e.g. Basic Principles*, *supra* note 93, ¶ 6 .

98. *See, e.g.*, U.N. Secretary-General, *Letter Dated Feb. 25, 2013 from the Secretary-General Addressed to the President of the General Assembly and to the President of the Security Council*, U.N. Doc. A/67/775 (Mar. 5, 2013) [hereinafter *Human Rights Due Diligence Policy*].Paragraph 12 of the Human Rights Due Policy stipulates:

> "Grave violations" mean, for the purposes of the present policy:
> (a) In the case of a unit:
> (i) Commission of 'war crimes' or of 'crimes against humanity', as defined in the Rome Statute of the International Criminal Court, or 'gross violations' of human rights, including summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence of a comparable serious nature, or acts of refoulement under refugee law that are committed on a significant scale or with a significant degree of frequency (that is, they are more than isolated or merely sporadic phenomena) […]

99. For an authoritative and thorough account of what "serious violations" entails as reflected in the decisions of ad hoc criminal tribunals and in the writings of jurists, *see* INT'L COMM. OF THE RED CROSS, *Rule 156. Definition of War Crimes, in* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005), https://ihl-databases.icrc.org/en/customary-ihl/v1/rule156.

100. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287.

from international armed conflict (war between states) to non-international armed conflict, including armed conflict in the context of colonial domination or alien occupation, contains specific provisions protecting cultural property.[101] In outlining the status of international customary law with respect to cultural property, the International Committee of the Red Cross states that "[t]heft, pillage, misappropriation and acts of vandalism" are specifically prohibited by Article 4 of the Hague Convention and that these protections have been "widely regarded as reflecting customary international law."[102]

Illicit acquisitions made during an armed conflict or occupation, then, may constitute "serious" violations of international humanitarian law for which the Basic Principles provide restitution. The Benin Bronzes and the Banjarmasin diamond were both acquired during situations of armed conflict and occupation, as were many other cultural heritage objects that left their communities of origin during the colonial period. It bears noting, however, that this argument would face at least one significant challenge if it were ever made before an international tribunal: The Geneva Conventions, Additional Protocol I, and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (which is invoked by the International Committee of the Red Cross in its evaluation of protections for cultural property under customary international law) were not in force at the time of colonial conquest. The so-called "intertemporality principle," namely the notion that contemporary standards of human rights and humanitarian law cannot be invoked retroactively, has been increasingly critiqued—especially when these standards are being invoked to vindicate colonial injustices.[103] It also bears noting that at the

101. Art. 53 of the Protocol Additional to the Geneva Conventions of 12 August 1949 prohibits making "committing acts of hostility" against historical monuments, works of art, or places of worship and "mak[ing] such objects the object of reprisals."

102. INT'L COMM. OF THE RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW ch. 12, § C, rule 40 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), https://ihl-databases.icrc.org/en/customary-ihl/v1/rule40.

103. For critiques of the intertemporal principle, *see, e.g.,* Elvis Mogesa Ongiri, *Decolonizing Intertemporal Law through the Lens of the Mau Mau Reparations Campaign*, 119 AJIL UNBOUND 182 (2025); Eliana Cusato, *Against Temporal Abstractions: The Battle for Colonial and Climate Reparations in International Law*, 21 INT'L J.L. CONTEXT 281 (2025); Matthias Goldmann, *The ambiguity of colonial international law: Three approaches to the Namibian* Genocide, 37 LEIDEN J. OF INT'L L. 580 (2024); Natalia Loyola Daiqui, *From Past Injustices to Today's Unlawful Consequences/Eurocentric legal systems with a global social claim to validity?*, VERFASSUGSBLOG (Dec. 6, 2022), https://verfassungsblog.de/from-past-injustices-to-todays-unlawful-consequences-eurocentric-legal-systems-with-a-global-social-claim-to-validity.

time of this writing, no domestic or international tribunal has invoked the Basic Principles in the context of a restitution claim.

C. The Move Toward Voluntary Restitution

Recently, an increasing number of institutions and ministries of culture have expressed a willingness to return cultural heritage objects acquired during the colonial period. This trend was at least partially inspired by Macron's 2017 speech in Burkina Faso, during which he said that he wanted "the conditions met for the temporary or definitive restitution of African heritage to Africa."[104] A year later, Bénédicte Savoy, an art historian in Berlin, and Felwine Sarr, a Senegalese academic, jointly published a report estimating that 90-95% of Africa's cultural heritage is located outside Africa and urging the repatriation of culturally meaningful artifacts.[105] Macron had commissioned the report.

Other countries followed suit. Belgium,[106] Germany,[107] the Netherlands,[108] and Switzerland[109] have created national guidelines or convened panels to evaluate restitution claims and work toward a coordinated policy for dealing with cultural heritage objects looted in the colonial era. Laws in France and Belgium make it unlawful for the state-owned museums (a category that includes all major museums in France and many in the French-speaking parts of Belgium) to

---

104. Anna Codrea-Rado, *Emmanuel Macron Says Return of African Artifacts Is a Top Priority*, N.Y. TIMES (Nov. 29, 2017), https://www-nytimes-com/2017/11/29/arts/emmanuel-macron-africa.html.

105. FELWINE SARR & BÉNÉDICTE SAVOY, THE RESTITUTION OF AFRICAN CULTURAL HERITAGE: TOWARD A NEW RELATIONAL ETHICS (2018), https://restitutionreport.fr/the-restitution-of-african-cultural-heritage.pdf.

106. Marie-Sophie de Clippele & Bert Demarsin, *Pioneering Belgium: Parliamentary Legislation on the Restitution of Colonial Collections*, 8 SANTANDER ART AND CULTURE L. REV. 323, 323 (2022).

107. Christopher F. Schuetze, *Germany Sets Guidelines for Repatriating Colonial-Era Artifacts* (15 Mar., 2019), N.Y. TIMES https://www.nytimes.com/2019/03/15/arts/design/germany-museums-restitution.html.

108. Jonathan Knott, *Dutch government to explore unconditional return of looted objects*, MUSEUMS ASS'N (14 Nov. 2020), https://www.museumsassociation.org/museums-journal/news/2020/10/dutch-government-to-explore-unconditional-return-of-looted-objects.

109. *See Bundesrat schafft eine unabh. . .ngige Kommission fur historisch belastetes Kulturerbe*, NEWS SERV. SWISS GOV'T (Nov. 22, 2023), https://www.news.admin.ch/de/nsb?id=98818 (The Federal Council creating an independent expert commission for to consider "historically burdened" cultural heritage items and make non-binding recommendations).

deaccession objects that constitute "cultural patrimony."[110] There is legislation in the works to create exceptions to these restrictions to allow for the repatriation of objects illicitly acquired during the colonial era.[111] The United Kingdom, where the largest collections are controlled by a board of trustees instead of the government, has similar restrictions on deaccessioning. In 2022, the U.K. Parliament passed the Charities Act, which included sections that "would allow national museums to return material in rare cases where there is an overwhelming moral obligation to do so."[112] In May 2023, following criminal investigations into some of the items in its collection, the Metropolitan Museum of Art announced that it planned to hire four experts to "more thoroughly" examine the history of its holdings.[113] In October of the same year, ministries of culture in Germany and France announced an agreement to launch a joint fund devoted to provenance research into colonial-era objects.[114] Public opinion and awareness of the history of these objects is pushing toward restitution, too.[115] This is especially significant in countries like France, Belgium, and the UK, where these objects are publicly owned or held in public trust. Bénédict Savoy, who wrote the report on restitution commissioned by Macron, likened the significance of this change in attitudes toward restitution to the fall of the Berlin Wall.[116]

---

110. *See* Clippele & Demarsin, *supra* note 106; *see also infra* note 102.

111. Recent reports suggest, however, that this legislation is unlikely to pass any time soon. *See* Michel Guerrin, *France is pathetically putting the brakes on the restitution of art to Africa which is inevitable*, LE MONDE (Apr. 28, 2024), https://www.lemonde.fr/en/opinion/article/2024/04/28/france-is-pathetically-putting-the-brakes-on-the-restitution-of-art-to-africa-which-is-inevitable_6669791_23.html.

112. This was how Alexander Herman, director of the UK-based Institute of Art & Law, described the 2022 Act to ArtNews. *See* Devorah Lautner, *Restitution, Repatriation Efforts See Halting Progress Across Europe and the US, amid Shifts in Public Opinion*, ARTNEWS, Feb. 19, 2024. It is important to note, however, that the interpretation of those sections and their potential to be used to deaccession colonial objects has since been called into question.

113. Kathleen Sharp, *The Met Will "More Thoroughly" Investigate Artwork Origins with Hire of Provenance Researchers*, PROPUBLICA, May 12, 2023.

114. Angela Villa, *France and Germany Forge Joint Fund for Colonial-Era Research*, ARTNEWS (Oct. 11, 2023), https://www.artnews.com/art-news/news/france-and-germany-forge-joint-fund-for-colonial-era-research-1234681956.

115. Tessa Solomon, *Restitution and Repatriation: How Art News's Year in Efforts To Return Heritage Shaped the Industry*, ARTNEWS (Feb. 16, 2024), https://www.artnews.com/art-news/news/restitution-repatriation-art-efforts-europe-united-states-progress-1234696438./

116. *Id.*

Despite these laudable intentions, the scope and pace of returns have fallen far short of what was hoped for even a few years ago. In 2017, Macron said that he wanted to begin a program of widespread returns; that deadline has long since passed, and France has returned only a handful of items.[117] Germany, which announced in 2021 that it intended to transfer 1,100 Benin bronzes to Nigeria, has so far returned fewer than 30.[118] Legislation that would lift restrictions on deaccessioning was passed in summer of 2025.[119] Last year, the Mauritshaus, a museum in the Hague, hosted an exhibition devoted to objects in its collection that had been looted. The curators' goal was to show the complexity of restitution. Kel O'Neill, one of the guest curators of the exhibition, described the need for restitution as "a continuum," elaborating that "there are objects that have been looted that perhaps people don't want back."[120] In this context, O'Neill described a spiritual object connected to a people in Bali; when O'Neill brought the object to Bali and presented it to the King of Klungkung, the King rejected it because, he argued, it had lost its spiritual significance.[121] Even though no restrictions on deaccessioning exist in the Netherlands, hesitancy about whether and how looted objects should be returned has kept them in Dutch museums.

D. Legal and Political Challenges to Effectuating Restitution

The primary hurdles to restitution are political. Even in countries where legal restrictions on deaccession exist (such as France, Belgium, and the U.K.), changes to these laws have been proposed, and the headwinds to restitution will be fought in parliament. Once a willingness to restitute objects exists and restrictions on transferring these objects out of the collections of national museums have been lifted, however, a myriad of logistical and ethical questions will remain. This

---

117. Emma Jacobs, *France promised to return cultural objects back to Africa. Is it still happening?* NPR (Feb. 2, 2025), https://www.npr.org/2025/02/02/nx-s1-5258467/france-promised-to-return-cultural-objects-back-to-africa-is-it-still-happening.

118. *Id.*

119. Kate Fitz Gibbon, *France Sets Conditions for Colonial Restitution—but Not Without Control*, CULTURAL PROP. NEWS (Aug. 3, 2025), https://culturalpropertynews.org/france-sets-conditions-for-colonial-restitution-but-not-without-control.

120. Nina Siegal, *When Should a Museum Return Looted Items? It's Complicated*, N.Y. TIMES (Sept. 14, 2023), https://www.nytimes.com/2023/09/14/arts/design/restitution-looted-10-stories-mauritshuis.html.

121. *See id* (connecting what constitutes the loss of spirituality of the object to the King's rejection of it).

Section will specifically examine questions related to the uncertainty about whom objects should be transferred to in cases where more than one group has significant connections to them.

This subsection distinguishes between the return of cultural heritage objects to states (or nations) and the return of these objects to peoples. The term "people" here denotes a subnational group with a distinct cultural identity and legitimate claims to collective rights on the basis of that distinct identity. These rights have historically been discussed in relation to Indigenous Peoples and minorities, as well as other groups whose rights may be jeopardized by state power. Generally speaking, countries in which museums and their collections are owned and controlled by governments tend to deal with states in negotiating restitution claims. In these contexts, restitution—which is decided on and carried by government officials (such as a minister of culture or a foreign minister)—constitutes a diplomatic act. Privately held and controlled museums and collections are usually free to make restitution to whatever groups they wish.

1. Legal Prohibitions on Deaccessioning

In many European countries, museums are nationally owned and fall within the purview of the Ministry of Culture. This is true of the Louvre[122] and Musée du Quai Branly in Paris,[123] both of which have enormous collections of objects (the Musée du Quai Branly has seventy thousand objects from Africa alone, as well as thousands of objects from Asia and Oceania). It is true of the Rijksmuseum in Amsterdam[124] (which has itself estimated that its collection includes at least 1000 stolen objects) and the Nationaal Museum van Wereldculturen, a Dutch organization that manages several publicly owned ethnographic museums throughout the Netherlands, which together have sixty-six thousand objects from Africa alone, in addition to sizeable holdings from the Netherlands' former colonies in Indonesia, Sri Lanka, Taiwan, and Malaysia. This is true of the Royal Museum for Central Africa in Belgium. Germany, which holds 180,000 objects

122. Décret 92-1338 du 22 décembre 1992 portant création de l'Établissement public du musée du Louvre, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.], 23 décembre 1992, p. 17565.

123. *See* CODE DU PATRIMOINE arts. L451-1 to L452-4, L451-3. *See also* Décret 92-1338 du 22 décembre 1992 portant création de l'Établissement public du musée du Louvre, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.], 23 déc. 1992, p. 17565 (setting out rules limiting transfer from national museums of France).

124. *Frequently Asked Questions about Provenance and Property Rights of the Collection*, RIJKSMUSEUM, https://www.rmo.nl/en/collection/provenance/frequently-asked-questions (last visited Oct. 24, 2025).

from Africa.[125] Because these museums are publicly owned, restitution claims are ultimately considered and carried out by the Minister of Culture and made to *countries* or publicly-held national collections in their places of origin.[126] They are not returned to peoples.

In Germany, by contrast, many museums are owned by private foundations or a combination of public and private entities. Although Germany has had a Minister for Culture since 1998, the country's federal structure puts the responsibility for cultural life in the hands of Germany's sixteen states. Many museums are run by state or even municipal organizations, and about two-thirds of museums receive some public funding (whether at the federal or state level).[127] The country's most prominent museums, the seventeen museums that comprise "die Staatliche Museen zu Berlin" (the Berlin State Museums), are owned and managed by the Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation), a federal government body. The Humboldt Forum, a museum built to showcase Germany's extensive collection of objects from Asia, Africa, Oceania, and the Indigenous Peoples of the Americas, is owned by a private foundation, but its collection is part of the Preußischer Kulturbesitz, which is federally owned. While restitution of objects from federally-owned collections often involve the Minister of Culture, restitutions of objects from privately-owned or state- or municipally-owned

125. Nosmot Gbadamosi, *Africa's Stolen Art Debate is Frozen in Time*, FOREIGN POL'Y (May 15, 2022), *available at* https://foreignpolicy.com/2022/05/15/africa-art-museum-europe-restitution-debate-book-colonialism-artifacts (providing an overview of the numbers of non-Western origin items in various major European museums).

126. This is true, for example, of the promised return of a "talking drum" from Frace's collection at the Musée du Quai Branly to Côte d'Ivoire, *see* Claire Gatinois, *Talking Drum to Return to Côte d'Ivoire as French Government Drags on Restitution Law*, LE MONDE (Nov. 18, 2024), https://www.lemonde.fr/en/culture/article/2024/11/18/talking-drum-to-return-to-cote-d-ivoire-as-french-government-drags-on-restitution-law_6733212_30.html. In another example, the Dutch government returned centuries-old Buddhist statutes to Indonesia in response to a repatriation claim by the Indonesian Repatriation Commission to the Dutch Commission of Colonial Collections, *see* Nina Siegal, *Netherlands to Return Hundreds of Artifacts to Indonesia and Nigeria*, N.Y. TIMES (Sept. 20, 2024), https://www-nytimes.com/2024/09/20/world/europe/netherlands-indonesia-artifacts.html.

127. MONIKA HAGEDORN-SAUPE & AXEL ERMERT, THE EUROPEAN GROUP ON MUSEUM STATISTICS: REPORT ON GERMANY (2004), https://www.egmus.eu/uploads/tx_usermusstatistic/Germany.pdf.

collections may be executed without the formal involvement of the German government.[128]

The most important collections of non-European cultural heritage objects in the United Kingdom are housed in the British Museum and the Victoria and Albert Museum, both in London. Both collections are managed by a board of trustees, at least some of whom are chosen by the Crown and the Prime Minister. Deaccessioning is the process museums undertake to formally remove objects from their collection, including by transferring or repatriating them.[129] The decision of these trustees to deaccession objects is constrained by British Law, most notably the British Museum Act of 1963[130] and the Charities Act of 2011.[131] So far, this legislation has severely curtailed the ability of these museums to make restitutions, but if this legislation were changed or interpreted more generously, the museums would have wide latitude to make restitutions to countries or national collections, municipal governments or collections, or peoples, as appropriate.

The United States is anomalous in that most collections are privately owned. This is true of most major museums in the U.S., apart from the Smithsonian Institute, which is held by the United States government as a trust instrumentality.[132] Items may be deaccessioned from the Smithsonian for several reasons, including if a determination has been made that they are stolen or looted. However, removals must be approved by the Smithsonian's board of regents. There are no laws governing the deaccessioning, restitution, or removal of other collections in the United States. There are several instances of individual museums deciding on their own initiative to return objects to

---

128. DEUTSCHER MUSEUMSBUND, GUIDELINES FOR THE CARE OF COLLECTIONS FROM COLONIAL CONTEXTS 86 (3d ed. 2021), https://www.museumsbund.de/publikationen/guidelines-on-dealing-with-collections-from-colonial-contexts-2.

129. *See, e.g., Direct Care of Collections: Ethics, Guidelines, and Recommendations*, AM. ALL. OF MUSEUMS (March, 2019), https://www.aam-us.org/wp-content/uploads/2018/01/Direct-Care-of-Collections_March-2019.pdf.

130. BRITISH MUSEUM ACT 1963, c. 24, § 5 (UK).

131. Charities Act of 2011, Sec 106, which stipulates that charity trustees can seek authorization from the Charity Commission to make a transfer if they feel morally compelled. For more on this deaccession under British law, *see* Lauren Bursey, *Colonial-Looted Cultural Objects in England,* 8 SANTANDER ART & CULTURE L. REV. 341 (2022).

132. The Smithsonian Institution is a trust instrumentality of the United States established by Act of Congress. 20 U.S.C. §§ 41–80; *see O'Rourke v. Smithsonian Inst. Press*, 399 F.3d 113, 114 (2d Cir. 2005). A trust instrumentality is an institution or entity that is created to administer trust property for the benefit of the public.

national collections abroad without a preliminary promise or negotiation by U.S. government officials.[133]

2. *Ethical Questions and Power Dynamics in the Restitution of Contested Items*

As the political and legal barriers to restitution fade, museums in formerly colonized countries stand ready to receive them, and their capacity to receive these objects is growing all the time. In 2018, the Museum of Black Civilizations opened in Dakar, a sprawling complex with the express purpose of becoming a home to objects restituted from Europe and elsewhere.[134] In 2021, France launched a training program for African heritage professionals in various fields, which complements existing programs in France and elsewhere.[135] Construction is underway for a museum in Benin City, Nigeria, that will also host a conservation facility.[136] The notion that museums outside Europe are ill-equipped to preserve cultural heritage objects and that

---

133. Two examples are the Denver Art Museum's return of several items to Cambodia. Although the United States government eventually helped facilitate the return, the museum reached out to Cambodian officials to make arrangements to deaccession certain objects when it became aware that they had faulty provenance. *See Denver Art Museum Returns Four Artworks to the People of Cambodia,* DENVER ART MUSEUM (June 4, 2024), https://www.denverartmuseum.org/en/press/release/museum-returns-art-cambodia] (explaining in brief the role of the Denver Art Museum in the return of four original wors of art to the Cambodian government). In another example, the Boston Art Museum's curator for provenance, Victoria Reed, who took the initiative to research the provenance of two terra cotta figures that were bequeathed to the museum in 2012, and subsequently decided that they were best returned to Mali. *See* Ted Loos, *A Long Way Home for 'Looted' Art Is Getting Shorter,* N.Y. TIMES (April 27, 2022), https://www.nytimes.com/2022/04/27/arts/design/victoria-reed-museum-of-fine-arts-stolen-artwork.html (highlighting the initiative of the museum in returning these objects to Mali, implying such restitution was not facilitate nor directed by the U.S. government).

134. Brigit Katz, *Sprawling Museum of Black Civilizations Opens in Senegal*, SMITHSONIAN MAGAZINE (Dec. 10, 2018), https://www.smithsonianmag.com/smart-news/sprawling-museum-black-civilizations-opens-senegal-180970976.

135. *See, e.g., Return of cultural goods: a new heritage co operation policy between France and Africa,* FR. DIPLOMACY, MINISTRY FOR EUR. AND CULTURAL AFFAIRS (Sept., 2021) https://www.diplomatie.gouv.fr/en/country-files/africa/cultural-exchanges/return-of-cultural-goods (describing France's support of technical experts in Benin's governmental program for heritage trades in the country, and the French Embassy in Cotonou building a coalition of French and Beninese public and private actors to support Beninese museum policy).

136. Catherine Hickley, *Benin City museum opens first part of planned campus*, THE ART NEWSPAPER (Nov. 1, 2024), https://www.theartnewspaper.com/2024/11/01/benin-city-museum-opens-first-part-of-planned-campus.

those objects should therefore remain in metropolitan museums—as morally flawed as it always was—has now also been thoroughly debunked.[137]

The majority of restituted objects have been or will be returned to governments in formerly colonized countries without contest. While such cases of restitution are almost never logistically or politically straightforward, they are ethically simple. Many objects currently displayed in museums throughout Europe and the United States were looted or otherwise acquired in an illicit manner from their places of origin. If metropolitan museums are willing to return them and there are national museums or institutions ready to receive them on the other side, they should be returned. It is the *illicit acquisition* of these objects that makes their return compelling. Indeed, when the provenance of objects of European origin is contested, their place in the hands of public museums and private collectors is appropriately precarious.

But there is a second justification for the return of at least some of these objects. The special nature of cultural heritage objects make them valuable not just as precious artifacts, but as mediums of collective identity and history. In the eloquent words of the First Director-General of UNESCO, Amadou-Mahtar M'Bow:

> "One of the most noble incarnations of a people's genius is its cultural heritage, built up over centuries by the work of its architects, sculptors, painters, engravers, goldsmiths and all the creations of forms, who have contrived to give tangible expression to the many-sided beauty and uniqueness of that genius…. [These objects were] more than decorations or ornamentation. They bore witness to a history, the history of a culture and of a nation whose spirit they perpetuated and renewed. The peoples who were victims of this plunder… have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better."[138]

---

137. *See, e.g.,* Liam Stack, *Are African Artifacts Safer in Europe? Museum Conditions Revive Debate*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/arts/design/germany-museum-condition-artifacts.html (investigating German museums falling short of international standards for storage and preservation; German state museums cite the lack of adherence to these same standards in Africa and Asia when declining to return items taken from former colonies).

138. Amadou-Mahtar M'Bow, *An Appeal by Mr. Amadou-Mahtar M'Bow, Director-General of UNESCO*, 31 UNESCO COURIER 1, 4 (1978).

Here, M'Bow is invoking a notion of identity-related collective rights that are cognizable at the national level. When the historical and cultural value of an object inheres at the level of a nation, that object is most appropriately received and held by a national museum. The same is arguably true of objects linked to a people that was once culturally distinct but that has been subsumed into a majoritarian national culture or have otherwise assimilated, or that predates the creation of the modern nation-state (such as the Normans in France or the Scythians in Central Asia). A Celtic copper helmet is at home in the British museum; a Sumerian seal is rightfully displayed at the Baghdad Archeological Museum in Iraq. But as countless independence movements and programs of ethnically-based repression demonstrate, the nation state often exists in tension or outright conflict with the identity of specific peoples, especially Indigenous Peoples.

This is especially true of African states. Many of the borders of African countries are grounded in the continent's colonial legacy. During the nineteenth and early twentieth centuries, the African continent was invaded and colonized by seven European powers.[139] It was these powers, rather than internal processes of nation-building and self-determination, that divided the continent into territories that would eventually become sovereign states during the postcolonial period. More concerned with an intra-European struggle for access to natural resources, the colonial powers paid little attention to the Indigenous Peoples of the continent and the territories they themselves lived in or laid claim to.[140] Many political and cultural groups were divided by national borders: for instance, the Masai were divided between Kenya and Tanzania, and the Ewe were divided between Togo and Ghana. Meanwhile, groups with a history of conflict like the Akimbo, Kikuyu and the Masai were all included within the territory of Kenya.[141] For the most part, these borders endured after African countries gained their independence. The principle of *uti possidetis* provides that states emerging from the process of decolonization presumptively inherit the borders of the previous colonial administration.[142] For this reason, the territorial borders that European powers

---

139. Freddy D. Mnyongani, *Between a rock and a hard place: the right to self-determination versus tui possidetis in Africa*, 41 COMPAR. INT'L L. J. S. AFR. 463, 466 (2008).

140. *Id.*

141. *See* Makua wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1136 (1995) (explaining the division of groups between the colonial powers' manufactured borders).

142. *See, e.g.*, *Frontier Dispute (Burk. Faso/Mali)*, Jugement, 1986 I.C.J. 554, 565, paras. 21, 24 (Dec. 22).

drew up during the Berlin Conference of 1884/85 (before most European powers had even had even taken the time to travel to and learn about the territories in question) largely endure until today.[143]

Because of this imperfect overlap between territory and distinct cultural groups, many peoples are imperfectly or insufficiently represented by their governments; in some cases, the interests of a particular people may be actively undermined by its national government. This phenomenon is not exclusive to Africa. The independence movements of the Kurds in Iraq and Turkey, the Abkhaz and South Ossetians in Georgia, and the Scots in the Catalans in Spain are testaments to its universality. In settler colonial societies like the United States, Canada, and Australia, decisions of national governments have actively destroyed or undermined the culture, practices, territories, and very existence of the Indigenous Populations.[144]

Cultural heritage objects that have a *contemporary* connection to a people with a cultural identity unique from that of the state from which the object originated pose a particular challenge to conventional approaches to restitution. This challenge is especially acute when the group in question is actively oppressed by its national government. In April 2024, the antique trafficking unit of the Manhattan District Attorney's office seized 38 objects dating from the Yuan, Ming, and Qing dynasties (which collectively span 1279-1911). The objects were then handed to the Chinese consulate in a ceremony attended by Li Qun, China's deputy minister of the Ministry of Culture and Tourism and the director of the National Cultural Heritage Foundation.[145] Among the items were a collection of Tibetan Buddhist objects

143. *See, e.g.*, Matua, *supra* note 141 (discussing the legacy of the Berlin Conference on the present state borders on the African continent).

144. *See, e.g.*, BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP (2018) (exploring the ways in which Western property law in the Americas rendered Indigenous subjects as outside history and lacking or incapable of the requisite cultural practices and economic organization to be considered sovereign); ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA (2017) (exploring the history of the enslavement of the indigenous population of the United States, which persisted despite its illegality and after abolition); NED BLACKHAWK, VIOLENCE OVER LAND (2008) (exploring the experiences of the indigenous peoples of the U.S. Great Basin in resisting and adapting to European expansion); Patrick Wolfe, *Settler colonialism and the elimination of the native*, 8 J. OF GENOCIDE RESEARCH 387, (2006) (exploring the status of settler colonialism as genocide under the definition of Raphael Lemkin, whose thinking undergirds the Genocide Convention).

145. Benjamin Sutton, *US authorities return 38 antiquities to China*, THE ART NEWSPAPER (Apr. 19, 2024), https://www.theartnewspaper.com/2024/04/19/repatriation-chinese-antiquities-manhattan-district-attorney.

(although certain of them may have been copies).[146] Since the 1990s, the government of the People's Republic of China has imposed increasingly restrictive measures against Tibetan religious expression and practice, including human rights violations such as arbitrary arrest, enforced disappearances and inhuman treatment and punishment.[147] The primary victims of these human rights abuses are Tibetan Buddhist monks and nuns.[148] In this context, it seems inappropriate for U.S. authorities to return the Tibetan objects to the People's Republic of China—both because there is a specific group that has a unique and compelling link to these objects, and the government of the People's Republic of China cannot be looked to adequately represent the interests of that group vis-à-vis these cultural heritage objects.

The conventional approach to restitution—turning objects over to a national government or a national collection—is also ill-suited to objects that have ongoing cultural relevance to groups that find themselves on both sides of an international border. This was the case when the Yaqui people, an Indigenous group living in both the Southwestern United States and northern Mexico, requested that the Museum of Ethnography in Stockholm return the Maaso Kova, a sacred item used in a religious ritual. In making their request to Sweden, the Yaqui invoked Article 11(2) of UNDRIP, which provides for the restitution of cultural property "taken without [an Indigenous group's] free, prior, and informed consent or in violation of their laws, traditions, and customs." Sweden resisted this initial request, arguing that it was invalid without a formal request from the Mexican government.[149] Eventually the return of the Maaso Kova and other items was negotiated with the help of the UN Expert Mechanism on the Rights of Indigenous Peoples, but the success of the process turned on Mexico's participation. The Yaqui had to come to an initial agreement amongst themselves about whether to involve the United States or the Mexican government, since Yaqui find themselves in the territories of

146. Adam Kuper, *Who Owns the 'Victorious Youth'?*, N.Y. TIMES (June 30, 2024), https://www-nytimes-com/2024/06/30/opinion/museum-statue-looted-culture.html?searchResultPosition=27.

147. *See* INT'L FED'N FOR HUM. RTS., *Chinese Crackdown on Tibetan Buddhism* (2013), https://www.fidh.org/IMG/pdf/en-report-tibet-4.pdf (noting Tibetan monks and nuns have experienced rights violations including arbitrary arrests, enforced disappearances and inhumane treatment or punishment).

148. *Id.*

149. Shea Esterling, *The Journey Home: The Repatriation of the Maaso Kova*, 27 ASIL INSIGHTS 3 (2023), https://asil.org/insights/volume/27/issue/3.

both countries.[150] The Yaqui were able to agree on which government would represent them in the negotiations with Sweden, and the Mexican government was supportive of the Yaqui people's claim to the Maaso Kova.[151] Had the Yaqui been unable to agree on which territory the Maaso Kova should be transferred to, it seems unlikely that Sweden would have agreed to its return.

Finally, restitution is especially complicated in cases in which overlapping groups have claims to the same object, as is the case with the Banjarmasin diamond and many of the Benin bronzes. Museums are ill-equipped to navigate tensions between competing claims of persons or cultural groups, especially when those claims are asserted against the claims of a sovereign state. In 2022, institutions across Germany announced a joint and coordinated decision to return the Benin Bronzes to Nigeria.[152] Germany and Nigeria subsequently signed an agreement in which Germany pledged to return two-thirds of the bronzes to the Nigerian government and to retain one-third in Germany as objects on loan, transferring title for the objects to Nigeria. In making this announcement, Germany became a model for other countries that own and exhibit looted art.[153]

However, Germany has so far returned fewer than thirty of its 1,100 bronzes. Plans to return the bronzes on the original timeline halted when Nigeria announced that it would pass the bronzes into private hands; Nigerian President Muhammadu Buhari published a decree that transferred the objects to Oba Ewuare II, the heir of the former royal family in Benin. When Germany originally concluded the agreement with Nigeria to return the bronzes, German authorities assumed that they would be publicly exhibited in a new museum in Benin City, where they could be viewed by local and international visitors alike. Instead, the President unilaterally chose to transfer the many valuable objects into the hands of one man, the heir to the Benin royal family from which the bronzes were originally snatched.

---

150. *See* Andrea Carmen, Kristen Carpenter & Shea Esterling, *Righting Wrongs: The Repatriation of the Maaso Kova,* AM. SOC'Y OF INT'L LAW (Oct. 3, 2023), https://www.asil.org/events/righting-wrongs-repatriation-maaso-kova (noting that the Yaqui people's members span across northern Mexico and southern Arizona).

151. *Id.*

152. *UNESCO welcomes the signing of a historic agreement between Germany and Nigeria for the return of 1,130 Benin bronzes*, UNESCO (July 1, 2022), https://www.unesco.org/en/articles/unesco-welcomes-signing-historic-agreement-between-germany-and-nigeria-return-1130-benin-bronzes.

153. *See, e.g.*, Thomas Rogers, Rahila Lassa & Alex Marshall, *How Germany Changed Its Mind, and Gave the Benin Bronzes Back*, N.Y. TIMES (Dec. 20, 2022), https://www.nytimes.com/2022/12/20/arts/benin-bronzes-nigeria-germany.html (describing Germany's transfer agreement as "part of a pioneering model for large-scale restitution").

This decision, while certainly legitimate from a historical perspective, was not what German institutions had in mind when they agreed to restitution.

But inveighing against the decision of a sovereign, democratically elected leader—especially in the context of addressing the historical injustices of colonialism—would seem to fundamentally undermine the broader project of creating more space for self-determination vis-à-vis cultural heritage objects. President Buhari's decision to transfer the objects into private hands instead of displaying them publicly kicked off a debate in the German parliament.[154] The right-leaning and far-right parties[155] criticized the decision to restitute the objects as a "failure" because of the lack of conditions imposed on Nigeria for acceptance. The social democrats and Greens defended the process, arguing that meddling in the decisions of a country whose artifacts had been looted during the colonial era was a form of neocolonialism. In the words of a spokesman for the social democrat and green coalition government:

"The [Benin Bronzes] were returned with the aim of repairing a historical error: the illegal acquisition and possession of these objects. No conditions were imposed... it is now the sovereign state of Nigeria that will decide who legally gets to keep them and how they are to be made available to the Nigerian people. Insinuating that [the transfer to private ownership means] that these bronzes will disappear—never to be seen again—just because Germany no longer exercises control over them, but Nigeria does, is a way of thinking that we hoped to have left in the past."[156]

Nigerian artist Vitor Ehikhamenor has echoed this sentiment, calling the concern of German parliamentarians that the Nigerian government was making the wrong decision by transferring the objects into private hands "disrespectful" and "insulting."[157] Indeed, the report authored by Felwine Sarr and Benedicte Savoy also advances the argument that because restitution is an international procedure, objects

---

154. Elena G. Sevillano, *Legitimate concerns, or neocolonialism? Germany expresses worry about the fate of the Benin Bronzes, following their restitution to Nigeria*, EL PAIS INTERNATIONAL (May 18, 2023), https://english.elpais.com/international/2023-05-19/legitimate-concerns-or-neocolonialism-germany-expresses-worry-about-the-fate-of-the-benin-bronzes-following-their-restitution-to-nigeria.html.

155. *See id.* (describing the criticism of the Christian Democrats (CDU) and the Alternative for Germany (AfD) parties).

156. *Id.*

157. *Id.*

must be returned to African nation-states.[158] Ultimately, according to the authors, the decision to place the objects in national or regional museums lies with the nation-state.

Museums and governments that wish to make restitution of contested cultural objects are left between a rock and a hard place. How should demonstrating respect and deference to sovereign states be weighed against taking into account the specific—and perhaps contrary—interests of a specific cultural group with ongoing connections to cultural heritage objects? Is *any* decision to prefer the interests or legitimacy of one group of claimants over another open to the criticism that Western institutions are imposing their own values in the process of making restitution? Does a lack of certainty about how to proceed justify museums' defaulting to the status quo, and continuing to hold objects they know to have been illicitly acquired in their collections? Section III will attempt to address these questions by demonstrating how the trust might be helpful in these contexts.

III. ESTABLISHING TRUSTS TO ADMINISTER CONTESTED CULTURAL HERITAGE OBJECTS

At present, the emergence of new claimants to cultural heritage objects risks frustrating and delaying the transfer of those objects back to communities of origin. In the cases of both the Benin bronzes and the Banjarmasin diamond, museum authorities and relevant officials have balked at the difficulty of prioritizing competing claims. A deep sense of self-criticism has occasioned and motivated the project of restitution, and museum officials likely realize the irony of their being granted the power to decide who among competing claimants is the most legitimate. This kind of decision-making should be neither a duty nor a right for museums. Paradoxically, though, this means that cultural heritage objects remain in the places most responsible for their being displaced for an even longer period. Furthermore, as explained in Sections I and II, although human rights law requires restitution to the relevant community in question or with the participation of the relevant community,[159] restitution is often conducted on a

158. *See* Sarr & Savoy, *supra note* 7, at 82 (stating that "[t]he property of the French State will thereby be granted to the requesting state, it is then that this (requesting) state's responsibility, after the negotiations, to give this property back to its community or initial owner.").

159. This requirement that restitution be made with the participation of the affected communities is set forth explicitly in Article 11(2) of UNDRIP, which applies with respect to Indigenous Peoples. The Basic Principles require restitution in the wake of a serious breach of international humanitarian law, which may entail the illicit

bilateral level between states or between museums and states. This means that the communities of origin for cultural heritage objects—those communities that arguably have the deepest spiritual, cultural, and traditional ties to the object—are often left out of negotiations for restitution unless the state seeking restitution voluntarily decides to involve them.

But the law has devised an entity that can respond to these difficulties: the trust. The humble trust offers a potential way forward because it allows the benefits of ownership of cultural heritage objects to be transferred away from Western museums to *all* claimants with relative immediacy. These transfers can be effectuated even as the claimants work out amongst themselves who will have possession of the cultural heritage objects and for what period, and even whether and under what circumstances objects might be lent or even sold to external parties for a profit. This section will examine the basics of trusts with a focus on how they can democratize the process of restitution by allowing all potential legitimate claimants to receive formal legal rights to cultural heritage objects.

A. Trusts in Common Law and Civil Law Jurisdictions

Trusts emerged in relation to the English legal doctrine of "equity." English law was historically divided into two distinct realms, each with its own subject matter and rules: common law and equity. Common law was developed and administered in royal courts and stood in contrast to customary law, which was applied in local manorial courts convened under local nobles. The common law was so called because it ostensibly applied universally. The Courts of Common Law developed the basic rules and principles that undergird basic private law today—the law of torts, contract, restitution, and much of property law.[160]

Equity's origins are less clear. Originally, equity was derived from the administrative power of the medieval Chancellor, who was the King's most powerful minister. Unlike the opinions of Common Law Courts, the decisions of Chancellors were not recorded. These decisions did not have the weight of precedent and were historically regarded as an *ad hoc* exercise of power to do justice in individual cases. Rather than contributing to a coherent body of universal rules, as Common Law Courts aimed to do, Chancellors made orders aimed

---

exploitation of cultural property. The Basic Principles apply to Non-Indigenous Peoples as well.

160. JAMES E. PENNER, LAW OF TRUSTS 1 (12th ed. 2022).

to ensure that individuals acted according to good conscience in the particular circumstances of a given case. Equity acts *in personam*, with respect to individual peoples.[161] Equity did not determine rights but instead made specific demands. As Common Law courts became stymied by precedent and the burden of making, through their decisions, rules that would become universal, parties began to turn to equity to seek justice. Sometimes, a party would appeal to the Chancellor on the basis that the rigid application of common law rules would lead to injustice in a particular case. The Chancellor, in turn, could order a person not to act on his common law rights if doing so would plainly cause injustice to be done.[162] The body of reasons and principles that grounded a Chancellor's decisions in his efforts to temper the overly harsh or rigid application of common law rules developed into a body of law known as "equity."[163] In the words of Penner, "The term 'equity' reflected the idea of fairness implicit both in the 'conscience-based' administrative jurisdiction of the Chancellor and in principles of 'equity' found in Roman and ecclesiastical law in which many early Chancellors were learned. These principles ultimately derived from Aristotle's idea of equity, that there will be cases in which one must depart from the rules in order to avoid injustice."[164]

Common law courts and Chancery courts also had access to different legal remedies. Common law courts had only one means of enforcing their decisions: they could empower officials (such as sheriffs) to separate a defendant from his property; defendants' property or land could be seized if they did not pay damages. Chancery courts, meanwhile, had access to more varied equitable remedies. A Chancellor could throw anyone found in contempt of court into detention ("goal") or order an injunction. If courts of common law governed property, equity governed the body of the parties. "Equity has the power to make you do something, or stop doing something... [it] can rescind contracts... and can rectify documents, i.e., tell people to carry on as if the document had different terms."[165] Chancery Courts would come to develop certain property principles, much of England's commercial law, legal remedies such as injunction, and the law of trusts.

The trust is essentially "equity's imposition of stringent personal obligations upon a legal owner," who, although she technically owns the property in question, must administer it completely for the benefit

161. *Id.* at 2–3.
162. *Id.* at 3.
163. *Id.* at 4.
164. *Id.*
165. *Id.* at 6.

of another "with the result that [s]he is no longer able to treat the property as [her] own..."[166] A trustee's behavior vis-à-vis the contents of the trust is, therefore, extremely constrained and guided by notions of fiduciary duty and good conscience. If an outright owner of an object has complete dominion over that object, the trustee has almost no rights, making her ownership of the contents of the trust purely formal. Trusts arose in English law as a way to pass property (especially land) from one generation to the next while sidestepping the complicated and cumbersome rules of feudal tenure. It allowed a person to provide for their loved ones in ways that would have been impossible or unwise in a simple transfer of legal title.[167]

Trusts are rooted in the duality between law and equity, which had to do with the idiosyncrasies of the development and centralization of royal power in England. These phenomena are without a direct parallel in continental legal history.[168] Is the trust, then, a singularly English institution? What use can it have in civil law jurisdictions? Does it make sense to assert, as this Article does, that the trust can be a useful tool in civil law jurisdictions, when these jurisdictions have managed fairly well without it?

Roman law, on which civil law systems are based, contains the elements of the law of trusts. The Roman institution of *fiducia* operated much like a trust,[169] but was usually deployed on a shorter timeline than a common law trust. Similarly, the institution of *fidei commissum* allowed a testator (the person who created the trust) to bequeath property to another person with the expectation that that person would transfer it to a designated third party at a given time. This allowed a person to essentially inherit property even if traditional inheritance rules would have prevented it; it also allowed for the more flexible distribution of assets over time.[170] Whether as an inheritance from Roman law or as a result of British colonization, the trust

166. *Id.* at 8.

167. *Id.* at 12–13.

168. PRINCIPLES OF EUROPEAN TRUST LAW 3 (David J. Hayton et al. eds. 1999).

169. It is important to note, though, that *fiducia* contemplated a temporary transfer of property, often for safekeeping. One example of *fiducia* provides that: "A man might transfer his property to another for the sake of greater security in time of danger, or for other sufficient reason…. The trustee was bound to discharge his trust by restoring the thing: if he did not, he was liable to an action fiduciae or fiduciaria…." *See also* GEORGE LONG, DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 536 (William Smith ed. 1875) (describing fiducia as a temporary transfer of property for security and noting that the transferee was bound to restore the property).

170. *Id.* at 536.

doctrine or a functional equivalent exists in various forms in civil law and hybrid jurisdictions throughout the world.[171]

In the final decades of the twentieth century, the variety of uses made of the trust in common law jurisdictions expanded, primarily through increased use of securitization and innovations in investment.[172] The spread of trust ideas has also expanded with the globalization of finance and the increased awareness of the advantages of globally diversified holdings.[173] To clarify the legal implications of these developments, the Hague Conference on Private International Law set about drafting a multilateral treaty aimed to clarify the law of trusts across jurisdictions. The Hague Convention on the Law Applicable to Trusts and on their Recognition ("The Hague Convention on Trusts") was concluded in 1985; it entered into force in 1992. The Hague Convention on Trusts offers a unified definition of trusts; it sets out clear rules for determining what law will govern trusts that have cross-jurisdictional features, and it allows the settlor (creator) of a trust to determine what law will govern it. So far, there are sixteen signatories to the treaty and fourteen ratifications. The United Kingdom, the Netherlands, and Switzerland have all signed and ratified the treaty. All three of these states parties to the treaty hold sizable collections of non-European objects, many of which were illicitly acquired.[174] Both the Netherlands and Switzerland have displayed a willingness to investigate and restitute objects that were acquired in a colonial context. France has signed the treaty but has not ratified it.

Germany, Belgium, and France have sizable collections of cultural heritage objects that were acquired in colonial contexts.[175] Each

---

171. *See* PRINCIPLES OF EUROPEAN TRUST LAW*, supra note* 168 at 4.

172. *See, e.g.*, John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L. J. 165, 167–174 (outlining various types of common commercial trusts).

173. *See* PRINCIPLES OF EUROPEAN TRUST LAW *supra note* 168 at 5.

174. On the United Kingdom, *see* Lauren Bursey, *Colonial-Looted Cultural Objects in* England, 8 SANTANDER ART AND CULTURE L. REV. 341, 342 (2022); on the Netherlands, *see* COUNCIL FOR CULTURE, COLONIAL COLLECTIONS AND A RECOGNITION OF INJUSTICE (2020), https://www.raadvoorcultuur.nl/documenten/adviezen/2020/10/07/summary-of-report-advisory-committee-on-the-national-policy-framework-for-colonial-collections; on Switzerland, *see* Karolina Kuprecht, *Colonial Loot and its Restitution – Country Report: Switzerland*, 8 SANTANDER ART AND CULTURE L. REV. 457, 458 (2022).

175. Although Germany had less extensive colonies than Belgium and France, it did acquire a substantial number of objects during its brief tenure as a colonizing power. A recent investigation concluded that there are 40,000 objects looted from Cameroon present in Germany. *See* Tessa Solomon, *German Museums Hold 40,000 Artifacts Looted from Cameroon, New Study Finds* (5 June 2023), ARTNEWS,

of these countries is governed by civil law, and none has signed the Hague Convention on Trusts, but Belgian and French law recognize trusts established in foreign jurisdictions. Germany does not have trust law per se, but has legal vehicles that act similarly to trusts.[176] Of the countries this Article considers with sizable collections of cultural heritage objects acquired in the colonial context, Germany's laws present the highest hurdles to the trust model this Article proposes.

B. Establishing Trusts for Cultural Heritage Objects

A trust is created when the holder of property (the settlor) gives it to another person or entity (the trustee) who is bound by a fiduciary duty to keep and use the property solely for the benefit of another person or group of persons (the beneficiaries). Once the settlor establishes the trust and transfers ownership of the contents of the trust, she ceases to be in legal relationship with the trustees and the beneficiaries of the trust. She has also has no ongoing rights or powers over how the trust is administered.[177] To animate this idea with an example, the Rijksmuseum could transfer the Banjarmasin diamond to a trust designed to benefit all legitimate claimants to it. To date, those potential claimants include the Indonesian state, the Banjarese, and any proven heirs to the Sultan from whom the diamond was taken.[178] Although the Rijksmuseum would have constitutive power over how the trust is formed and may, for example, name the trustees and identify the beneficiaries, it would cease to own the diamond and would lose any power to make decisions about its fate after the trust is established.

Trusts are administered by trustees, but a single trust may have more than one trustee (co-trustees). In such cases, decisions about administering the trust are made by consensus or majority vote—whatever is set forth by the terms of the trust.[179] To continue with the example of the Banjarmasin diamond, trustees could be appointed from among the members or representatives of each claimant group. The

---

https://www.artnews.com/art-news/news/german-museums-hold-40000-artifacts-looted-from-cameroon-1234670469. Cameroon was a German colony from 1884 until the First World War, after which Germany lost its colonies as part of the negotiations of the Treaty of Versailles.

176. David Hayton, *Anglo-Trust, Euro-Trusts and Caribbo-Trusts: Whither Trusts?*, *in* MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 3 (David Hayton ed., 1999).

177. George Gleason Bogert et al., The Law of Trusts and Trustees § 42 (3d ed. 2007).

178. *See supra,* Section II.

179. RESTATEMENT (THIRD) OF TRUSTS § 39 (AM. L. INST. 2003).

Indonesian state might be represented by an individual appointed by the Ministry of Culture; the regency of Banjar may select its own representative; and a trustee might be selected to represent the interests of any demonstrable heirs of Sultan Tamjidillah, whom the Dutch forced to surrender the royal regalia. A trustee can be selected to represent these interests even if it remains unclear at the moment the trust is created who exactly comprises this class of heirs—more on this below. In this example, co-trustees can be chosen to represent the potentially divergent interests of a diverse group of claimants. The terms of the trust set out how they will cooperate and make decisions together for the benefit of the equitable owners of the trust. Occasionally, some trustees are given extra votes to provide a limited mechanism for control.[180]

The beneficiaries of a trust are commonly individuals, but they may also be classes of people. If the beneficiaries are a class of people (as in the example of the Banjarmasin diamond), the law only requires that the class be "definite." A class is definite if the identity of all the people who comprise it is ascertainable when the trust is created. A class of people is not indefinite for the purpose of a trust "merely because it consists of a changing or shifting group, the number of whose members may increase or decrease."[181] Trusts often refer to the definite classes of "children" or "grandchildren" or "heirs" of a settlor, and may be created before it is clear who and how many people belong to these classes because they are not yet born. In the Banjarmasin diamond example, then, the classes of beneficiaries may consist in the citizens of Indonesia; the native residents of the regency of Banjar, and; the demonstrated heirs of Sultan Tamjidillah. Each of these classes will change over time, but their membership will always be ascertainable (even if vast) at any given moment.

The mechanism of a trust also features methods for ensuring that trustees remain accountable to their beneficiaries. Proceedings for the removal of a trustee may be instituted by beneficiaries, and beneficiaries may act jointly to bring such proceedings.[182] Trustees may also seek to remove co-trustees, putting themselves in the shoes of the beneficiaries and acting on their behalf.[183] If some beneficiaries or a co-trustee seek to remove a trustee, the remaining beneficiaries must be made parties to the action (potentially as defendants), drawing all

---

180. Sidney Kess & Edward Mendlowitz, *Understanding the Duties of a Trustee in Administering a Trust*, CPA J., (June 2019), https://www.cpajournal.com/2019/06/03/understanding-the-duties-of-a-trustee-in-administering-a-trust/.

181. RESTATEMENT (THIRD) OF TRUSTS § 45 (AM. L. INST. 2003).

182. Bogert et. al., *supra* note 177, at § 522.

183. *Id.*

beneficiaries into the adjudication process and requiring all to take a position.[184] If the removal of a trustee is sought, she can be removed in accordance with the terms of the trust,[185] meaning that conditions for removal can be established when a trust is created. Alternatively, a trustee can be removed for cause by a relevant court. The relevant court will be dictated by the terms of the trust (see Part B below), which will ultimately be decided or influenced by the institution that establishes the trust. These accountability provisions ensure that trusts can remain flexible and responsive to the desires and priorities of the claimant communities, and trustees can be replaced if necessary to accommodate these priorities.

C. The Role of the Museum in Creating the Trust

While placing cultural heritage objects into a trust ensures that all legitimate claimants can enjoy the benefits of equitable title to the trust property, the trust itself must be established by the museum or the institution that holds the cultural heritage objects, possibly with the consent of the state in which the transferring museum is located. That means that even as trusts are ultimately vehicles that transfer equitable title to communities of origin as their beneficiaries, the contours of the trust can or will be determined by the transferor, or the *settlor*. The terms of the trust reflect the intention of the settlor as the original holder of the trust property. It is up to the settlor to set forth the reasons for establishing the trust, to determine the number and identity of the trustees, to stipulate the trust's beneficiaries, and to outline the value and character of the trust property. In other words, even institutions seeking to divest themselves of difficult decision-making about the fate of cultural heritage objects, setting up a trust to do so is a process that must be undertaken with great care and respect for the communities involved. However, once the trust is established, any ownership rights of the museum are terminated, as are any legal or administrative rights or powers over the contents of the trust.[186]

First and foremost, cultural institutions that establish trusts to facilitate the restitution of cultural heritage objects must make an initial determination about who counts as a legitimate claimant. By refusing to recognize a particular claimant or community as a trust beneficiary, the cultural institution excludes them from equitable ownership and perhaps even access to the cultural heritage property far into the

184. *Id.*

185. RESTATEMENT (THIRD) OF TRUSTS § 37 (AM. L. INST. 2003).

186. *See supra*, Section III (B).

future. On the other hand, choosing to include a beneficiary or class of beneficiaries with tenuous or spurious claims to an object forces legitimate claimants to share the negotiating table with them in a more permanent way. Given the genuine and thorough provenance research many Western museums have begun to undertake regarding their non-Western cultural heritage objects,[187] it is not unreasonable to expect that such institutions will be well-positioned to discern bogus from legitimate claims. This is true even while it is unreasonable to assume that they can or should choose among legitimate claimants. Still, it is worth mentioning that even creating the kind of trusts this Article proposes involves a serious sorting of competing interests. This Article proposes a method of empowering non-state actors and communities so that they have equal or near-equal opportunity to make decisions about cultural heritage objects to states. Establishing trusts in this way is not a first-line solution for the challenges posed by restitution. If there are clear and unique claims on a cultural heritage object—whether by states or particular communities—those claims should be considered and honored. This Article proposes the use of trusts for situations in which there are no such claims, or there are multiple competing claims. At present, the lack or complexity of restitution claims results in a default to the status quo—the museum in possession holds on to the object. This Article proposes a method for working toward restitution even in the most difficult cases.

Second, the settlor of a trust (here, cultural institutions) acts as the ultimate decision-maker as to who will act as trustees. Because a trust can have multiple trustees, a representative can be chosen for each class of beneficiaries and may even be appointed by each class of beneficiaries in accordance with the terms of the trust. Still, since the settlor decides the terms of the trust, it will have to make important decisions about how trustees are appointed or selected, even if they

187. *See, e.g.*, *Artworks, Cultural Goods: Re-examining Questions of Provenance and Restitution*, L'edition of Université Paris-Saclay, no. 26 (July 1, 2025), https://www.universite-paris-saclay.fr/en/news/artworks-cultural-goods-re-examining-questions-provenance-and-restitution (reflecting the renewed scholarly and institutional focus on rigorously investigating the ownership histories and restitution claims of cultural goods, as highlighted in recent research on provenance and restitution questions); *Provenance and Other Contemporary Challenges for Global Cultural Heritage: A Conversation with Emanuele Pellegrini,* LAWART (Apr. 10, 2023), https://www.lawart.it/Article/Archive/index_html?ida=73&idn=4&idi=-1&idu=-1 (identifying the development of "a legal system of cultural heritage which partly still reflects its colonial roots."); Meghan Bill, *Decolonizing Provenance Research in Practice, Some Guidelines*, BOASBLOG (July 24, 2022), https://boasblogs.org/dcntr/decolonizing-provenance-research-in-practice-some-guidelines (emphasizing the need for provenance research that critically interrogates colonial power structures and incorporates the perspectives of source communities).

are ultimately chosen with the input or consent of those in whose interests they are meant to act.

Finally, it is the settlor that determines the body of law that applies to the trust, and with it, the law that will govern any disputes that arise in the context of administering the trust. Because the restitution of cultural heritage objects is often a cross-border endeavor—meaning that there may be a true choice among differing legal regimes—determinations about the applicable law are important and may have an outcome-determining effect if a conflict arises. Because the law of trusts is well-established under the common law, a common law jurisdiction will likely be selected as the applicable law governing the trust.

D. The Trust as a Wedge Between Legal Title and Full Ownership Rights

At its core, a trust is a mechanism whereby one person can transfer her property to another person for the benefit of one or more other identified persons or groups, or for some specific purpose. Although the common law doctrine of the trust has its roots in medieval England, the concept of transferring property to someone who bears a fiduciary duty to another is an ancient and near-universal concept.[188] The trust has a handful of common applications—such as transferring property without having to go through probate, or shielding property from creditors. However, it is the trust's status as a vehicle of equity, not law, that makes it especially valuable for managing cultural heritage objects.

Placing an object into a trust—especially a trust with multiple beneficiaries—makes the ability to exercise "full liberal ownership" over it (with the associated rights of exclusion, possession, use, income, and alienation) functionally impossible. This warrants an explanation. In the common law system from which trusts emerge, rights can be divided into two categories: legal rights and equitable rights.[189] Legal rights can be further subdivided into two classes: (1) those which conflict with equitable principles and therefore are unenforceable, and;

---

188. IRINA GVELESIANI, THE ORIGIN OF THE TRUST: A COMPARATIVE LINGUISTICS AND LAW PERSPECTIVE 16 (2024).

189. These separate rights regimes were easier to distinguish (at least in the U.S.) in the first half of the twentieth century, before the adoption of the Federal Rules of Civil Procedure merged law and equity into a single civil jurisdiction in the United States and allowed parties to combine legal and equitable claims in a single action, and simultaneously gave courts combined jurisdiction over both kinds of claims.

(2) those which do not.[190] Consider, for example, Sandra. Sandra has obtained Theodore's vacation home through fraud, and now she holds the deed to it. Because she has obtained the home through unjust means, she is a "constructive trustee." Sandra technically owns the vacation home. But compare her title to that of her neighbor, Ursula. Ursula purchased her vacation home legitimately with money she saved over the course of decades. Under common law, Sandra, as a constructive trustee, has the right to do things associated with ownership of the house; she can paint it a gaudy color, she can rent it, she can sell it; she can burn it down. But she is prevented from doing so—thankfully—by principles of equity. Because she is a constructive trustee for Theodore, who was defrauded, equitable principles prevent her from transferring or damaging the house. But, because Sandra still holds title to the house under common law, Theodore likewise lacks the right to paint, rent, sell, or burn the house down. Ursula, by contrast, has common law rights to her house and no principles of equity impose duties curtailing these rights. She can paint, rent, sell or burn her house down. Ursula has full liberal ownership rights to her house; Sandra and even Theodore lack these rights.

A trust—especially one with trustees who take and act on substantive input from beneficiaries—effectively decouples the incidents of ownership (exclusion, possession, use, income, and alienation) from legal title. If a trust has multiple beneficiaries, the trust structure allows for more parties—and more *kinds* of parties—to effectively make decisions about and benefit from individual incidents of ownership. This decoupling feature of trusts is compelling because it bursts open the notion of "sole and despotic dominion" that conventionally characterizes ownership. If the trust is structured in a way where power to make significant management decisions about the contents of the trust is shared equally or proportionally between various groups of beneficiaries, these decisions will have to be made by consensus or at least by majority vote. This is unique because, as Stuart Banner observes, transitions from common or collective property regimes to private property regimes tend to be a one-way ratchet.[191]

---

190. For a more detailed explanation of the interaction of common law rights and duties in equity, *see* Wesley Newcomb Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 17–19 (Walter Wheeler Cook ed. 1920).

191. *See* Stuart Banner, *Transitions between Property Regimes*, 31 J. LEGAL STUD. S359, S361 (2002) (observing that "over the long run, transitions between property regimes do generally seem to run in the direction of efficiency. Enclosure in early modern Europe, for example, ran in only one direction…. [T]here was no trend toward disenclosure of land owned outright be a single person, nor even a hodgepodge of enclosures and disenclosures.").

While it is impossible to know what kinds of property rights governed cultural heritage objects before they were looted and transferred to a Western property regime, administering these objects via trusts with multiple beneficiaries goes some way toward removing or undoing the "sole and despotic dominion" that private collectors and some museums exercise over these objects as a result of their legal title.

IV. POLITICAL IMPLICATIONS OF TRUST-BASED RESTITUTION

Section III proposes that cultural heritage objects that are ripe for restitution because they were looted or otherwise illegitimately acquired be placed in trusts in certain cases. While it is usually appropriate to carry out restitution by transferring cultural heritage objects from metropolitan museums to their societies of origin, there are cases in which this is inappropriate or even unjust. If a cultural heritage object is central to the cultural or religious life of the members of a community, principles of human rights and ethics require that that group have access to the object and be given the ability to make decisions about how it is managed and administered. This is especially true if the members of the community in question are insufficiently or poorly represented by their national government, whether because they constitute a subnational group; they constitute a group that spans an international border; their interests are being ignored or they are being oppressed by the government, or all three. Cultural heritage objects to which multiple groups—such as a national government and a specific cultural community—lay claim, can be placed into trusts with trustees that maintain fiduciary duties to specific stakeholders. Trusts make it impossible for any one entity to exercise the full panoply of ownership rights and instead moves the object toward a kind of collective ownership.

This proposal has several important policy implications. First, it introduces a level of clarity and uniformity to managing contested cultural heritage objects. Second, it offers a method of evading the criticism that restitution choices are inherently neocolonial. Finally, the proposal offers a radical approach to undermining unrepresentative or unaccountable state power by putting minority communities and governments on a level playing field vis-à-vis the cultural heritage objects at issue. This Section will examine each of these policy implications in turn.

First, the use of trusts to administer contested cultural heritage objects provides a level of clarity and uniformity that curators and museum administrators currently lack. Experience demonstrates that

even when a museum has made the decision to restitute an object, uncertainty about whom the object should be returned to delays or even permanently stops the restitution process. The use of trusts overcomes this hurdle by allowing museum administrators to include all possible claimants as beneficiaries. In many cases, museum administrators are extremely well-positioned to understand who the relevant stakeholders are. An increased capacity for provenance research and increased collaboration with communities of origin—developments that are already underway—will only increase this understanding.

The fact that the trust is an instrument that exists in both common and civil law systems means that museums and collectors who are restituting objects can take a uniform approach to restitution. Article 8 of the Hague Convention on Trusts allows signatories to choose a foreign jurisdiction as the applicable law for a trust. It may be that there is a jurisdiction that is particularly suited to creating flexible trust instruments—U.S. law, say. In that case, if appropriate, the same applicable law can be chosen to apply across collections and countries. France and Belgium, which have not ratified the Hague Convention,[192] both recognize validly-established foreign trusts.[193]

Second, the use of trusts to administer contested objects does something potentially radical: where a sovereign state is one of the potential claimants (as with the Benin bronzes, for instance), a trust that incorporates other groups or parties as beneficiaries puts the interests and priorities of minority groups on the same level as those of the nation state. To the extent that the interests of each possible claimant of a contested object are represented by one or more trustees, the interests of the government will be given potentially equal weight to the interests of specific communities in making decisions about a given cultural heritage object. Most restitutions to date have been negotiated or organized between state officials, such as ministers of culture or even foreign ministers. They are diplomatic phenomena in which the state is the only entity that is given legal personality and negotiating power. In these negotiations, the implicit assumption is

---

192. Convention on the Law Applicable to Trusts and on Their Recognition art. [Pinpoint], Oct. 20, 1984, 1664 U.N.T.S. 322 (entered into force July 1, 1992).

193. On the recognition of foreign trusts in France, *see* Emmanuel Moyne, Geoffroy Goubin, & Léa Zimmermann, Trusts and French courts: a continuing misunderstanding, INT'L BAR ASS'N (Jan. 2021), https://www.ibanet.org/article/bb06267d-e23f-4732-afed-e1a1ba4780bd (exploring a case on the effects of foreign trusts in France, which are recognized but subject to French tax law). On the recognition of foreign trusts in Belgium, *see* Gerd D. Goyvaerts, *Income Taxation of Trusts in Belgium*, 4 INSIGHTS 17, 17-18 (2017) (explaining that even though trusts are unknown in Belgian law, foreign trusts are recognized in Belgium and subject to Belgian tax law).

that the state represents the interest of its constituent peoples, including minority and Indigenous groups.

However, many or even most governments fail to honor this duty. International human rights law provides Indigenous or minority groups whose collective rights have been violated grounds for a claim, but these claims must be brought first against the state that violated the rights in question. Examples of this principle are seen most clearly in the many cases litigated before the Inter-American Court of Human Rights (IACtHR) by Indigenous groups whose national governments contract with foreign investors to grant licenses that interfere with Indigenous land rights.[194] In such cases, the state, which has granted concessions to private companies that interfere with the rights of Indigenous groups, is nevertheless ultimately responsible for providing relief to these groups. On the other hand, the state may have obligations to honor the investor's property rights, which it initially created by illicitly granting licenses or concessions to Indigenous Land. State delays and refusals to enforce decisions of the IACtHR demonstrate that states are cannot be trusted to step in and act on behalf of the rights of minorities and Indigenous Peoples. The proposed use of trusts allows museums to avoid reinforcing the power of a government that might ignore or misinterpret the interests of Indigenous or minority groups that have a special relationship with a given cultural heritage object. At the same time, by relinquishing both title to and control over a cultural heritage object that forms the basis of a trust, a museum can in good conscience turn negotiations about the management of the object over to a complete set of relevant stakeholders.

However, this use of trusts is still open to criticisms of neocolonialism, namely that museums are meddling in the affairs of sovereign states or imposing their values on communities of origin. In acting as

194. *See, e.g.*, *Kaliña & Lokono Peoples v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015).(holding that the state of Suriname had violated the rights of two Indigenous groups by denying them juridical personality and collective property rights that could have been asserted against nature reserves and private title); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012) (holding that Ecuador had violated the rights of the Kichwa by authorizing a foreign company to engage in oil exploration on tribal lands without prior consultation); and *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) (holding that a Non-Indigenous group descended from enslaved Africans had spiritual and cultural ties to land that warranted property rights, which Suriname had failed to honor against mining and logging concessions).

the settlor of a trust and identifying possible claimants to a particular cultural heritage object as its beneficiaries, the museum makes decisions about the legitimacy of potential claimants. The museum's power to establish the trust and to choose the processes by which trustees will make decisions arguably gives it an enduring influence over the management of the object. This level of power and influence—especially in a context of redressing colonial injustices and power imbalances—may be disconcerting.

Still, the most pressing of these concerns might be obviated by ingenious drafting of the trust deed. Once a settlor creates a trust, she relinquishes control over it. The beneficiaries may enforce their rights by enforcing the terms of the trust obligation against the trustee. A well-crafted trust will feature strong accountability mechanisms and may even set forth consultations on a specific, frequent cadence between beneficiaries and the trustees who represent them. If the museum can identify the set of legitimate claimants, it can effectively relinquish control and decision-making about cultural heritage objects to that group. In any case, it is important to not let the perfect become the enemy of the good. When an object is contested, there is no single path for restitution that will be universally satisfying. The challenge is to bring as many legitimate stakeholders into the process as possible, and to create conditions under which they can negotiate and exercise joint control over the object in question. The existence of groups such as the Benin Dialogue Group[195] are promising, and suggests that arrangements for restitution through the establishment of trusts can be made in close consultation and buy-in from the relevant stakeholders from the source communities.

V. CONCLUSION

During the colonial period, countless objects were removed by force or through coercion from their societies of origin. Many of these objects eventually found their way to museums in the United Kingdom, France, Belgium, the Netherlands, Germany, the United States, and other societies in the Global North. In many cases, these objects passed through the hands of collectors or dealers and were legitimately purchased or otherwise acquired by the museums. Having long resisted, museums have begun to accept the fact that even objects

195. *See supra*, Section II(A)(1). The Benin Dialoged Group is "a multi-lateral collaborative working group that brings together museum directors and delegates from Austria, Germany, the Netherlands, Sweden, and the United Kingdom" with representatives from Edo State government, the Royal Court of Benin, and the Nigerian National Commission for Museums and Monuments. Benin Dialogue, *supra* note 26.

that they purchased legitimately may have been previously illegitimately acquired. Many governments have undertaken efforts to critically examine the provenance of the objects in national museums and have vowed to restitute looted objects to their societies of origin.

However, restitution is often pursued on an ad-hoc bilateral basis between cultural institutions and governments. When objects have additional claimants, restitution is stymied by a lack of clarity about how to weigh competing claims. If Western cultural institutions and governments are serious about their willingness to repatriate cultural heritage objects, new structures and methods must be sought that fully take into account the complexities of colonial history and the rights of Indigenous communities of origin. Placing contested cultural heritage objects into trusts for which all claimants to an object are potential beneficiaries is a compelling path forward. Trusts drive a wedge between legal title (which is held by the trustee(s)) and the right to make management decisions about and benefit from an object. As a result, no single party can claim substantive ownership rights over the object. This decoupling of legal title and the incidents of ownership offers a more inclusive and equitable framework for addressing restitution claims.