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Beyond “To Return or Not To Return” – The Benin Bronzes as a Game Changer?

Abstract: “These works notably stand among the highest heights of European casting”. This is what Felix von Luschan, the curator of the ethnographic museum in Berlin, wrote in 1919 in his book on the Benin objects. Their looting in 1897 foreshadowed a scramble for cultural colonial objects in the heydays of colonial collecting. Today, they stand at the forefront of discussions on return, including new forms of consent, ownership, or re-appropriation. They constitute a special case and have triggered a novel race for returns. This contribution traces some of the violence and colonial stereotypes underpinning their taking, different perceptions of the objects, and contemporary ethical and legal frames for their return. It argues that the contemporary debate over the Benin Bronzes reflects certain changes in the attitude towards return in general; changes which are grounded in the interplay between justice, ethics, and human rights. It challenges the argument that takings were acceptable according to the standards of the time. At the same time it cautions that the current movement towards return should not turn into a cosmetic ritual of self-purification, which detracts from necessary reforms at the macro-level.

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Keywords: Benin Bronzes, colonial violence, object biographies, restitution and return, museum ethics, national guidelines, relational cultural justice

Introduction

“I have come to take you home”. This was the title of a performance delivered by Nigerian artist Peju Layiwola in November 2021 at the Rautenstrauch-Joest-Museum in Cologne during the exhibition “RESIST! The Art of Resistance”. The title is borrowed from a poem dedicated to South African icon Sarah Baartman,¹ whose remains were returned from France in 2002 after 170 years of display in anthropological museums. This time the call for return referred to the Benin Bronzes, which were taken in a “punitive exhibition” in 1897 from the Oba of Benin in modern-day Nigeria.² They have become a poster-child of looted colonial art.³ They are representative of a paradigm shift relating to restitution and the return of “cultural colonial objects”.⁴

Restitution and return claims go back to the first half of the 20th century and the debates on an international cultural order in the 1970s.⁵ However, for decades they have been followed by talk without action, or been treated as a matter of comity or cultural cooperation, reflecting the benevolence of the holding coun-

¹ D. Ferrus, *I've Come to Take You Home: A Tribute to Sarah Baartman*, June 1998, <https://kentakepage.com/ive-come-to-take-you-home-a-tribute-to-sarah-baartman-by-diana-ferrus/> [accessed: 25.09.2022].

² See P. Layiwola, *Making Meaning from a Fragmented Past: 1897 and the Creative Process*, “Open Arts Journal” 2014, Vol. 3, pp. 85-96.

³ Academic writing has been heavily dominated by Western voices. See M. Moiloa, *Reclaiming Restitution: Centering and Contextualizing the African Narrative*, August 2022, <https://openrestitution.africa/wp-content/uploads/2022/09/ANF-Report-Main-Report.pdf> [accessed: 25.09.2022]. On the Benin Bronzes, see B. Phillips, *Loot: Britain and the Benin Bronzes*, Oneworld Publications, London 2021; D. Hicks, *The Brutish Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution*, Pluto Press, London 2020; A.A. Adewumi, *Possessing Possession: Who Owns Benin Artefacts*, “Art, Antiquity and Law” 2015, Vol. 20(3), pp. 229-242; S. Kiwara-Wilson, *Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories*, “DePaul Journal of Art, Technology & Intellectual Property Law” 2013, Vol. 23.

⁴ The term “object” is misleading since it may conceal the various identities of artefacts, including their embodiment of personhood or sacred nature. It is used in a broad sense here and also covers “subjects/objects”. On the paradigm shift, see W. Apoh, A. Mehler, *Mainstreaming the Discourse on Restitution and Repatriation within African History, Heritage Studies and Political Science*, “Contemporary Journal of African Studies” 2020, Vol. 7(1), pp. 1-16. See also E. Bertho, *Restitutions du patrimoine africain. Fictions et réalités*, “Multitudes” 2019, Vol. 1(74), pp. 23-29.

⁵ B. Savoy, *Africa's Struggle for Its Art: History of a Postcolonial Defeat*, Princeton University Press, Princeton, NJ 2022. The struggle for decolonization was expressly associated with cultural development. See generally M. Bedjaoui, *Towards a New International Economic Order*, UNESCO, Paris 1979.

tries.⁶ The debate on colonial objects, or better “subjects/objects”,⁷ has remained in the shadow of the Holocaust and the return of Nazi-looted art. In the context of the struggle over colonial objects in the 1970s and beyond, former colonial powers have lobbied extensively for use of the term “return”, rather than “restitution”, in order not to set any precedent implying the illegality of historical takings.⁸

Today, these developments are seen in a novel light. There is a growing trend in many former colonial powers, such as France, the Netherlands, Germany, or Belgium, and among museums (e.g., Smithsonian Institution, Metropolitan Museum of Art) and universities (e.g., Cambridge, Aberdeen) to question the *status quo*, interrogate provenance and conditions of ownership, and contemplate return or new forms of access or circulation.⁹ Art historian Bénédicte Savoy, who co-authored the French report on *The Restitution of African Cultural Heritage*¹⁰ commissioned by President Emmanuel Macron, qualified the return of the Abomey treasures¹¹ – including three half-animal statues representing the former kings of Dahomey (Guezo, Glélé, and Béhanzin), from the Quai Branly museum to the modern-day Republic of Benin – as a historical tipping point in approaches towards returns, similar to the Fall of the Berlin Wall: There is a before, and there is an after.¹²

Objects taken in the 1897 attack on the kingdom of the Oba of Benin occupy a central place in the restitution movement.¹³ They have triggered a “domino

⁶ J. van Beurden, *Treasures in Trusted Hands: Negotiating the Future of Colonial Cultural Objects*, Sidestone Press, Leiden 2017, pp. 155, 183; A.F. Vrdoljak, *International Law: Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006, pp. 197 et seq.

⁷ On an agency-based understanding of objects, see A. Gell, *Art and Agency: An Anthropological Theory*, Oxford University Press, Oxford 1998, p. 7.

⁸ Many European powers feared that any act of restitution would imply that the initial “possession of the cultural property, historical archives, works of art etc.” was unlawful. See International Law Commission, *Eleventh Report on Succession of States in Respect of Matters Other than Treaties*, by Mr. Mohammed Bedjaoui, *Special Rapporteur*, May 1979, UN Doc. A.CN.4/322, para. 52.

⁹ A. Herman, *Restitution: The Return of Cultural Artefacts*, Lund Humphries, London 2022; E. Campfens, *Cross-Border Claims to Cultural Objects: Property or Heritage?*, Eleven Publishers, The Hague 2021; P. McAuliffe, *Complicity or Decolonization? Restitution of Heritage from “Global” Ethnographic Museums*, “International Journal of Transitional Justice” 2021, Vol. 15(3), pp. 678–689; P. Losson, *Opening Pandora’s Box: Will the Return of Cultural Heritage Objects to Their Country of Origin Empty Western Museums?*, “The Journal of Arts Management, Law, and Society” 2021, Vol. 51(6), pp. 379–392; E. Peters, *Fair and Just Decolonial Solutions: Adaptation of the Washington Principles to the Context of Disputed Colonial Cultural Objects*, “Case Western Reserve Journal of International Law” 2023, Vol. 55 (forthcoming).

¹⁰ F. Sarr, B. Savoy, *The Restitution of African Cultural Heritage: Toward a New Relational Ethics*, November 2018, http://restitutionreport2018.com/sarr_savoy_en.pdf [accessed: 25.09.2022].

¹¹ F. Desplantes, *Le général Dodds et l’expédition du Dahomey*, Mégard et Cie, Rouen 1894; F. Michel, J. Serre, *La campagne du Dahomey, 1893-1894: la reddition de Béhanzin*, L’Harmattan, Paris 2001.

¹² F. Nayeri, N. Onishi, *Looted Treasures Begin a Long Journey Home from France*, “The New York Times”, 28 October 2021.

¹³ See also K. Opoku, *Have Ethical Considerations Returned to Restitution for Good? Smithsonian Adopts a Policy on Ethical Returns*, “Modern Ghana”, 6 June 2022, <https://www.modernghana.com/news/1162776/have-ethical-considerations-returned-to-restitutio.html> [accessed: 25.09.2022]; idem, *Will the New Guide-*

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effect”, which is reflected in, *inter alia*, the decisions by Cambridge, Aberdeen, or the Horniman Museum to return objects to Nigeria; the return of two brass plaques and a brass head by the Metropolitan Museum of Art in New York;¹⁴ the new return policy by the Smithsonian Institution,¹⁵ facilitating the return of 39 Benin objects; and the agreement on “unconditional” return between Germany and Nigeria on 1 July 2022, by which Germany agreed to transfer ownership to Nigeria “of all Benin Bronzes held in public museums and institutions in Germany”, i.e. more than 1,130 objects in total.¹⁶ Today, return is not only contemplated by countries which were involved in forcible takings, but also by countries which acquired objects through market transactions.

This shift appears to be driven not by just singular events, but rather by deeper structural changes which have occurred over past decades. It is partly the result of enduring resistance to takings. Return claims have been filed since the 1930s, have been repeated since the 1960s,¹⁷ and later pursued within the format of the Benin Dialogue Group.¹⁸ The basis for retention of colonial objects has been challenged by the Indigenous repatriation movement, which has gained broader recognition in settler colonial contexts since the 1980s,¹⁹ and more contemporary forms of protest such as the Black Lives Matter movement or Emery Mwazulu Diyabanza’s public actions to re-claim “stolen property” from Africa.²⁰ The understanding of museums has also changed. There has been a move away from an encyclopaedic or universal understanding of museums, which was promoted in the 2002 Declaration on

lines of the Arts Council England Help Restitution of Looted Asante Gold and Benin Bronzes?, “Modern Ghana”, 15 September 2022, <https://www.modernghana.com/news/1183469/will-the-new-guidelines-of-the-arts-council-englan.html> [accessed: 25.09.2022].

¹⁴ S. Bahr, *Met Museum Announces Return of Two Benin Bronzes to Nigeria*, “The New York Times”, 9 June 2021.

¹⁵ Smithsonian, *Smithsonian Adopts Policy on Ethical Returns*, 3 May 2022, <https://www.si.edu/newsdesk/releases/smithsonian-adopts-policy-ethical-returns> [accessed: 25.09.2022].

¹⁶ Joint Declaration on the Return of Benin Bronzes and Bilateral Museum Cooperation Between the Federal Republic of Germany and the Federal Republic of Nigeria, 1 July 2022, <https://www.auswaertiges-amt.de/blob/2540404/8a42afe8f5d79683391f8188ee9ee016/220701-benin-bronzen-polerkl-data.pdf> [accessed: 25.09.2022].

¹⁷ House of Commons, Select Committee on Culture, Media and Sport, *Appendices to the Minutes of Evidence, Appendix 21: The Case of Benin. Memorandum Submitted by Prince Edun Akenzua*, March 2000, <https://publications.parliament.uk/pa/cm199900/cmselect/cmcmds/371/371ap27.htm> [accessed: 25.09.2022].

¹⁸ F. Shyllon, *Benin Dialogue Group: Benin Royal Museum – Three Steps Forward, Six Steps Back*, “Art, Antiquity and Law” 2018, Vol. 23, pp. 341-346.

¹⁹ C.T. McKeown, *Indigenous Repatriation: The Rise of the Global Legal Movement*, in: C. Fforde, C.T. McKeown, H. Keeler (eds.), *The Routledge Companion to Indigenous Repatriation: Return, Reconcile, Renew*, Routledge, London 2020, pp. 23-43.

²⁰ He has been branded as the “Robin Hood of Restitution”. See K. Brown, *Mwazulu Diyabanza, the Robin Hood of Restitution Activism, Has Been Fined for Removing a Congolese Funerary Statue From a Dutch Museum*, “Artnet News”, 12 January 2021, <https://news.artnet.com/art-world/mwazulu-diyabanza-netherlands-1936340> [accessed: 25.09.2022].

universal museums,²¹ towards a more critical museology²² which encourages critical encounters with provenance histories and new ways of engagement with objects, including multiple forms of access, new models of ownership or guardianship, and openness to return.²³ Social media and digital transformation make it harder to hide objects in collections or to silence violent histories of takings and invoke pretexts or delay tactics. Transparency makes the continuing nature of the violence more apparent. It affects not only North-South relations, but also consciousness in the West. The possibility to reconnect to objects is crucial for both the identities and histories in the Global South and the transformation of knowledge and the confrontation of the colonial past in European societies. This trend is reinforced by the work of individual curators, who re-think the ways in which return may be understood as an act of repair or “future-making”,²⁴ as well as by moves towards a cultural renaissance on the continent and the creation of new museums, such as the National Museum of Mali in Bamako, the Museum of Black Civilizations in Dakar, the national museum in Kinshasa, and the Edo Museum, all of which challenge the traditional narrative that objects cannot be adequately preserved or guarded in non-Western contexts.²⁵

This contribution analyses the shift from colonial takings towards return through the story of the Benin Bronzes. It develops: (i) their “dual” face as a symbol of looting and colonial violence on the one hand, and as drivers of social transformation and a cry for justice, acknowledgment of wrongs, and return on the other.²⁶ It shows that there is a certain “mirror effect”. Historically, their taking paved the way for a scramble for cultural objects in the heydays of colonial collecting and a quantum leap in the recognition of African objects and artefacts as art.²⁷ Today,

²¹ It was signed in 2002 by 18 of the world’s leading museums and galleries. See Declaration on the Importance and Value of Universal Museums, December 2002, https://www.hermitagemuseum.org/wps/portal/hermitage/news/news-item/news/1999_2013/hm11_1_93/?lng [accessed: 25.09.2022].

²² C. Kreps, *Museums and Anthropology in the Age of Engagement*, Routledge, New York 2020; eadem, *Appropriate Museology and the “New Museum Ethics”: Honoring Diversity*, “Nordisk Museologi” 2015, Vol. 2, pp. 4-16.

²³ On 24 August 2022, the 26th ICOM General Conference approved a more cautious museum definition, which refers to the mandate of museums to “foster diversity and sustainability”.

²⁴ See F. Sarr, B. Savoy, op. cit.; C. Rassool, *Re-storing the Skeletons of Empire: Return, Reburial and Rehumanisation in Southern Africa*, “Journal of Southern African Studies” 2015, Vol. 41, pp. 653-670.

²⁵ For the antinomies, see S. Van Beurden, *The Value of Culture: Congolese Art and the Promotion of Belgian Colonialism (1945-1959)*, “History and Anthropology” 2013, Vol. 24, pp. 472-492.

²⁶ As Sarah Van Beurden has shown in her study of the Congo, many “objects” have undergone social transformation in the colonial era. They constituted “artefacts of science, players in the construction of narratives about the ‘civilizing mission’, and eventually art”. See ibidem, p. 473.

²⁷ See, e.g., A. Boisragon, *The Benin Massacre*, Methuen, London 1897; P.A. Igbafe, *The Fall of Benin: A Re-assessment*, “Journal of African History” 1970, Vol. 11(3), pp. 385-400; C.O. Osarumwense, *Igue Festival and the British Invasion of Benin 1897: The Violation of a People’s Culture and Sovereignty*, “African Journal of History and Culture” 2014, Vol. 6(1), pp. 1-5; T.U. Obinyan, *The Annexation of Benin*, “Journal of Black Studies” 1988, Vol. 19(1), pp. 29-40; B. Plankensteiner, *Benin – Kings and Rituals: Court Arts from Nigeria*, “African Arts”

they stand at the forefront of a development in the opposite direction, namely the move towards return. This contribution examines two dimensions of this development: the turn to (ii) ethical guidelines and (iii) underlying legal models of responsibility. This entire process demonstrates how developments in ethics and law challenge the “standards of the time” argument, i.e. the claim that takings were acceptable according to the ethics or laws of the time they occurred. It shows, in a powerful way, that returns may be grounded in both wrongful agency and concepts of relational justice, namely the contemporary relationship to objects, and their cultural significance to their societies or communities of origin.²⁸ It then develops: (iv) features of a relational cultural justice approach, which seeks to overcome traditional dichotomies between cultural nationalism²⁹ and cultural internationalism.³⁰ In conclusion, it offers reflections over how to strengthen relational approaches towards return beyond the case of the Benin Bronzes.

The “Dual” Face of the Benin Bronzes

The story of the Benin Bronzes illustrates the changing identities and social biographies of cultural objects throughout the colonial period.³¹ Their taking marked a hallmark in the history of cultural dispossession.³² It not only constituted a brazen taking of property, but an attack on history and identity – an attack which involved orientalisising³³ and the “othering” of cultures. Each bronze head represented an Oba (King), recording chronology back to the 12th century. The looting occurred only two years before the 1899 Hague Peace Conference, which protected cultural property as a category of civilian property and prohibited the pillaging of towns or places more generally.³⁴

2017, Vol. 40(4), pp. 74-87; D. Hicks, op. cit. See also generally E. Schildkrout, C.A. Keim (eds.), *The Scramble for Art in Central Africa*, Cambridge University Press, Cambridge 1998.

²⁸ See C. Joy, *Heritage Justice*, Cambridge University Press, Cambridge 2020.

²⁹ Cultural nationalism places emphasis on national interests, shared identity, and community, including the bond of the object to its place of origin. See R. Anglin, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, “Yale Journal of Law & the Humanities” 2008, Vol. 20, p. 242.

³⁰ Cultural internationalism reflects “the idea that everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated, from whatever cultural or geographic source it derives”. See J.H. Merryman, *Cultural Property Internationalism*, “International Journal of Cultural Property” 2005, Vol. 12(1), p. 11.

³¹ J. Hoskins, *Agency, Biography and Objects*, in: C. Tilley et al. (eds.), *Handbook of Material Culture*, Sage, London 2006, pp. 75-84.

³² Dan Hicks has used the notion of “ultraviolence” to describe the brutality. See D. Hicks, op. cit., p. 164.

³³ E. Said, *Orientalism*, Vintage Books, New York 1978; idem, *Culture and Imperialism*, Vintage Books, New York 1993.

³⁴ It deviated from the very same rules that European powers used in the middle of the 19th century to define their own identity as civilized and progressed nations.

Traditional cultural property lenses, which approach artefacts through the perspective of ownership, are ill-equipped to capture the complexity of the objects. As social anthropologist Alfred Gell has argued, objects are social agents,³⁵ which can have an agency of their own³⁶ and create links between past and present. They acquire a specific cultural biography³⁷ “as they move through different hands, contexts, and uses”.³⁸ Their taking creates different types of “entanglements”, to borrow from Nicholas Thomas’ characterization of collecting practices in the Pacific region.³⁹ It leaves a void in the place of origin. Their translocation opens space for new meanings, object conversions, or “necrographies”,⁴⁰ i.e. the gradual loss of meaning or amnesia.

The Benin Bronzes have a “dual” face: they embody both the structural nature of colonial injustice – which reinforced the scramble for cultural objects and their commodification in the first two decades of the 20th century – as well as attempts to enable new types of engagement with cultural takings.

The taking was justified as part of a British “punitive expedition”. This very term shows the complicity of law and legal semantics in cultural takings.⁴¹ Nigerian scholars speak of “invasion” (*Osarumwense*)⁴² or “annexation” (*Obinya*),⁴³ since the categorization as a “punitive expedition” conceals the real underlying narrative, namely that people of Benin resisted “British interference in the affairs of a sovereign and independent nation”.⁴⁴

The attack was carried out after failed attempts by the British Empire to negotiate access to palm oil and rubber with the King of Benin. It was officially justified on two grounds. The first was the failure of the Oba of Benin to abide by a treaty-

³⁵ A. Gell, op. cit., p. 7.

³⁶ Gell refers, *inter alia*, to “idols” which are “not depictions, not portraits, but (artefactual) bodies” creating religious agency, *ibidem*, pp. 98-99.

³⁷ Anthropologists, such as Arjun Appadurai or Igor Kopytoff, have recognized that objects have “life stories”. See I. Kopytoff, *The Cultural Biography of Things: Commoditization as Process*, in: A. Appadurai (ed.), *The Social Life of Things: Commodities in Cultural Perspective*, Cambridge University Press, Cambridge 1986, p. 67; A. Appadurai, *Introduction: Commodities and the Politics of Value*, in: A. Appadurai (ed.), *The Social Life of Things: Commodities in Cultural Perspective*, Cambridge University Press, Cambridge 1986, p. 5.

³⁸ I. Kopytoff, op. cit., p. 34.

³⁹ N. Thomas, *Entangled Objects: Exchange, Material Culture, and Colonialism in the Pacific*, Harvard University Press, Cambridge, MA 1991.

⁴⁰ D. Hicks, op. cit., pp. 227, 239.

⁴¹ E. Eyo, *The Dialectics of Definitions: “Massacre” and “Sack” in the History of the Punitive Expedition*, “African Arts” 1997, Vol. 30(3), pp. 34-35; I. Van Hulle, *British Humanitarianism, International Law and Human Sacrifice in West Africa*, in: I. Van Hulle, R. Lesaffer (eds.), *International Law in the Long Nineteenth Century (1776-1914)*, Brill, Leiden 2019, pp. 105-125.

⁴² See C.O. Osarumwense, op. cit., p. 27.

⁴³ See T.U. Obinyan, op. cit.

⁴⁴ This position was defended by Nigerian Attorney-General Richard Akinjide. See B. Adebisi, *Legal and Other Issues in Repatriating Nigeria’s Looted Artefacts*, Abuja 2009, p. 43.

-derived obligation to suppress human sacrifice, slavery, and denial of trading rights.⁴⁵ It illustrates how the human rights discourses over “obligations” and arguments of “civilization” were used as a pretext to justify forcible intervention. It is unclear to what extent the Oba or his entourage understood the treaty as an instrument giving up royal rights or privileges.⁴⁶ The agreement, concluded in 1892, simply contains an “X” in place of a signature by the Oba. The second ground was retaliation against an ambush on a British party in 1896, which became known in the British press as the “Benin massacre”.⁴⁷ The British contingent sought to enter the city during a sacred period, the Igue festival. The Oba had sent messages not to approach Benin, but the warning was disregarded.

The following intervention, which resulted in the looting of Benin City, was branded as a counter-insurgency operation. It was carried out by around 5,000 men, with the support of 10 warships. During the raid, British forces removed several thousands of “bronzes”, including artefacts made from other material. They were collected as trophies and sold for personal profit or to cover the costs of the “expedition”. Their removal was planned in advance. According to documentation in Nigeria’s National Archives, Captain Phillips had written to Britain’s Foreign Office in November 1896 that he had “reason to hope that sufficient ivory may be found in the king’s house to pay the expenses in removing the king from his stool”.⁴⁸ Diary entries and photos from soldiers at the time confirm that the removals were an act of looting. Many of them were shared by soldiers or sold to cover the costs of the expedition.⁴⁹

The looting caused long-lasting physical and emotional damage that is difficult to repair. For instance, Cameroonian philosopher Achilles Mbembe has argued in his *Critique of Black Reason* that this form of cultural “expropriation” created sentiments of inferiority and “humiliation” in formerly colonized societies, with ongoing effects until the present.⁵⁰ Seretse Khama (1921-1980), former President of Botswana, stressed the link between culture and the past in striking words:

We should write our own history books to prove that we did have a past, and that it was a past that was just as worth writing and learning about as any other. We must do this for the simple reason that a nation without a past is a lost nation, and a people without a past are a people without a soul.⁵¹

⁴⁵ A.E. Coombes, *Reinventing Africa: Museums, Material Culture and Popular Imagination in Late Victorian and Edwardian England*, Yale University Press, New Haven, CT 1994, p. 9.

⁴⁶ O. n’Oba n’Edo, U. Akpolokpolo, *Opening Ceremony Address*, “African Arts” 1997, Vol. 30(3), p. 32.

⁴⁷ E. Eyo, op. cit.

⁴⁸ House of Commons, Select Committee on Culture, Media and Sport, op. cit.

⁴⁹ See D. Hicks, op. cit., pp. 167 et seq.

⁵⁰ A. Mbembe, *Critique of Black Reason*, Duke University Press, Durham–London 2017.

⁵¹ University of Botswana History Department, *A Nation Without a Past Is a Lost Nation*, 2008, <http://www.thuto.org/ubh/bw/squote1.htm> [accessed: 25.09.2022].

After their taking, the Benin objects acquired various identities. Soon after their arrival in Europe, the bronzes were quickly dispersed throughout Europe and North America.⁵² In Britain they were first celebrated as objects of triumph and prestige. They reinforced the colonial narrative of the victory of “civilization” over the inhumane and barbaric rule in the Kingdom of Benin. They were initially perceived as artefacts of “savages”.⁵³ The Commissioner and Consul-General of the Niger Coast protectorate, Ralph Moor (1860-1909), who played a key role in the takings, described some of the items found as “hideously-constructed brass heads” and viewed them predominantly as “trophies” or “curios”.⁵⁴ Initially, it was questioned whether they originated from the Edo culture. For instance, German archaeologist Leo Frobenius (1873-1938) was persuaded that they were of Greek origin. He noted in 1913: “I was moved to silent melancholy at the thought that this assembly of degenerate and feeble-minded posterity should be the legitimate guardians of so much loveliness”.⁵⁵ When it became clear that they were indeed from Africa, they reinvigorated the hype for colonial collecting and challenged common European stereotypes of Africa.

Collectors soon expressed interest. Many of the objects brought to Britain were sold at public auctions in London as early as in 1898. Emerging ethnological museums prepared “wish lists of objects” or instructions for takings. Experts joined colonial missions to facilitate acquisition and/or document provenance. The objects themselves went through a process of conversion. Their violent acquisition became secondary, and they gained a different meaning. They were no longer treated as sacred or historical objects, but became commodified objects for collection. They were appreciated for their rarity, their craftsmanship, and their physical beauty. In the 20th century they gradually became considered as art. Felix von Luschan (1854-1924), the curator of the ethnographic museum in Berlin, wrote in his 1919 book on the Benin objects: “These works notably stand among the highest heights of European casting”.⁵⁶ They quickly turned into “the most highly prized of all African art”.⁵⁷ They became a source of inspiration for modernist artists. They were re-branded as international heritage. They have multiple meanings and identities: They are objects of national prestige to some (e.g. the British Museum); de-colonial symbols, illustrating the horrors of colonialism or anti-colonial resistance to others; sacred or historical objects to local communities; and global objects as works of art.

⁵² C.J. Ananwa, *Internationalisation of Benin Art Works*, “Journal of Humanity” 2014, Vol. 2(1), pp. 41-53.

⁵³ E. Barkan, *Aesthetics and Evolution: Benin Art in Europe*, “African Arts” 1997, Vol. 30(3), pp. 36-41.

⁵⁴ Dispatch from Consul-General Moor to the Marquess of Salisbury, Benin City, 24 February 1897.

⁵⁵ L. Frobenius, *Voice of Africa*, Hutchinson & Co., London 1913, p. 98.

⁵⁶ F. von Luschan, *Die Altertümer von Benin*, Vereinigung Wissenschaftlicher Verleger, Berlin 1919, p. 15.

⁵⁷ E. Barkan, op. cit., pp. 53, 36. Auction prices for Benin Bronzes have increased rapidly, reaching up to £10 million.

More than 120 years later, the bronzes have taken on another pioneering role for social transformation: They are turning into the public face of colonial injustice and embodiments of the shifting attitudes towards return.

The changing policies of museums towards return mark a significant rupture with the stalemate of past decades.⁵⁸ In 2006, the Benin Dialogue Group was created in order to advance discussions. Initially, the Group was reluctant to express a clear commitment to return.⁵⁹ The initial focus was on “sharing of the cultural heritage through loans or common exhibition projects”.⁶⁰ A breakthrough occurred at the 2019 meeting in Benin, which envisaged the establishment of “a new Royal Museum to reunite in Benin City the most significant of Benin’s historical artefacts”.⁶¹ This led to the creation of a Legacy Restoration Trust under the umbrella of the Edo State Government, whose main project is the construction of the planned Edo Museum of West African Art in Nigeria.⁶² The plan for the new museum paved the way for coordinated talks on return and transfer of ownership. It alleviated concerns by holding institutions regarding the safety and preservation of objects. Many of the objects are deemed to have found a new home in the newly built Edo Museum of West African Art in Benin City.

The shift in return policy is visibly reflected in the Joint Declaration on the Return of Benin Bronzes and Bilateral Museum Cooperation by Germany and Nigeria. It provides a novel consensual basis for colonial objects. It applies a two-step logic in order to break the impasses of past decades. It recognizes both “the great artistic, historical and current value of these artefacts for Nigeria and its present and future generations, particularly for the Edo people”, as well as “their universal importance for humankind”.⁶³ It accommodates these multiple identities through the separation of legal and physical ownership. It authorizes “German public museums and institutions” holding Benin Bronzes to sign “transfer Agreements”, enabling

⁵⁸ In 1939, Oba Akenzua II was required to buy back replica of royal stools that had been taken in 1897, since museums refused to return the originals. See A. Peraldi, *Oba Akenzua II’s Restitution Requests*, “Kunst & Kontext” 2017, Vol. 1, pp. 23-33.

⁵⁹ The 2013 “Benin Plan of Action” merely contained an agreement to “create an enabling environment for an increased exchange of touring/travelling exhibitions for the Benin art objects and other art traditions”. See *The “Benin Plan of Action for Restitution” and What It Means for the Return of Disputed Artefacts*, “Elginism”, 28 February 2013, <http://www.elginism.com/similar-cases/the-benin-plan-of-action-for-restitution-and-what-it-means-for-the-return-of-disputed-artefacts/20130228/6897/> [accessed: 25.09.2022].

⁶⁰ F. Shyllon, op. cit., p. 341. The Leiden Statement, issued in 2018, separated the issues of loans and ownership. See Museum Volkenkunde, *Statement from Benin Dialogue Group*, 19 October 2018, <https://www.volkenkunde.nl/en/about-volkenkunde/press/statement-benin-dialogue-group-0> [accessed: 25.09.2022].

⁶¹ Press Statement of the meeting of the Benin Dialogue Group, 11 July 2019.

⁶² It is partly financed by contributions from Germany and projects of the British Museum.

⁶³ Joint Declaration..., Preamble.

“transfer of ownership” and “physical return of objects to Nigeria from 2022”,⁶⁴ while maintaining the possibility for German public museums and institutions to continue to “display Benin Bronzes on loan” in agreement with Nigeria.⁶⁵

This approach reverses the logic of past decades. It changes the ownership title in light of the fact that the objects were “looted from the former Kingdom of Benin after its colonial occupation and acquired in the aftermath mainly through colonial trading networks”.⁶⁶ At the same time it accepts that the “universal importance” of the objects may be accommodated through loans from Nigeria to collections in the West, shared exhibitions, and research or accessible display.⁶⁷ The practice of “reverse loans” challenges the oft-repeated stereotype that return would lead to the emptying of Western collections – an assumption that proved to be wrong in the repatriation practices under the Native American Graves Protection and Repatriation Act.⁶⁸ An important feature of the agreement is that it embeds returns in a broader policy of continued cultural cooperation, which has been promoted by relational ethics.⁶⁹

Developments in Ethics: Advances and Limitations

These changing attitudes towards retention and ownership coincide with an increase of ethical instruments to address the dilemmas of restitution and return. Ethical frames are convenient to fill in some of the gaps and silences left by cultural heritage instruments in relation to the colonial past.⁷⁰ The turn to ethics is reflected in guidelines or policy principles, which have been developed by “specially affected” countries such as the Netherlands,⁷¹ Germany,⁷² Belgium,⁷³ and

⁶⁴ Ibidem, p. 4.

⁶⁵ Ibidem, p. 5.

⁶⁶ Ibidem, Preamble.

⁶⁷ Ibidem, p. 10.

⁶⁸ See K. Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*, Springer, Heidelberg 2014, p. 66.

⁶⁹ See F. Sarr, B. Savoy, op. cit.

⁷⁰ On gaps and silences, see also A.F. Vrdoljak, op. cit., pp. 103 et seq.; S.M. Spitra, *Civilisation, Protection, Restitution: A Critical History of International Cultural Heritage Law in the 19th and 20th Century*, “Journal of the History of International Law” 2020, Vol. 22, pp. 329-354.

⁷¹ See, e.g., National Museum of World Cultures, *Return of Cultural Objects: Principles and Process*, 2019, <https://www.tropenmuseum.nl/sites/default/files/2019-06/NMVW%20Return%20of%20Cultural%20Objects%20Principles%20and%20Process.pdf> [accessed: 25.09.2022] (“NMVW Principles”).

⁷² German Museums Association, *Guidelines for German Museums: Care of Collections from Colonial Contexts*, 3rd ed., 2021, <https://www.museumsbund.de/wp-content/uploads/2021/03/mb-leitfaden-en-web.pdf> [accessed: 25.09.2022] (“Guidelines for German Museums 2021”).

⁷³ Restitution Belgium, *Ethical Principles for the Management and Restitution of Colonial Collections in Belgium*, June 2021, <https://restitutionbelgium.be/en/report> [accessed: 25.09.2022] (“Belgian Ethical Principles”).

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the Arts Council in England,⁷⁴ or particular museums (e.g., the Smithsonian Institution⁷⁵), in order to deal with the colonial heritage of collections. They embrace a bottom-up approach to standard-setting or regulation which enables case-by-case solutions without setting firm legal precedents.

One common premise of contemporary initiatives is that they rely on the premise that the law is inadequate to address the challenges of return.⁷⁶ They recognize that the collecting practices of the past were grounded in deep structural inequalities and require new critical approaches to history in the present circumstances.⁷⁷ The Benin Bronzes are a clear-cut example of looting. However, there are many takings which are neither purely voluntary, such as gift exchanges or sale of objects produced for Western markets, nor clearly grounded in excessive violence such as punitive expeditions. Their taking is shaped by indirect violence or structural inequality, which casts doubt on the voluntary nature of dispossession or change of title.⁷⁸ They may be referred to as “legally entangled objects”,⁷⁹ i.e. as objects taken under unjust structural conditions, which produce unjust acts or outcomes. Ethical criteria provide space to broaden the frames of reference and accommodate such conditions.

New museum ethics and policies enable decision-making processes which take a broader perspective, focused more on justice than legality. They build on ideas, such as justice, fairness, and transparency, which are reflected in the Washington Principles on Nazi-Confiscated Art.⁸⁰ In general they use two sets of criteria to assess cultural returns: justice-related criteria, which justify return by the wrongdoing involved; and arguments of cultural significance, which are more closely embedded in cultural rights. These criteria delegitimize the claim that return should be

⁷⁴ Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England*, August 2022, <https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/restitution-and> [accessed: 25.09.2022].

⁷⁵ Smithsonian, op. cit.

⁷⁶ See C. Stahn, *Confronting Colonial Amnesia: Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects*, “Journal of International Criminal Justice” 2020, Vol. 18(4), pp. 793-824.

⁷⁷ On “structural injustice”, see C. Lu, *Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress*, “Journal of Political Philosophy” 2011, Vol. 19(3), p. 264.

⁷⁸ On collecting methods, see, *inter alia*, M. Jasanoff, *Collectors of Empire: Objects, Conquests and Imperial Self-Fashioning*, “Past and Present” 2004, Vol. 184, pp. 109-135; S. Longair, J. McAleer (eds.), *Curating Empire: Museums and the British Imperial Experience*, Manchester University Press, Manchester 2012; J. van Beurden, *Decolonisation and Colonial Collections: An Unresolved Conflict*, “BMGN – Low Countries Historical Review” 2018, Vol. 133(2), pp. 66-78; E. Campfens, *The Bangwa Queen: Artifact or Heritage?*, “International Journal of Cultural Property” 2019, Vol. 26(1), pp. 75-110.

⁷⁹ On the notion of “entangled objects”, see N. Thomas, op. cit.

⁸⁰ The Washington Principles on Nazi-Confiscated Art (3 December 1998, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [accessed: 25.09.2022]) made it clear that disputes should be settled through “fair and just” solutions, even in the absence of clear international legal norms. See Principle 11.

excluded since many of the takings were arguably acceptable in light of the standards prevailing of the time. But the existing initiatives differ considerably in terms of their framing and approach.

The most far-reaching example is the Sarr and Savoy report. It took the “structural injustice approach” all the way. It proposed a common stance for both return of objects taken by force as well as objects taken under conditions of structural inequality. It recommended not only the return of artefacts looted in “military contexts”,⁸¹ such as “punitive expeditions”; but also the return of objects acquired “under proven conditions of illicit trade”⁸² or through “scientific missions”, which embodied a “rationalized system of exploitation” comparable to the “exploitation of natural resources”.⁸³ It supported a reversal of the burden of proof in relation to colonial missions and scientific “raids” in Africa between 1885 and 1960, according to which the irregular nature of the acquisition should be presumed in this period unless the museum is able to demonstrate that an object was acquired in Africa pursuant to a free, equitable, and properly-evidenced transaction.⁸⁴ This approach has been criticized for its generalized treatment of colonial acquisitions and transactions. For instance, the 2021 German guidelines refuse to adopt a general presumption that “any acquisition during the era of colonialism was wrongful”⁸⁵ since it is “problematic to deny that the communities of origin had any agency and to declare them all to be victims”.⁸⁶

Other guidelines focus to a greater extent on wrongdoing or concepts of law that shed doubt on the legality of the acquisition. For instance, the Dutch NMVW principles allow return in cases where the cultural objects were “collected/acquired in contravention of the standards of legality at the time”,⁸⁷ or in circumstances where “the claimants were involuntarily separated” from the objects, due to lack of consent, duress (“forced sale”) or lack of authority of the former “possessor” to dispose of the object (e.g. “inalienable communal property”).⁸⁸ The report of the Dutch Advisory Committee made unconditional returns dependent on proof (e.g., through provenance research) that the “objects came into Dutch possession against the owner’s will” with a “reasonable degree of certainty”.⁸⁹ It lists “theft,

⁸¹ F. Sarr, B. Savoy, *op. cit.*, p. 54.

⁸² *Ibidem*, p. 61.

⁸³ *Ibidem*, p. 57.

⁸⁴ *Ibidem*, p. 58.

⁸⁵ Guidelines for German Museums 2021, p. 83.

⁸⁶ *Ibidem*.

⁸⁷ NMVW Principles, § 4.2.

⁸⁸ *Ibidem*, § 4.3.

⁸⁹ Council for Culture, Advisory Committee on the National Policy Framework for Colonial Collections, *Guidance on the Way Forward for Colonial Collections*, January 2021, p. 68.

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looting, extortion or seizure of cultural heritage objects as spoils of war” as examples.⁹⁰ It adds that in grey areas, such as gifts or sales in “contexts of power inequality”, it is “necessary to rely on the available information to assess the degree to which the transfer of possession was voluntary”.⁹¹

The German guidelines do not specify a definitive list of circumstances, but use similar parameters. The main test is whether “the legal and ethical standards of the time were already violated when the object was acquired, or if the circumstances under which it was acquired fundamentally contravene today’s ethical standards for museum acquisitions”.⁹² Relevant factors include whether the “object was taken from the original owner by the use of direct violent force”⁹³ or as “a result of the colonial situation”, for example because “members of the communities of origin acted on behalf of the colonial masters”.⁹⁴ The document recognizes that the “wrongful act” does not necessarily “have to have been committed by the staff of the museum itself or by German citizens”.⁹⁵

The Belgian principles take as a point of departure that “[a]ll colonial era collections were gathered in [...] contexts of deep structural inequality” and postulate that “heritage institutions must be willing to relinquish the gains they made owing to these unequal relationships”.⁹⁶ The Belgian draft law on the legal framework for restitution and return adopts a more narrow approach.⁹⁷ It recognizes that assessment must go beyond the legality of the taking according to the standards of the time,⁹⁸ but it lists “coercion or force” as the main examples of illegitimately-acquired objects which should be returned *ex officio*,⁹⁹ while positing that objects whose status cannot be determined should remain in Belgian possession.¹⁰⁰

The Arts Council England’s guidance openly recognizes that return claims offer an “opportunity for museums to develop their collections knowledge and research, to build relationships with originating communities, [and] to open up di-

⁹⁰ Ibidem, p. 55.

⁹¹ Ibidem.

⁹² Guidelines for German Museums 2021, p. 83.

⁹³ Ibidem.

⁹⁴ Ibidem, p. 84.

⁹⁵ Ibidem.

⁹⁶ Belgian Ethical Principles, § 1 and § 3 (2).

⁹⁷ For a discussion of the background, see B. Demarsin, M.-S. de Clippele, *Georganiseerde terugkeer van koloniaal erfgoed*, “NjW” 2021, Vol. 449, pp. 706-715.

⁹⁸ Chambre des représentants de Belgique, *Projet de loi reconnaissant le caractère aliénable des biens liés au passé colonial de l’État belge et déterminant un cadre juridique pour leur restitution et leur retour*, 25 April 2022, Doc. 55 2646/001, p. 14, <https://www.lachambre.be/FLWB/PDF/55/2646/55K2646001.pdf> [accessed: 25.09.2022].

⁹⁹ Ibidem.

¹⁰⁰ Ibidem, p. 15.

alogue around contested items”.¹⁰¹ It relies on principles of transparency, collaboration, and fairness to guide decision-making processes. It applies multiple criteria, including the significance of the object to the claimant (i.e. a country or community of origin, or to a past owner)¹⁰² and the conditions of acquisition, e.g. whether the removal occurred “in a way that was unlawful at the time or through a transaction entered into under duress or without consent”.¹⁰³ It has been criticized for, *inter alia*, its technical approach towards restitution and return, i.e. its lack of engagement with structures of injustice and the histories of colonial objects, and its insufficient distinction between unconditional and conditional returns. Kwame Opoku has openly questioned the relevance of the cultural significance requirement in cases of looting:

Why should I as African, Ghanaian, and Asante have to explain to an Englishman why an Asante sword in any British museum is significant for my people? [...] Would a British museum official ask a Western claimant such a question?¹⁰⁴

One common feature of all the initiatives is that they openly challenge the traditional “salvage logic”¹⁰⁵ which was used to justify the taking of many objects; namely the idea that objects were simply rescued from dying populations or from decay based on lack of care. They make it clear that rescuing an object does not provide a title for the guardian to keep it. The reliance on the two criteria, i.e. justice and cultural significance, extends the cases for restitution or return of objects beyond “looted art” or coercively-acquired objects. It justifies the case for redistribution of cultural objects based on both the conditions of takings and their relational significance in and throughout the world.

Legal Underpinnings of Takings and Return: Three Models of Responsibility

Many of the existing guidelines marginalize the legal foundations of ethical criteria. They recognize that ethical frames are important in order to address the limitations of law in relation to historical injustices created by the complexity of colonial relations or legal obstacles, such as time bars or the intertemporal rule, which requires

¹⁰¹ Arts Council England, op. cit., p. 2.

¹⁰² Ibidem, p. 14.

¹⁰³ Ibidem, p. 15.

¹⁰⁴ K. Opoku, *Will the New Guidelines...*

¹⁰⁵ See J. Gruber, *Ethnographic Salvage and the Shaping of American Anthropology*, “*American Anthropologist*” 1970, Vol. 72(6), pp. 1289-1299; K.A. Wagner, *Savage Warfare: Violence and the Rule of Colonial Difference in Early British Counterinsurgency*, “*History Workshop Journal*” 2018, Vol. 85, pp. 217-237; N. Tzouvala, *Capitalism as Civilisation*, Cambridge University Press, Cambridge 2020.

contemporary agents to assess past conduct based on the legal standards of the time.¹⁰⁶ At the same time they posit that the reality is more complex. The treatment of cultural colonial objects is neither a purely moral nor a purely legal question,¹⁰⁷ but rather situated at the intersection of three different concepts: justice,¹⁰⁸ ethics,¹⁰⁹ and human rights.¹¹⁰ It thus requires consideration of all three perspectives, i.e. “justice, morality, and human rights”.¹¹¹

The assessment of cultural colonial takings, such as the Benin Bronzes, is not only governed by ethics, but also by process-related norms and legal requirements in relation to their return. They provide an important legal foundation for ethical instruments and challenge the idea that return is merely an act of comity rather than something that is due.¹¹²

There are three main legal approaches to assess the legality of takings or the return of cultural objects: (i) past wrongdoing (the torts model); (ii) an ongoing structural relationship to a wrong (the unjust enrichment model); and (iii) rights of access to culture (the human rights model). The first approach grounds responsibility in human agency, such as that involved in the removal of cultural objects. The second approach ties responsibility to implications arising from structural types of injustice. The third approach derives responsibilities from the link between communities and cultural objects. The combined focus on both past wrongdoing or the involuntary loss of objects and contemporary relations towards objects, geared at righting the future, counters the classical objection that modern-day responsibility would blame “people living today” for the wrongs of the past.¹¹³

¹⁰⁶ See T.O. Elias, *The Doctrine of Intertemporal Law*, “American Journal of International Law” 1980, Vol. 74(2), pp. 285-307; R. Higgins, *Time and the Law: International Perspectives on an Old Problem*, “The International and Comparative Law Quarterly” 1997, Vol. 46(3), pp. 501-520.

¹⁰⁷ See S. Schönberger, *Restitution of Ethnological Objects: Legal Obligation or Moral Dilemma?*, “Museumskunde” 2016, Vol. 81, pp. 45-48; T. O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, “European Journal of International Law” 2011, Vol. 22(1), pp. 49-80.

¹⁰⁸ C. Joy, *op. cit.*

¹⁰⁹ See also C. Roodt, *Restitution of Art and Cultural Objects and Its Limits*, “Comparative and International Law Journal of Southern Africa” 2013, Vol. 46(3), p. 286.

¹¹⁰ T. Scovazzi, *Diviser c'est détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property*, “Rivista di Diritto Internazionale” 2011, Vol. 94, p. 392.

¹¹¹ R. Peters, *Complementary and Alternative Mechanisms beyond Restitution: An Interest-oriented Approach to Resolving International Cultural Heritage Disputes*, PhD diss., European University Institute, Florence 2011, p. 157.

¹¹² The Belgian principles refer to an “ethical responsibility heard in law”. See Belgian Ethical Principles, § 2.3.

¹¹³ T. Jenkins, *Keeping their Marbles: How the Treasures of the Past Ended Up in Museums... and Why They Should Stay There*, Oxford University Press, Oxford 2016, p. 90.

The “torts model”: Remedying past wrongs

The first approach is the most classical approach. It is agent-based. It follows a torts model, based on perpetrator-victim schemes. The wrongdoer, i.e. the former colonial power(s), is responsible for “righting the wrong” to the former colonized subject(s).

This argument poses difficult challenges in light of the ambiguous or discriminatory nature of positivist law in the 19th century, which distinguished wars fought in Europe from colonial warfare.¹¹⁴ For instance, in the context of the negotiation of the Hague Conventions of 1899 and 1907, it was heavily debated to what extent the laws of war should apply in relation to “non-civilized entities”.¹¹⁵ Protection of cultural property was governed by double standards.¹¹⁶ At the same time however, colonial encounters were not a “law free zone”.¹¹⁷ Legally, there are at least two ways to establish a past legal wrong.¹¹⁸

One possibility is to argue that certain cultural takings contravened the “principles of justice which guide the public conscience”, even in the absence of express general prohibitions.¹¹⁹ This argument does not simply apply today’s standards of justice to distant historical realities, since “principles of justice have [...] always existed in parallel to the laws at any given time”,¹²⁰ and in particular in 19th-century international law. The protection of cultural objects was not only governed by treaty protections and “hard” customary rules of the laws of war, but informed by natural law, minimum standards of behaviour, and military ethics. The increasing codification and protection of cultural property suggests that colonial powers were governed at least by a “pre-modern realm” of natural law,¹²¹ and thus by greater positive legal obligations in the 19th century. Concepts of public conscience

¹¹⁴ The Lieber Code is replete with civilization narratives and distinctions between “civilized” and “barbarous armies”. Lieber Code, 24 April 1863, Art. 24.

¹¹⁵ Some voices argued at the 1899 Peace Conference that it would be “impermissible to make a distinction between a savage and a civilized enemy” in the rules on the means and methods of warfare. See J.B. Scott (ed.), *Proceedings of the Hague Peace Conferences: The Conference of 1899*, Oxford University Press, London 1920, p. 343. Others argued that “the Hague code deals only with war between civilised states” and defended “punitive expeditions”. See J. Westlake, *International Law*, Cambridge University Press, Cambridge 1907, pp. 55, 76.

¹¹⁶ See F. Mégret, *From Savages to Unlawful Combatants: A Postcolonial Look at International Humanitarian Law’s “Other”*, in: A. Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge 2006, pp. 265-317; S.M. Spitra, op. cit., pp. 332-338.

¹¹⁷ C. Elkins, *The “Moral Effect” of Legalized Lawlessness*, “Historical Reflections” 2018, Vol. 44(1), p. 84.

¹¹⁸ For a different view, see A.A. Adewumi, op. cit., p. 240 (“the collections located in foreign museums should not, in our view, be regarded as illegal”).

¹¹⁹ G. Robertson, *Who Owns History?*, Biteback, London 2019, p. 170.

¹²⁰ See C. Joy, op. cit., p. 24.

¹²¹ F. Mégret, op. cit., p. 283.

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and morality were not only moral categories, but part of the legal frameworks designed to ensure protection.

There is significant authority to make the argument that violent cultural takings, such as the Benin takings in 1897, violated minimum standards of protection and “principles of justice which guide the public conscience” even according to the standards of that time,¹²² or contravened local customs and practices prohibiting looting for personal gains or absconding with stolen objects from the enemy.¹²³ They conflicted with the expected standards of behaviour under minimum principles of humanity, and with the principles of cultural protection and integrity asserted among “civilized” nations, such as the universalist arguments made by Antoine-Chrysostome Quatremère de Quincy (1755-1849),¹²⁴ the *Marquis de Somerueles* case,¹²⁵ or professional codes and practices. Certain forcible property takings can also be seen as treaty violations. Instruments such as the General Act of the Berlin Conference obligated the colonial powers to further “the moral and material well-being of the native populations”¹²⁶ and “to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being”.¹²⁷ Protectorate agreements typically involved obligations for both the colonial powers and local leaders.¹²⁸ From the perspective of the Oba, the brutal looting of the city and spoliation of the Benin Bronzes may qualify as a violation of Britain’s general protective duty under the protectorate agreement.¹²⁹

These conflicts were sometimes openly admitted. For instance, British Prime Minister William Gladstone (1809-1898) openly condemned the Maqdala raid in the British Parliament in 1871. He “deeply regretted” that the treasures “were ever brought from Abyssinia” and expressed sorrow that such “sacred and imposing

¹²² Ibidem.

¹²³ The 8th edition of Henry Wheaton’s treatise on international law recognized that looting and seizure of cultural property contravened civilized principles of warfare. See H. Wheaton, *Elements of International Law*, 8th ed., Sampson Low, Son and Co., London 1866, pp. 449-450.

¹²⁴ A.-C. Quatremère de Quincy, *Letters on the Plan to Abduct the Monuments of Italy*, in: idem, *Letters to Miranda and Canova on the Abduction of Antiquities from Rome and Athens*, transl. C. Miller, D. Gilks, Getty Research Institute, Los Angeles 2012, p. 9.

¹²⁵ J. Stewart, *Reports of Cases, Argued and Determined in the Court of Vice-Admiralty at Halifax, in Nova-Scotia*, Butterworth and Son, London 1814, p. 483 (*The Marquis de Somerueles*, 21 April 1813).

¹²⁶ General Act of the Berlin Conference on West Africa, 26 February 1885, Preamble.

¹²⁷ Ibidem, Art. 6.

¹²⁸ See M. Hébié, *The Role of the Agreements Concluded with Local Political Entities in the Course of French Colonial Expansion in West Africa*, “British Yearbook of International Law” 2015, Vol. 85(1), p. 89.

¹²⁹ On state responsibility for violation of protectorate agreements, see W.M. Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, “Michigan Journal of International Law” 1989, Vol. 10(1), p. 240.

symbols” were “thought fit to be brought away by the British army”.¹³⁰ Diary entries from agents, such as Marcel Griaule, show that the “collectors” were often acutely aware of the “enormity of [their] crime”,¹³¹ and simply decided to transgress expected norms out of opportunity, relying on the social context of colonial expeditions or in the name of the “objectivity” of science.

Another way to establish legal wrong is to look at cultural takings not only from a purely Western perspective, but also from the perspective of the context of other customs of the time,¹³² i.e. non-European practices. This argument takes into account the pluriversality of legal orders at the time.¹³³ Various pre-colonial African customs reflect “principles” which can be found in modern rules of international humanitarian law.¹³⁴ They sometimes formed part of “a genuine ethics of war which was taught to any young nobleman for his future calling as a warrior”.¹³⁵ These customs protected, *inter alia*, sacred places (e.g. shrines, trees, ceremonial spaces) and their surroundings.¹³⁶ For example, customs in Mahgreb countries protected places of worship from attack, based on a rule of conduct laid down by Hannibal in the Punic wars.¹³⁷ Some tribes recognized the prohibition of looting for personal gain.¹³⁸ African Indigenous law protected ownership and property entitlements, based on communal land tenure schemes and/or social customs and relationships. The existence of local customs or native forms of sovereignty challenges the perception that the acquisition of cultural colonial objects occurred in a legal vacuum, or was exclusively governed by European standards of colonial law.¹³⁹ The idea of inalienable cultural property and its intergenerational character – which has been invoked as a bar to takings in Western contexts – also applies in other societies. It calls into

¹³⁰ Statement of 30 June 1871, cited after Afromet, *Statements*, http://web.archive.org/web/20190206200328/http://www.afromet.info/about_us_statements.html [accessed: 25.09.2022].

¹³¹ M. Leiris, *Phantom Africa*, transl. B.H. Edwards, Seagull Books, Calcutta–London–New York 2017, Entry 7, September 1931.

¹³² S. Kiwara-Wilson, op. cit., p. 392.

¹³³ Lauren Benton has used the notion of “interpolity law” to characterize the normative pluralism. See L. Benton, A. Clulow, *Empires and Protection: Making Interpolity Law in the Early Modern World*, “Journal of Global History” 2017, Vol. 12(1), pp. 74-92.

¹³⁴ Y. Diallo, *African Traditions and Humanitarian Law*, “International Review of the Red Cross” 1976, Vol. 16(185), p. 400; E.G. Bello, *Shared Legal Concepts between African Customary Norms and International Conventions on Humanitarian Law*, “Military Law and Law of War Review” 1984, Vol. 23, pp. 285-310. See also T.O. Elias, *The Nature of African Customary Law*, Manchester University Press, Manchester 1956.

¹³⁵ Y. Diallo, op. cit., p. 394.

¹³⁶ *Ibidem*, p. 395.

¹³⁷ M. Mubiala, *International Humanitarian Law in the African Context*, in: M.K. Juma, A. Suhrke (eds.), *Eroding Local Capacity: International Humanitarian Action in Africa*, Nordiska Afrikainstitutet, Upsala 2002, p. 38.

¹³⁸ A. Ndam Njoya, *The African Concept*, in: *International Dimensions of Humanitarian Law*, UNESCO, Paris 1988, p. 8.

¹³⁹ W.J. du Plessis, *African Indigenous Land Rights in a Private Ownership Paradigm*, “Potchefstroom Electronic Law Journal” 2011, Vol. 14(7), pp. 44-69.

question the taking of objects which are “not subject to individual ownership by anyone”, and “cannot justly be transferred by any individual”, including persons who belong “to the relevant culture”.¹⁴⁰ This is gradually being acknowledged in contemporary international law. For instance, in settler colonial contexts, such as the US, Australia, or New Zealand, pre-colonial ancestral bonds between land and people are increasingly viewed as a form of “native sovereignty” (aboriginal sovereignty) that has not been extinguished by colonization.¹⁴¹

Structural (in-)justice: Return grounded in its contemporary relationship to a wrong

A second model, the structural injustice model, ties responsibility to a larger structural relationship with a wrong.¹⁴² This approach pays greater attention to the broader context of colonial injustice. It recognizes the identity-related nature of the removal of cultural objects, grounds responsibility in a contemporary view of a “wrong”, and may overcome some of the problems of non-retroactivity or inter-temporal law caused by classical agent-related models. This approach may enable restitution or return even in cases in which the conduct in question may have been permissible under the formal structures of law applicable at the time.

Continuing violations

The taking of objects, such as the Benin Bronzes, cannot be reduced to an ordinary property taking. For example, legal philosopher Wouter Veraart has argued that the takings were based on a “legalized structure of racial inequalities” and the “destruction of the cultural and ecological environments” of human beings.¹⁴³ Bernadette Atuahene has developed the argument that property dispossessions qualify as “dignity takings” in cases where “the state takes property from a class of people that it considers sub-persons”.¹⁴⁴ Following Atuahene’s theory, looting may not only be qualified as a removal of cultural property, but as a “dignity taking” that requires redress, i.e. an “involuntary property loss accompanied by dehumanization

¹⁴⁰ E.H. Matthes, *Repatriation and the Radical Redistribution of Art*, “Ergo” 2017, Vol. 4(32), p. 936.

¹⁴¹ See J. Cassidy, *Sovereignty of Aboriginal Peoples*, “Indiana International & Comparative Law Review” 1998, Vol. 9(1), pp. 65-119.

¹⁴² See I. Young, *Responsibility and Global Justice: A Social Connection Model*, “Social Philosophy and Policy” 2006, Vol. 23(1), pp. 102-130.

¹⁴³ W. Veraart, *Beyond Property. A Reflection on the Value of Restitution of Looted Cultural Objects*, 2 December 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3524852 [accessed: 25.09.2022].

¹⁴⁴ B. Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, “Annual Review of Law and Social Science” 2016, Vol. 12, p. 178.

or infantilization” and “community destruction”.¹⁴⁵ Based on this approach, returns of cultural artefacts are a way of returning to the original owners and possessors the dignity and culture of their past, the taking of which marks an ongoing violation in contemporary relations. This human dignity argument is increasingly applied to justify the right to repatriate and to rebury human remains.¹⁴⁶

Unjust enrichment

Another avenue to address structural injustice is the concept of unjust enrichment. Holocaust historian and memory studies scholar Michael Rothberg has developed the notion of an “implicated subject” in order to emphasize the enduring responsibility of “those who have inherited or who have otherwise benefited from histories of perpetration”.¹⁴⁷ In cultural heritage law, this idea is reflected, *inter alia*, in proposals to ground the return of cultural objects removed under colonial or foreign occupation in unjust structures, namely the exploitation of unequal bargaining power in colonial contexts. For instance, Italian international lawyer Tullio Scovazzi has argued that cultural heritage law cannot be limited to existing treaties. He has defended the view that principles such as the preservation of “the integrity of cultural contexts” or “non-exploitation of the weakness of another for cultural gain”¹⁴⁸ form part of the practices in the field which are necessary to address “shortcomings of multilateral treaties” regarding the return of cultural objects¹⁴⁹ and “reach an equitable solution for each particular case”.¹⁵⁰ This theory has been invoked in the context of the removal of objects during the Second World War in relation to objects which “left the possession of a person [...] in circumstances deemed offensive to the principles of humanity and dictates of public conscience”.¹⁵¹ Scovazzi has applied the prohibition to “exploit weakness of another subject to get a cultural gain” not only to the Second World War contexts, but also to peoples subjected to colonial or foreign occupation.¹⁵²

¹⁴⁵ See B. Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, “Law and Social Inquiry” 2016, Vol. 41(4), p. 800.

¹⁴⁶ C. Rassool, *op. cit.*, pp. 653-670.

¹⁴⁷ M. Rothberg, *The Implicated Subject: Beyond Victims and Perpetrators*, Stanford University Press, Stanford 2019, p. 83.

¹⁴⁸ T. Scovazzi, *The “First Time Instance” as Regards Restitution of Removed Cultural Properties*, “Agenda Internacional” 2012, Vol. 19(30), p. 18.

¹⁴⁹ *Ibidem*.

¹⁵⁰ *Ibidem*, p. 19.

¹⁵¹ UNESCO Draft Declaration of Principles relating to Cultural Objects Displaced in Connection with the Second World War, 5 September 2007, UN Doc. 34 C/22, Principle II(iv).

¹⁵² T. Scovazzi, *The “First Time Instance”...*, p. 18.

This approach makes it possible to take into account ethical and historical considerations which taint the acquisition of such objects based on their current implications, irrespective of whether or not the underlying transactions were “legal” in form in the past.¹⁵³ It captures transactions in which colonial officials, museums, or private collectors exploited unequal bargaining power in colonial contexts, or deliberately closed their eyes to the history or conditions accompanying the taking of objects. It facilitates the requisite proof for returns, since it does not require a determination as to whether the particular action was legal or illegal according to the standards of the time.¹⁵⁴

Relational justice: The human rights-based approaches towards cultural heritage

The third and most contemporary model grounds responsibility in the relationship between people and objects, and the rights of people to access their culture. It is less concerned with the allocation of blame or culpability for past wrongs, but rather deals with the contemporary connection to objects. It is grounded in cultural heritage law, which has recognized the non-severability between people and objects since the 19th century,¹⁵⁵ and modern strands in human rights law, which create “a positive obligation to take steps to protect cultural groups and communities in their exercise of [cultural] freedoms”.¹⁵⁶ This approach recognizes requests for return as identity claims by communities. The guiding criterion is not so much to whom objects belonged in the past or where they are most visible, but rather where they “belong” culturally and socially today.

The important link between objects and people was first recognized in the context of self-determination. In a famous case concerning the return of a marble statue, the *Venus of Cyrene* taken by Italian troops in Libya in 1913, Italian courts even held that the right to self-determination provides a customary law basis for the duty to return cultural objects removed as a result of colonial domination.¹⁵⁷ Ana F. Vrdoljak has argued that the rationale for the “restitution of cultural objects

¹⁵³ T. Scovazzi, *Diviser c'est détruire...*, p. 370.

¹⁵⁴ This logic is reflected, *inter alia*, in the Dutch principles, which establish a balancing test for return of objects taken by other European powers. They state that the “guiding principle must be the redress of an injustice” regardless “of whether the Netherlands itself played a part in causing the original injustice, as the current owner of the cultural object it is the only party capable of rectifying that injustice”. Council for Culture, Advisory Committee on the National Policy Framework for Colonial Collections, *op. cit.*, p. 7, Principle 7.

¹⁵⁵ See A.F. Vrdoljak, *op. cit.*, pp. 23, 26-27.

¹⁵⁶ F. Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, “Michigan Journal of International Law” 2004, Vol. 25(4), p. 1213.

¹⁵⁷ A. Chechi, *The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene*, “Italian Yearbook of International Law” 2008, Vol. 18, pp. 159-181.

held by museums of former metropolitan and national capitals” is intimately linked to the right to self-determination under international law, including “a people’s ability to maintain, revitalize and develop their collective cultural identity”.¹⁵⁸

Today, this approach is most visibly reflected in the growing recognition of cultural rights under human rights law and the development of the rights of Indigenous peoples. It is grounded in the right of access to and enjoyment of cultural heritage, which follows from the right to culture under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁵⁹ It is also reflected in the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (the Faro Convention)¹⁶⁰ and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),¹⁶¹ the latter of which contains an obligation on the part of States to provide “redress” to 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”.¹⁶²

As Evelien Campfens has noted, the novelty of this approach lies in the fact that it ties return to “the acknowledgement of a right to possess, access, or control certain involuntarily lost cultural objects on the grounds of their intangible heritage interests for specific people, independent of ownership”.¹⁶³ It seeks to build and reinforce “relationships of respect and responsibility between people”, by recognizing the importance of cultural heritage to communities. It thereby goes beyond cultural nationalist approaches, which link return to sovereignty interests, such as the right of States to have a “key to their own history”.¹⁶⁴ It facilitates return to sub-state actors, such as communities or individuals.

The Way Forward: Towards Relational Cultural Justice

One of the main innovations of the changing national or museum practices vis-à-vis the Benin objects is their contribution to a new model of cultural justice, namely a relational approach to restitution and return. This approach reflects develop-

¹⁵⁸ A.F. Vrdoljak, *op. cit.*, p. 300.

¹⁵⁹ 16 December 1966, 993 UNTS 3. See also Committee on Economic, Social and Cultural Rights, *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)*, 21 December 2009, UN Doc. E/C.12/GC/21; Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, 21 March 2011, UN Doc. A/HRC/17/38, para. 78.

¹⁶⁰ 27 October 2005, CETS 199, Art. 6.

¹⁶¹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, UN Doc. A/RES/61/295.

¹⁶² UNDRIP, Art. 11(2). In the *Quimbaya Treasure* case, the Constitutional Court of Colombia justified the duty to return on the basis of, *inter alia*, UNDRIP.

¹⁶³ E. Campfens, *The Bangwa Queen...*, p. 106.

¹⁶⁴ G. Robertson, *op. cit.*, p. 30.

ments in critical museology¹⁶⁵ and has been advocated in the Sarr and Savoy report.¹⁶⁶ It is based on the premise that return is fundamentally about re-inventing relations, including re-assessment of historical relations and knowledge systems, and defining new pathways for objects. It breaks with the binary framing of return as a modern Shakespearean dilemma: “to return or not to return”. It takes into account that physical return is not always the “golden rule”¹⁶⁷ or the most appropriate solution,¹⁶⁸ but one among several options to reconcile competing interests, such as the typical divides between cultural nationalism and cultural internationalism.

The main point of the relational model is to find new ways of agreement towards contemporary forms of the ownership or display of objects. It relies on three elements: (i) the need to find a new contemporary basis of consent for “entangled objects”; (ii) the development of more inclusive procedures in line with rights of access to culture; and (iii) strategies to enable new object possibilities and engagement, including in the post-return stage.

New approaches towards consent

The first element of the relational justice approach, namely the need to establish new forms of consent, finds its basis in the three above-mentioned models of responsibility. It may be derived from both responsibility for past violations and contemporary rights of access to culture.

Cultural takings in the colonial period involve different forms of legal entanglement, ranging from takings under force¹⁶⁹ or without consent to “objects whose acquisition was in breach of the colonial legal concepts and morality of the period”.¹⁷⁰ It is unquestionably compelling to seek forms of consent for objects obtained through force or coercion, which violated past laws and standards of humanity, such as the taking of Benin Bronzes. For instance, Andreas von Arnould has argued that even violation of ethical principles in cases of historical injustice may create a contemporary obligation to negotiate with the victims of historical injustice or their descendants, i.e. “meaningful negotiations in order to come to an agreed solution”.¹⁷¹

¹⁶⁵ C. Kreps, *Museums and Anthropology...*; eadem, *Appropriate Museology...*

¹⁶⁶ F. Sarr, B. Savoy, op. cit.

¹⁶⁷ See L.N. Stutz, *Claims to the Past: A Critical View of the Arguments Driving Repatriation of Cultural Heritage and Their Role in Contemporary Identity Politics*, “Journal of Intervention and Statebuilding” 2013, Vol. 7(2), p. 185.

¹⁶⁸ K. Opoku, *Revised Guidelines on Colonial Collections: Germany Not Advanced with Restitution of Looted African Artefacts*, “Modern Ghana”, 28 July 2019, <https://www.modernghana.com/news/947508/revised-guidelines-on-colonial-collections-german.html> [accessed: 25.09.2022].

¹⁶⁹ See J. van Beurden, *Inconvenient Heritage: Colonial Collections and Restitution in the Netherlands and Belgium*, Amsterdam University Press, Amsterdam 2022, pp. 19, 71.

¹⁷⁰ Guidelines for German Museums 2021, p. 58.

¹⁷¹ See A. von Arnould, *How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality*, “European Journal of International Law” 2021, Vol. 32(2), pp. 426, 432.

This argument may also be applied to certain objects acquired in contexts of colonial oppression, with an entangled voluntary consent. The importance of “free, prior and informed consent” is recognized in relation to cultural takings from Indigenous groups in settler colonial contexts.¹⁷² It may also be extended beyond settler colonial contexts, based on the application of general principles of cultural heritage law,¹⁷³ such as the prohibition of loot and plunder or the duty not to benefit from the exploitation of peoples subjected to colonial or foreign occupation for cultural gain.¹⁷⁴

Legally, the need to establish new forms of consent may also arise from contemporary relations towards objects, namely human rights-based duties to provide access to culture. Such obligations may be derived from the right of people and communities to maintain and develop their cultural identity and enjoy access to their culture;¹⁷⁵ the principle of “cultural integrity”;¹⁷⁶ or the protection of “intangible cultural heritage”. These rights may trigger a procedural duty to seek a new contemporary basis of consent in relation to the status of contested colonial objects.¹⁷⁷ The Prussian Cultural Heritage Foundation applied this logic in the context of return of the statue of Ngonso to Cameroon. It stated that return is not limited to looted objects, but can also be justified by the “special – especially spiritual – significance of an object for the society of origin”.¹⁷⁸

The two-step model towards return – which has been applied by Germany¹⁷⁹ in relation to the Benin objects held in German collections and by Belgium in relation to objects acquired by force or as spoils of war¹⁸⁰ – provides a new methodology to realize the duty to seek new forms of consent. The separation of ownership and return and the application of a phased-approach, starting with the return of ownership rights and subsequent discussion on physical return, breaks the traditional inequality in negotiations between holding countries and States and communities

¹⁷² Art. 11(2) UNDRIP.

¹⁷³ F. Francioni, *General Principles Applicable to International Cultural Heritage Law*, in: M. Andenas et al. (eds.), *General Principles and the Coherence of International Law*, Brill, Leiden 2019, pp. 389-407.

¹⁷⁴ T. Scovazzi, *The “First Time Instance”...*, p. 18.

¹⁷⁵ A.F. Vrdoljak, op. cit., pp. 301-302.

¹⁷⁶ T. Scovazzi, L. Westra, *The Safeguarding of the Intangible Cultural Heritage According to the 2003 UNESCO Convention: The Case of the First Nations of Canada*, “*Inter Gentes*” 2017, Vol. 1(2), p. 39. It also protects economic aspects central to a communities’ culture.

¹⁷⁷ See J. von Bernstorff, J. Schuler, *Wer spricht für die Kolonisierten? Eine völkerrechtliche Analyse der Passivlegitimation in Restitutionsverhandlungen*, “*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*” 2019, Vol. 79, p. 576.

¹⁷⁸ See *Germany to Return Looted Artifacts to Africa*, “*Deutsche Welle*”, 29 June 2022, <https://www.dw.com/en/germany-to-return-looted-artifacts-to-africa/a-62300419> [accessed: 25.09.2022].

¹⁷⁹ See Joint Declaration...

¹⁸⁰ M.-S. de Clippele, B. Demarsin, *Retourner le patrimoine colonial – proposition d'une lex specialis culturae*, “*Journal des tribunaux*” 2021, Vol. 19(6857), pp. 345-353.

requesting return. It provides a window of opportunity to find mutually-agreed solutions. It has been branded as a “pioneering model for the approach to looted art from the colonial period” by Hermann Parzinger, the President of the Prussian Cultural Heritage Foundation,¹⁸¹ or as a “Copernican proposal” by Thomas Dermine, Belgian State Secretary for Recovery and Strategic Investments.¹⁸² Such “immaterial returns” cannot and should not replace final consent, but they open room for a spectrum of possibilities. They may lead to agreement on the retention of certain objects or commitments to broader circulation, based on the importance or social value of objects.

Inclusive procedures

The second element of relational culture justice is an open and inclusive process concerning the past and future of objects, which goes beyond inter-state negotiation¹⁸³ and offers possibilities for the participation of affected groups, communities, or stakeholders (e.g. descendants of former rulers). This entitlement may be derived from the participatory rights relating to the protection of cultural rights under international human rights law¹⁸⁴ as well as specific cultural heritage instruments.¹⁸⁵ In order to implement these rights it is however necessary to address the risks and pitfalls of returns. Existing experiences show that returns may “white-wash” responsibility towards the past; shift post-colonial continuities to the national realm;¹⁸⁶ or create secondary conflicts in the societies of origin. The process of the return of the Benin objects reflects these challenges.

¹⁸¹ Federal Foreign Office, *Federal Foreign Office on the Signing of a Memorandum of Understanding on Museum Cooperation with Nigeria*, 14 October 2021, <https://www.auswaertiges-amt.de/en/newsroom/news/museum-cooperation-nigeria/2489498> [accessed: 25.09.2022].

¹⁸² T. Dermine, *Restitutie: het voorstel van Thomas Dermine*, 6 July 2021, <https://dermine.belgium.be/nl/restitutie-het-voorstel-van-thomas-dermine> [accessed: 25.09.2022]; B. Demarsin, *Restitutie van koloniaal erfgoed*, “Faro” 2022, Vol. 1, <https://www.foliomagazines.be/artikels/restitutie-van-koloniaal-erfgoed> [accessed: 25.09.2022].

¹⁸³ J. von Bernstorff, J. Schuler, op. cit., p. 576.

¹⁸⁴ See Art. 15(1)(a) ICESCR and Art. 27 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171. Art. 18 UNDRIP states that “indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”.

¹⁸⁵ See the Preamble of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3, Arts. 2(3) and 7(1) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311, or Art. 3(8) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.

¹⁸⁶ See with respect to Latin American returns, P. Losson, *The Return of Cultural Heritage to Latin America*, Routledge, London 2022.

In Nigeria, the planned return of objects created disputes between the Oba of Benin, the Governor of Edo State, and the Federal Government. The contemporary Oba of Benin, Oba Ewaure II, argued that he is the proper owner of the cultural heritage of the Benin Kingdom and that the objects should be placed in a “Benin Royal Museum” at his court. He stated:

There is no alternative native authority and custodian of the cultural heritage of the Benin Kingdom outside the Oba of Benin, as constituted by the Royal Palace. I do not believe that the move by a privately registered company, the Legacy Restoration Trust Ltd. and the purported establishment of the Edo Museum of West African Arts (EMOWAA) are in consonance with the wishes of the people of Benin Kingdom.¹⁸⁷

The Nigerian government, in turn, argued that the Benin Bronzes are national heritage; that it is internationally entitled to receive the objects; and that the National Commission for Museums and Monuments of Nigeria has the right to determine where arts and monuments are kept, in consultation with the Edo State government and the Royal Benin Palace. Alhaji Lai Mohammed, the Minister of Information and Culture, stated that:

Nigeria is the entity recognized by international law as the authority in control of antiquities originating from Nigeria. The relevant international Conventions treat heritage properties as properties belonging to the nation and not to individuals or subnational groups [...] The Federal government will take possession of these antiquities, because it is its duty to do so, in line with the extant laws. [W]e have always exercised this right in cognizance of that culture that produced the art works.¹⁸⁸

Not surprisingly, these two conflicting positions have caused delays in the progress toward returns. One of the lessons of the format of the Benin Dialogue Group is that it is imperative to establish structures for consultation and dialogue which go beyond the State-centric frame of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁸⁹ Negotiations and determinations regarding the status of “entangled” colonial objects should involve multiple stakeholders: government officials; museums and curators; communities of origin; descendants of former local rulers; or private actors with a link to the objects, and provide structures to give

¹⁸⁷ Statement at the Meeting of His Royal Majesty Omo N’Oba N’Edo, Ewaure II, Oba of Benin with Palace Chiefs and Enigies on the Repatriation of the Looted Benin Artifacts, in: K. Opoku, *Oba of Benin Speaks on the Return of Artefacts*, “Modern Ghana”, 12 July 2021, <https://www.modernghana.com/news/1092994/oba-of-benin-speaks-on-the-return-of-artefacts.html> [accessed: 25.09.2022].

¹⁸⁸ K. Opoku, *Benin Bronzes Belong to Oba of Benin*, “Modern Ghana”, 20 September 2021, <https://www.modernghana.com/news/1105713/benin-bronzes-belong-to-oba-of-benin.html> [accessed: 25.09.2022].

¹⁸⁹ 14 November 1970, 823 UNTS 231.

them a voice in the process.¹⁹⁰ This approach obviously may make negotiations more complex. But it is necessary to avoid a situation whereby return procedures are simply used by governments to enhance national prestige, while sidelining the interests of affected cultural communities.

Relation-building and new object possibilities

A third element of cultural relational justice is the treatment of return as a process, rather than an act. As Felwine Sarr has argued, return is about relation-building and the development of object possibilities: “The return of objects does not mean restoring them as they once were, but reinvesting them with social function. It is not a question of return of the same, but of an ‘other same’”.¹⁹¹

The relationship to objects and the knowledge that pertains to them may need to be renewed. This requires new forms of collaboration or sharing, based on the different meanings of objects, even after their return. It offers the possibility to recognize the multi-dimensional nature of objects, i.e. beyond just “cultural property”. The Western museum model may not always be the ideal frame. Certain objects represent the mutation of life, and as such ought to be treated as living objects, which may perish and be replaced.¹⁹² Return may require new forms of object mobility, or the circulation or development of new creative partnerships between the museums and local communities through which the objects are shared. For instance, Nana Oforiatta Ayim has established a mobile museum in Ghana in order to facilitate greater access to objects.¹⁹³

Digital access is another important element.¹⁹⁴ It does not necessarily provide a viable substitute to return and carries risks of “appropriation and alienation”.¹⁹⁵ But it may constitute an important means to enhance transparency, renew memory, or facilitate social re-connection with objects.¹⁹⁶ The case of the Benin Bronzes

¹⁹⁰ Procedures should also allow communities to file requests for return. See with respect to Indigenous peoples, International Law Association, *Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material*, in: *Report of the Seventy-second Conference, 2006*, Annex, Principle 4.

¹⁹¹ F. Sarr, *Restitution of African Heritage: History, Memory, Traces, Re-Appropriation*, Geneva, 24 September 2021, p. 4.

¹⁹² *Ibidem*, p. 6.

¹⁹³ F. Driver, M. Nesbitt, C. Cornish (eds.), *Mobile Museums*, UCL Press, London 2021.

¹⁹⁴ S. Singh, M. Blake, J. O'Donnell, *Digitizing Pacific Cultural Collections: The Australian Experience*, “International Journal of Cultural Property” 2013, Vol. 20(1), pp. 77-107; L. Lixinski, *Digital Heritage Surrogates, Decolonization, and International Law: Restitution, Control, and the Creation of Value as Reparations and Emancipation*, “Santander Art and Culture Law Review” 2020, Vol. 2(6), pp. 65-86.

¹⁹⁵ M. Pavis, A. Wallace, *Response to the 2018 Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access Relevant to the Digitization and Restitution of African Cultural Heritage and Associated Materials*, “Journal of Intellectual Property, Information Technology and E-Commerce Law” 2019, Vol. 10(2), pp. 240-271.

¹⁹⁶ For a critique of the “radical practice of sharing”, proposed in the Sarr and Savoy report, see L. Lixinski, *op. cit.*, p. 80.

is unique, since it has inspired a new digital inventory and environment of Benin Bronzes: “Digital Benin”. This was supported by countries of the Benin Dialogue Group, including the British Museum, the Weltmuseum in Vienna, Oxford University’s Pitt Rivers Museum, and Berlin’s Ethnology Museum. It is the first project which re-assembled all objects in a common digital environment and traces the histories of their taking and acquisition. It has important symbolic value and contributes to meaning-making. Cultural anthropologist Kokunre Eghafona has compared it to a re-composition of a book. He noted that: “The looting was like a book being torn to pieces and then the pages were put in different places”.¹⁹⁷ “Gathering them together in one place” restores a fuller meaning that has gone lost.

One possibility to mitigate neo-colonial dilemmas regarding digitization is the creation of “a third space” around digitized objects, i.e. an environment which presents the digital record in conjunction with contextualized narratives of histories and meanings, and offers communities the possibility to add “their own descriptions without approval from the museums that have the objects in custody” and to “decide to whom they give access to see and use their digitally curated objects and collection”.¹⁹⁸

Beyond Ritual Guilt Relief and Atonement

In 1978, former UNESCO Director-General Amadou-Mahtar M’Bow issued his famous *Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It*, in which it was argued that return cannot “be solved simply by negotiated agreements and spontaneous acts”.¹⁹⁹ Are the Benin Bronzes a game changer? The jury is still out. There are both positive developments, as well as signs of caution.

It is clear that Western collections need to take a step back from the moral high ground which they have occupied for decades. The dynamics of the Benin return movement reflect in part a turn towards a new relational cultural justice approach. It offers a way to critically interrogate the role of Western institutions as “guardians of universal heritage” and to clarify the value and significance of objects through dialogue. However, there remains a lack of targeted instruments at the macro-level (e.g. conventions, resolutions, identification of common principles). Change occurs predominantly on the meso- (policy guidelines, national practices) or micro-levels (museum or university practices).

¹⁹⁷ C. Hickey, *Digital Benin: A Milestone on the Long, Slow Journey to Restitution*, “The Art Newspaper”, 8 June 2020, <https://www.theartnewspaper.com/2020/06/08/digital-benin-a-milestone-on-the-long-slow-journey-to-restitution> [accessed: 25.09.2022].

¹⁹⁸ C. Jeurgens, M. Karabinos, *Paradoxes of Curating Colonial Memory*, “Archival Science” 2020, Vol. 20, p.216.

¹⁹⁹ A.-M. M’Bow, *A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It*, 7 June 1978, http://www.unesco.org/culture/laws/pdf/PealforReturn_DG_1978.pdf [accessed: 25.09.2022].

Nonetheless, the adoption of individual national guidelines and policies on colonial collections marks an important step. The German, Dutch, or Belgian principles avoid a generalized qualification of colonial injustice as looting or theft and encourage a differentiated, case-by-case assessment, based on criteria which draw on the interplay between accountability for wrongdoing, ethical responsibilities, and cultural heritage rights. They take into account justice and ethical criteria regarding the context of acquisition, as well as criteria drawing on the right of access to culture. At the same time they reflect a principled commitment to the recognition of injustice and redress as an overarching principle. This is expressly acknowledged in the Dutch principles²⁰⁰ and the Belgian guidelines, which recommend the adoption of a separate legal framework;²⁰¹ and the German guidelines, which state that the principles in the instrument “bear witness to a value system in which, on the basis of an assumed superiority, colonial powers placed themselves above other states and their populations or parts of the population, exploiting and oppressing them”.²⁰²

These guidelines and policies do not in and of themselves constitute a form of “international custom” which makes return or restitution mandatory. But they go beyond mere moral commitments. They reflect professional practices and are built not only on ethical, but also on legal criteria. They may contribute to the formation of a sense of legal obligation (*opinio juris*) and generate more differentiated legal principles, based on mutually-beneficial return practices.²⁰³ This contribution has shown that the “justice and cultural significance criteria” are based on three legal models of responsibility (past wrongdoing, contemporary relationship to a wrong, and access to culture) as well as on general principles of cultural heritage law.

However, the landscape of return continues to be governed by traces of cultural nationalism, on both sides of the equation. The overall number of existing returns remains low. Some countries, such as the UK, are still reluctant to engage in open dialogue. Change is driven by individual return practices and voluntary commitments made by museums or universities (the micro-level). There are fears that the strong focus on iconic objects, such the Benin Bronzes, is merely an act of tokenism, which may be used to provide moral absolution for other takings; embellish or distort the past; marginalize the thousands of other objects which are hidden in collections; or entail the discursive silencing of other calls for returns. The strong focus on the Benin Bronzes conceals the lack of attention to objects taken in other

²⁰⁰ Council for Culture, Advisory Committee on the National Policy Framework for Colonial Collections, op. cit., p. 6, Recommendation 5.

²⁰¹ Belgian Ethical Principles, § 2.3.

²⁰² Guidelines for German Museums 2021, p. 12.

²⁰³ P. Losson, *Opening Pandora's Box...*; M. Cornu, M.-A. Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, “International Journal of Cultural Property” 2010, Vol. 17(1), p. 23.

campaigns of violence, such as the attack on the Beijing summer palace in 1860, the Maqdala looting in 1868, the lootings in the Asante wars, or the many lesser known “punitive expeditions” carried out under colonial authority.

The time has come to rethink structures more systematically. One option is to develop a common set of UN or European principles in order to provide greater transparency with respect to objects, minimize diverging return criteria, and develop provenance research. This would prevent the movement towards return of the Benin Bronzes from being perceived as mere symbolism or a ritual of guilt, relief, and/or “self-purification”.²⁰⁴ Another option is to work on a political declaration which recognizes the injustice of colonial takings in general and their enduring effects, i.e. a counter-document to the General Act of the Berlin Conference on West Africa of 26 February 1885.²⁰⁵

Modalities of private acquisition deserve fresh attention. More transparency and social media action is needed to draw attention to gaps in the private sector and prevent sales on the open market, which facilitate the continued commodification of colonial art. Artefacts such as the Benin Bronzes have been offered for sale at public auctions, despite their violent acquisition. The history of objects is a tool to put pressure on private auction houses not to sell looted objects. For example, in June 2021 the Ethiopian government requested an auction house in Dorset (Busby) to stop the auction of a Coptic bible and horn beakers taken during the hostilities in Maqdala in 1868, in order to “stop the cycle of dispossession”.²⁰⁶ It mobilized a social media campaign after which the objects were withdrawn from the auction and purchased by an association.

The existing movement towards change at the meso- and micro-levels should be complemented by further action at the macro-level, including an international framework clarifying the recognized criteria of return, procedures for the handling of claims, modalities of provenance research and/or practices of re-engagement, and the strengthening of transparency requirements and due diligence duties in the private sector. These reforms need to extend beyond iconic objects such as the Benin Bronzes and cover the thousands of objects which are still kept in storage. The past cannot be undone. But it is time to make footprints for “the possibility of a just future”.²⁰⁷

²⁰⁴ See D. Frum, *Who Benefits When Western Museums Return Looted Art?*, “The Atlantic”, 14 September 2022, <https://www.theatlantic.com/magazine/archive/2022/10/benin-bronzes-nigeria-return-stolen-art/671245/> [accessed: 25.09.2022].

²⁰⁵ On the context, see M. Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, “London Review of International Law” 2015, Vol. 3(1), pp. 31-59.

²⁰⁶ L. Bakare, *Looted Artefacts Withdrawn from UK Auction after Ethiopia's Appeal*, “The Guardian”, 16 June 2021, <https://www.theguardian.com/world/2021/jun/16/looted-artefacts-withdrawn-from-uk-auction-after-ethiopia-appeal> [accessed: 25.09.2022].

²⁰⁷ S. Durrant, *Postcolonial Narrative and the Work of Mourning: J.M. Coetzee, Wilson Harris, and Toni Morrison*, State University of New York Press, Albany 2004, p. 1.

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