Cross-border title claims to cultural objects: property or heritage?

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5 Colonial looting and indigenous peoples' lost heritage

ABSTRACT

Chapter 5 deals with claims by former owners to cultural objects lost as a result of colonial looting practices. This is a category which recently received much attention. A common response to such claims by holding states has been that the takings were lawful at the time and, therefore, not a legal but (merely) an ethical issue. But is that so? It is argued that it is not a lack of legal norms that explains this (belated) attention for colonial looting but, rather, the asymmetrical application of norms. Moreover, a human rights law approach, focusing on the heritage aspect of cultural objects for people today – instead of a sole focus on ownership – offers useful tools to structure this field. To illustrate these points, a case concerning an African ancestral sculpture today known as the 'Bangwa Queen' will be assessed on its merits under international law. The Bangwa Queen is of spiritual importance to the Bangwa, a people indigenous to the western part of Cameroon. She was taken as part of a collection of so-called *lefem* figures and other artefacts by German colonisers in 1899 and is currently part of a French museum collection.

Questions addressed in this chapter are: How did international law on looting and restitution of cultural objects develop? How were claims to colonial booty in the post-colonial era generally perceived? Can recent soft law in this field be seen as a reflection of evolving law, and what is the status of the United Nations Declaration on the Rights of Indigenous Peoples in this regard?

The Bangwa Queen, photographed sometime in the 1950s or 1960s when the Bangwa Queen was in the United States. Reproduced from Robert Brain and Adam Pollock, *Bangwa Funerary Sculpture* (Gerald Duckworth & Company Limited 1971) 125.

*The Bangwa Queen: Artefact or heritage?**

'One of the most noble incarnations of a people's genius is its cultural heritage. The vicissitudes of history have nevertheless robbed many peoples of this inheritance. They … have not only been despoiled of … masterpieces but (were) also robbed of a memory. … These men and women have the right to recover these cultural assets which are part of their being.'[1]

1 INTRODUCTION

Forty years after this plea and some 20 United Nations (UN) Resolutions later, the lingering discussion about colonial takings in Western museums seems to have entered a new phase.[2] In November 2017, President Emmanuel Macron of France set the stage by announcing a policy of restitution of African artefacts from French museums.[3] This change in attitude is not limited to France, as illustrated by the presentation in Germany in March 2019 of new government policy to enable the return of colonial takings, and guidelines of a group of ethnological museums in the Netherlands.[4] In France this was followed by President Macron's decision to return statutes and regalia that were taken as

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1 A.M. M'Bow, 'A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It' (1978) <http://www.unesco.org/culture/laws/pdf/PealforReturn_DG_1978.pdf>.

2 For an overview, see 'Restitution of Cultural Property: Resolutions Adopted by the United Nations General Assembly about Return and Restitution of Cultural Property' (*UNESCO*) <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/united-nations/>.

3 E. Macron, 'Discours d'Emmanuel Macron à l'université de Ouagadougou' (Burkina Faso, 2017) <https://www.elysee.fr/emmanuel-macron/2017/11/28/discours-demmanuel-macron-a-luniversite-de-ouagadougou> accessed 18 March 2019.

4 See the German 'Eckpunkte zum Umgang mit Sammlungsgut aus Kolonialen Kontexten', Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany, Anlage II z. NS 1. Kultur-MK (2019) <https://www.kmk.org/fileadmin/pdf/PresseUndAktuelles/2019/2019-03-25_Erste-Eckpunkte-Sammlungsgut-koloniale-Kontexte_final.pdf> accessed 19 April 2019; for the Dutch guidelines, see 'Dutch National Museum of World Cultures Announces Principles Claims Colonial Collections' (*Museum Volkenkunde*, 2019) <https://www.volkenkunde.nl/en/about-volkenkunde/press/dutch-national-museum-world-cultures-nmvw-announces-principles-claims> accessed 19 April 2019.

war booty during a punitive colonial expedition in 1892 from the Kingdom of Dahomey to Benin,[5] a claim that had been rejected not long before.[6] And in May 2018, the German Prussian Cultural Heritage Foundation – one of the main 'universal' museums[7] – returned artefacts with the argumentation that these were 'taken without the consent of the Alaska Natives and were therefore removed [...] unlawfully.'[8] These are remarkable developments given that a common response to such claims is that they lack legal grounds. In this chapter, the view is taken that it is not a lack of legal norms that explains this belated discussion but, rather, the asymmetrical application of such norms. Furthermore, it is suggested that a human rights law approach as taken in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), offers useful tools to structure this field.[9] As a case example, it will evaluate a claim regarding an African ancestral sculpture known as the 'Bangwa Queen' (Figure 1) on its merits under international law.

The Bangwa Queen is a wooden ancestor sculpture of spiritual importance to the Bangwa, a people indigenous to the western part of Cameroon. She[10] was lost during an expedition by German colonisers who invaded the Bangwa territory in the latter years of the nineteenth century and, today, is part of a French museum collection. She was recognised in 2014 by a Bangwa chief, and, in 2017, their representative contacted the museum.[11] The background and factual circumstances of this case are discussed in the first section of the article. An overview of international standards relevant to this case will follow in the second and third sections. An analysis of the traditional legal framework in the next section will illustrate that norms that protect cultural objects from pillage and destruction have always existed throughout history. At some point, these evolved into (customary) international law under the rules of warfare.

5 'Remise du Rapport Savoy/Sarr sur la Restitution du Patrimoine Africain' (*Elysée*, 2018) <https://www.elysee.fr/emmanuel-macron/2018/11/23/remise-du-rapport-savoy-sarr-sur-la-restitution-du-patrimoine-africain>.

6 P. Dagen, 'La Restitution d'Œuvres d'Art?: «?Une Question de Dignité?»' (17 August 2017) *Le Monde* <https://www.lemonde.fr/festival/article/2017/08/17/la-restitution-d-uvres-d-art-une-question-de-dignite_5173397_4415198.html>.

7 In 2002, eighteen Western museums had taken a stance for 'retention' and against restitution of colonial takings in the so-called Declaration on the Importance and Value of Universal Museums. This declaration can still be found on the website of the Hermitage: <http://www.hermitagemuseum.org/wps/portal/hermitage/news/news-item/news/1999_2013/hm11_1_93/?lng=> accessed 31 March 2019.

8 Objects are grave goods from Chenega Island: 'Press Release: Ethnologisches Museum Returns Objects to Alaska Natives' (2018) <http://www.preussischer-kulturbesitz.de/fileadmin/user_upload_SPK/documents/presse/pressemitteilungen/2018/180516_Restitution-Chugach-Ceremony_EN.pdf>.

9 Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295 (13 September 2007) UN Doc A/RES/61/295 (UNDRIP).

10 Given the meaning of the statue to the Bangwa, the personal pronoun 'she' will be used.

11 Letters by the legal representative of Fon Fontem Assabaton and the Bangwa People of the Fontem Kingdom (8 June 2017, 24 July 2017) (on file with the author).

Therefore, certain acquisitions that occurred at the close of the nineteenth century might well be characterised as unlawful under contemporary international law, notwithstanding Western justifications. Not seldom, though, the exact circumstances of a loss are unclear. Besides, even if it can be argued that a loss was unlawful, a number of legal hurdles may implicate that claims, based on events in a distant past, today are 'stale.'

On the other hand, the rights of former owners to their involuntarily lost artefacts are increasingly acknowledged in soft law instruments, even if a loss predates treaties that specifically arrange for the return of looted artefacts, and regardless of whose hands the objects are found in today. Although such instruments usually take the form of non-binding governmental declarations or private voluntary codes, they seem to reflect evolving international (human rights) law norms. This will be the topic of the third section of this chapter. In this regard, the UNDRIP is important when it comes to the category of artefacts lost as a result of colonial rule. It formulates the rights of indigenous peoples regarding their lost cultural heritage, ranging from a right to access, use, and control to repatriation. Its relevance for the African Bangwa case will be dealt with in the third section. What follows, in short, is a proposition for a legal approach to claims that are often set aside as merely 'moral' in nature.

2 THE BANGWA QUEEN AND HER LOSS

2.1 The sculpture and her meaning

Today, the wooden sculpture known as the Bangwa Queen is part of the collection of the Dapper Foundation exhibited in the Musée du Quai Branly Jacques Chirac in Paris.[12] Since her transfer to Berlin in the latter years of the nineteenth century, and her subsequent acquisition by collector Arthur Speyer in 1926, she gained fame as a major work of art.[13] She was featured in a series of photos taken by Man Ray in the 1930s and was part of several important exhibitions such as the 1935 African Negro Art exhibition in New York and, most recently, the 2011 Heroic Africans: Legendary Leaders, Iconic Sculptures exhibition of the Metropolitan Museum of Art. Her 'iconic' import-

12 A picture of the Bangwa Queen was until recently shown on the website of the Dapper Foundation: 'Présentation' (*Fondation Dapper*) <http://www.dapper.fr/en/foundation-presentation.php> accessed 18 March 2019. Musée Dapper, Paris. Inv. no. 3343. In May 2017, the Fondation Dapper announced it was closing a museum. It announced it would continue exhibiting its collection in other museums.

13 B. Von Lintig, 'On the Bangwa Collection Formed by Gustav Conrau' (2017) 86 *Tribal Art* 94.

ance is illustrated by the fact that the Musée Dapper reportedly set a record for the purchase of African art by paying US $3.4 million for her in 1990.[14]

To her creators, the Bangwa people, who are indigenous to the grasslands region of present-day Cameroon,[15] the Bangwa Queen is not a work of art but, rather, is sacred.[16] She is a so-called *lefem* figure, personifying a special ancestor.[17] In Bangwa tradition, individuals may own artefacts, but once a statue is carved as a symbol of authority, it must be presented to the king and, through a series of traditional procedures, is transformed into a religious symbol of authority of the chief.[18] According to Bangwa representatives, this custom is still revered. The Bangwa Queen was such a statue, and she was meant to be kept in the royal shrine for praying and consultation purposes by the reigning king of the Bangwa kingdom Lebang, Fon Asonganyi, the belief being that lefem statues render the ancestor present.[19] This connotation is confirmed by the Metropolitan Museum of Art, which is home to her counterpart, a male ancestral figure seemingly with the same provenance:

> Because of their important status, memorial figures are honoured and well cared for while being housed in a secure place within the king's palace. This work was assembled with other portrait figures from previous generations, including representations of other chiefs, as well as queen mothers, princesses, titled brothers, and favourite wives. The assembly served as a concentrated symbol of dynastic power and continuity, a visual record of family history that inspired deference and obedience. During the ceremonies that surround a chief's funeral and the installation

14 J.L. DeFabo, 'The Bangwa Queen: Interpretations, Constructions, and Appropriations of Meaning of the Esteemed Ancestress Figure from the Cameroon Grassfields' (2014) Senior Projects Spring Paper 14 1, 59 <https://digitalcommons.bard.edu/senproj_s2014/14/>. See S. Muchnic, '$3.4-Million Sculpture Sale Sets Record for African Art' (22 April 1990) *Los Angeles Times* <https://www.latimes.com/archives/la-xpm-1990-04-22-mn-392-story.html>.

15 The name 'Bangwa' is not used consistently. Bangwa territory consists of nine chiefdom, while Fontem is the name of the chief and main village of the most populated kingdom. R. Brain, *The Bangwa of West Cameroon: A Brief Account of Their History and Culture* (1967) London University College, 1. V. Lockhart, 'A Social-Historical Study of Social Change among the Bangwa of Cameroon' (1994) Occasional Papers No 52, 9.

16 For an object to be defined as 'sacred,' the definition used in the NAGPRA is useful: 'Objects that were devoted to a traditional religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony.' Native American Graves Protection and Repatriation Act (16 November 1990) 25 USC (NAGPRA) paras 3001-13.

17 At times also referred to as a 'Njuindem,' a woman who has birthed twins and acts as a priestess of the earth. R. Brain and A. Pollock, *Bangwa Funerary Sculpture* (1971) Gerald Duckworth & Company Limited, fig 58. According to A. Schlothauer, 'Gustav Conrau's Cameroon Collection in the Berlin Ethnological Museum' (2015) 9 Kunst & Kontext Humboldt-Forum 20, this is a mistake.

18 Statement of Chief Taku, Bangwa representative (on file with the author).

19 G. Atem, 'Account on the Looting of the Bangwa King and Queen by the Germans', Statement (2017) (on file with the author); Lockhart (1994) 17; Brain and Pollock (1971) 118.

> of his successor, his lefem is exhibited publicly, again as a means to maintain social and political continuity as well as to encourage faith in the strength of royal ancestral power.[20]

To the religious Bangwa people, this spiritual meaning did not extinguish upon the loss of these statues but continues today; misfortunes that have hit the kingdom since the loss are attributed to the absence from the shrine of the lefem figures like the Bangwa Queen.[21] Moreover, she symbolises the lost lives and injustices that occurred at the time.[22]

Her meaning thus varies in different settings and to different people: from an ancestral portrait in between the human and spiritual world in her original African context, to an exotic ethnographic specimen for European scientists at the turn of the nineteenth century, to a famous work of art that has inspired artists and a commodity for Western collectors.[23] As the Bangwa have largely maintained their religious practices and social-cultural structure, this connotation of the Bangwa Queen continues to exist. Several years ago, the late fontem was informed that the Bangwa Queen was in the Metropolitan Museum of Art in New York, presumably on the occasion of the 2011 Heroic Africans exhibition. He visited the United States to ascertain that this was true and recognised the Bangwa Queen.[24] In late 2017, contact was established with the Dapper Foundation, which, however, did not lead to a meeting or dialogue.[25]

2.2 The loss

Bangwa historical accounts report that the Bangwa Queen, together with other lefem figures, were looted by German soldiers when they invaded the palace of the then ruling Fontem Asonganyi (Figure 2) during their conquest of the Bangwa region in 1899/1900.[26] While his quarters were invaded and

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20 Commemorative Figure (Lefem) from Cameroon, Grassfields Region, Account No 1978.412.576 <https://www.metmuseum.org/art/collection/search/311037> accessed 18 March 2019. It appears a total of 71 Bangwa objects were delivered to the Berlin Ethnological Museum by Gustav Conrau. See Schlothauer (2015) 24. Von Lintig (2017) 94 concludes that five of these were 'deaccesioned' in the late 1920s and, today, are in private or institutional collections (amongst them, the Bangwa Queen).

21 Atem (2017).

22 A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (2006) Cambridge University Press, 299: '[F]or colonized peoples, the removal of these cultural objects represented the dispossession of their lands, autonomy and identity.' Bangwa representatives estimate the Bangwa population at 148,000 in 2017 (on file with the author).

23 For details on the provenance of the Bangwa Queen, see DeFabo (2014).

24 Atem (2017).

25 Correspondence between representative of the Bangwa and Dapper Foundation (2017-18) (on file with the author.

26 Atem (2017); affirmed by Brain and Pollock (1971) 118; Lockhart (1994) 29.

plundered, Fontem Asonganyi escaped.[27] After years in hiding, he turned himself in to stop the punitive German military campaign.[28] The Bangwa consider a voluntary transfer of the statues by Fontem Asonganyi unthinkable as that would mean a relinquishment of his spiritual and political powers.[29]

Where Bangwa sources cast no doubt on the loss of the lefem figures by pillage, research by Andreas Shlothauer and Bettina von Lintig indicates that a German named Gustav Conrau acquired these statues between June and September 1899 for the Ethnological Museum in Berlin – just before the punitive military actions that started in December 1899.[30] Conrau's letters from that period to the director of the Berlin museum mention his 'secret' acquisition of 'quite beautiful fetishes' that were 'carefully hidden.' Conrau hints in his letter that the acquisition was with the consent of Fontem Asonganyi.[31] And whilst Shlothauer characterises the acquisition as peaceful trading, Von Lintig leaves that conclusion open.[32] Obviously, 'consent' in these circumstances is a matter of interpretation.[33]

Notwithstanding the uncertainty concerning the exact circumstances of the loss and diverging views on its voluntary nature,[34] the following circumstances are certain. First, the Bangwa Queen was part of a collection of Bangwa statues taken by Germans in the last year of the nineteenth century and dispatched to the Museum für Völkerkunde (Ethnological Museum) in Berlin.

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27 Looting of the palace is confirmed by E.M. Chilver, 'The Bangwa and the Germans: A Tailpiece' (1967) 4 Journal of the Historical Society of Nigeria 156 under reference to German colonial archives: 'Von Pavell's force reached Tinto on November 5th 1901. … achieving little except the capture of some prisoners and much booty.'

28 Atem (2017); confirmed, for example, Ibid. 157.

29 H. Cadman, 'An Assessment Report on the Bangwa Tribal Area in the Mamfe Division of the Cameroon Province', Buea Archive File No. Af.13 (1922) <http://lebialem.info/page/> accessed 18 March 2019: 'The Clan Chief … has power over all the Chiefs under him, since he alone has the power to commune with or propitiate the spirit of their ancestors.'

30 Schlothauer (2015); Von Lintig (2017). On the punitive actions against the Bangwa, see Chilver (1967) 155, referring also to German colonial archives and the memoirs of Von Puttkamer, the German governor.

31 Gustav Conrau, Letters to Felix von Luschan (11 June and 1 October 1899) *Acta Africa,* vol 21, file E1015/99-49, cited by Schlothauer (2015) 26.

32 Schlothauer (2015) 27: 'The acquisition from the Bangwa can only have been by consensus […] Theft or the use of force would have been fatal for Conrau.' However, the expedition was fatal for Conrau. Von Lintig (2017) 104.

33 For an impression on colonial acquisition tactics in Africa, see Michel Leiris's diary of a French scientific expedition. M. Leiris, *Phantom Africa* (Seagull Books 2017), translated by Brent Hayes Edwards from the original Michel Leiris, *L'Afrique fantôme* (Gallimard 1934).

34 Sarr and Savoy recommend restitution of 'any objects taken by force or presumed to be acquired through inequitable conditions,' including acquisitions by 'active administrators' or 'through scientific expeditions prior to 1960.' F. Sarr and B. Savoy, 'The Restitution of African Cultural Heritage. Toward a New Relational Ethics' (2018) 61 <http://restitutionreport2018.com/sarr_savoy_en.pdf>. In the field of Nazi-looted art, a sale by a Jewish owner to a Nazi official is considered a 'forced sale'. E. Campfens, 'Nazi-Looted Art: A Note in Favour of Clear Standards and Neutral Procedures' (2017) 22 Art Antiquity and Law 315.

This was shortly after the colonial powers had arranged for the division of Africa at the Berlin Conference on West Africa in 1884-85, justifying the appropriation of land and resources by relying on the *terra nullius* argumentation[35] and their religious duty to spread the 'blessings of civilization.'[36]

By introducing the principle of 'effective control' as a base for territorial claims by European powers, this instigated a period of conquest of African territories by expeditions to hitherto unknown territories in the following years.[37] Germany had claimed the Bangwa territory at the Berlin Conference as part of the territory they named 'Kamerun,' having had a port colony at Douala since 1884. In this context, the expeditions into the Bangwa territory should be seen as being military and political in nature.[38]

Second, Gustav Conrau had a central role in the transaction relating to the Bangwa Queen. Conrau, a 'recruiter, collector on commission, elephant-hunter, researcher and businessman,' also had a role in the German colonial organisation.[39] He seems to have been the first European to be in contact with the Bangwa in 1898.[40] At the time, he held a position at the German concession company Gesellschaft Nordwest-Kamerun.[41] Indicators of his role as a colonial agent are that he recruited laborers to work at plantations along the coast and that he asked Fontem Asonganyi to raise the German flag during his stay with the Bangwa in 1899.[42] Conrau died on his third visit to the Bangwa in December 1899, reportedly by killing himself to avoid being

35 Scholars like 18th century Emer de Vattel argued that cultivation of the land is a natural duty of humankind, and, therefore, European peoples had the right to occupy, colonise, and thereby organise the land that was of no special need to 'wild peoples' who did not properly use the land. De Vattel, *Le droit des gens, ou Principes de la loi naturelle, Appliqués à la conduite et aux affaires des Nations et des Souverains* (1758) paras 81, 209, cited by K. Kuprecht, *Indigenous Peoples' Cultural Property Claims* (2014) Springer International Publishing, 24.

36 General Act of the Berlin Conference on West Africa 1885 art 6: 'All the Powers ... bind themselves ... to care for the improvement of the conditions of their moral and material well-being. ... They shall ... protect and favour all religious, scientific or charitable institutions and undertakings ... which aim at instructing the natives and bringing home to them the blessings of civilization. Christian missionaries, scientists and explorers, with their followers, property and collections, shall likewise be the objects of especial protection.'

37 Ibid. art 35: 'The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them.'

38 E. Dunstan, 'A Bangwa Account of Early Encounters with the German Colonial Administration' (1965) 3 Journal of the Historical Society of Nigeria 403; see also Cadman (1922) on the political and military nature of the German expeditions in the first years; Von Lintig (2017).

39 See, e.g., Von Lintig (2017) 101: '[I]t is reasonable to assume that this journey was undertaken in consultation with the governor of Cameroon.' See Schlothauer (2015) 25, 28: Schlothauer's conclusion is that Conrau was at most a temporary colonial agent.

40 Confirmed by many sources. See, e.g., Chilver (1967); Schlothauer (2015); Cadman (1922).

41 Chilver (1967) 155.

42 Cadman (1922) 36: 'This German … again took up his quarters in FONTEM. Chief FONTEM was now given a German flag to fly.'

captured by the Bangwa.[43] The cause of the incident leading to his death appears to have been that Fontem Asonganyi had provided Conrau with a number of Bangwa men on his earlier expedition in the expectation that these men would return.[44] Instead, they did not return, and it can be assumed that they were used or sold as forced laborers on rubber plantations in the coastal region.[45]

In other words, the Bangwa's initial friendly attitude toward Conrau changed after the purpose of the expedition emerged: the recruitment of forced laborers and the collection of valuables. As noted by Elizabeth M. Chilver on the basis of German colonial archival records, '[t]he north-west hinterland – Bangwa territory – was increasingly viewed as a labour reservoir rather than as an outlet for trade-goods or as a producer of raw materials.'[46] In an account in which the lefem figures, which included the Bangwa Queen, were handed to Conrau with the permission of Fontem Asonganyi, as hinted to by Conrau in his letters to the director of the Berlin museum, a misunderstanding similar to the 'lending' of the Bangwa men may have occurred. Indeed, one source notes that the conflict between Fontem Asonganyi and Conrau arose over the missing 'secret' objects.[47]

The German colonial army dispatched several military punitive expeditions after the death of Conrau from late December 1899 on, causing the death of many Bangwa and the destruction of Fontem Asonganyi's palace.[48] Fontem Asonganyi was eventually caught and sent into exile; however, after the area came under British colonial rule (1915-61), he was able to return.[49] Regarding the German colonial period, a study notes:

> Of all the major social changes experienced in the Bangwa area the German colonial period was perhaps the most sudden and violent. The population was conscripted into forced labour both on the plantations and in the building of a road which

43 The Deutsche Kolonialzeitung vol 17 n 6 (8 February 1900) reported on the suicide: '*Er war von den Bangwa...gefangen, unternahm einen Fluchtversuch, wurde dabei durch einen Speerwurf verwundet und erschoss sich selbst, um nicht wehrlos in die Hände der Feinde zu fallen*.' Cited by Dunstan (1965) 403.

44 Chilver (1967) 154: 'Conrau died in December, 1899. According to the Governors' official report Conrau had 'some months before' brought down fifty labourers from Fontem to work for the Victoria plantation company. He had been despatched by Governor von Puttkamer to the relief of von Queis in Rio del Rey.'

45 Interview with Chief Taku, July 2017. See Dunstan (1965); Brain and Pollock (1971); Schlothauer (2015).

46 Chilver (1967) 155. Confirmed by Conrau. See Von Lintig (2017).

47 However, this account is dismissed by Von Lintig (2017) 105.

48 Dunstan (1965) 405-6; Chilver (1967) 155-56; Lockhart (1994) 27.

49 On charges, amongst others, of (1) 'depriving Conrau of his freedom and causing him to commit suicide' and (2) 'tough resistance to the expeditions.' Chilver (1967) 157.

linked the grasslands and the lower forest area, following the traditional trade route. Many Bangwa died in these ventures.[50]

2.3 Subsequent ownership history

In summary, it can be concluded that the Bangwa Queen was taken as part of a bigger collection of Bangwa figures during the annexation of the Bangwa territory, most likely in 1899 by a German named Conrau. While many objects remained in Berlin,[51] the Bangwa Queen was sold and changed hands many times between her arrival at the Museum für Völkerkunde in Berlin in 1899 and the acquisition by the French Dapper Foundation in 1990. Her history of ownership is well documented; she was in the Ethnological Museum in Berlin until 1926, after which she was subsequently owned by collectors Arthur Speyer, Charles Ratton, Helena Rubinstein, and Harry A. Franklin before the Musée Dapper acquired her at an auction in 1990.[52]

3 LEGAL STANDARDS

The Bangwa people wish to bring home the Bangwa Queen since she is sacred for them and personifies the ancestors of their epic Chief Fontem Asonganyi. Moreover, she symbolises the injustices of colonial rule. For an analysis of such a claim under international law, what needs to be assessed is: (1) the unlawfulness of the acquisition according to international law at the time or (2) the existence of a subsequent rule of international law that entitles the Bangwa to rights with regard to their lost cultural property. What follows is, first, an overview of the traditional legal framework for restitution claims, with the aim of achieving clarity on the question of the legality of the taking at the time, whereas new rules that may entitle the Bangwa to rights concerning their lost cultural property will be addressed in Section 3.

50 Lockhart (1998) 28. Cadman (1922) 49-56 confirms the German rule that 'plantation labourers had to be supplied (sometimes as often as three times a year)' as well as many other malpractices.

51 It appears a total of 71 Bangwa objects were delivered to the Berlin Ethnological Museum by Gustav Conrau. See Schlothauer (2015) 24. See Von Lintig (2017) 94: Von Lintig concludes that five of these were 'deaccesioned' in the late 1920s and, today, are in private or institutional collections – among those, the Bangwa Queen.

52 DeFabo (2014); Von Lintig (2017) figs 4, 7 and 8.

3.1 Unlawful taking?

It is often said that the looting of cultural objects occurred throughout history and was lawful at the time. This statement, however, depends on the perspective taken: that of the Bangwa, the conquerors, or international law? From the perspective of the Bangwa's customs and laws, the appropriation of a lefem figure was not allowed. It may suffice here to recall the special status of the Bangwa Queen: she was sacred and was to be kept by the ruling fontem in his shrine for praying purposes and as a symbol of his power and of his ancestors.[53] On the other hand, such foreign customs or laws under which certain objects are inalienable are often not recognised in other jurisdictions.[54] In France, for example, litigation on behalf of the Hopi Native Americans to stop the auction of their lost sacred 'Katsina,' referred to as 'friends' that represent incarnated spirits of their ancestors, was soon stranded in court proceedings in 2013.[55] The auction was considered legitimate by the French court since the claim by the Hopi that these Katsina were their communal and inalienable patrimony has no legal basis in French law.[56] Then again, if the Katsina were held by a US museum, the situation would be different given that the 1990 American Graves Protection and Repatriation Act (NAGPRA) recognises the inalienability of cultural objects with an 'ongoing historical, traditional or cultural importance central to the Native American Group.'[57] This is a path-breaking approach to tackle such cultural differences. However, for the Bangwa Queen – or even her counterpart in New York –, this law is of no avail or direct relevance since the NAGPRA only applies to the cultural objects of Native American communities in the United States.

Leaving the particularities of local laws aside, the question raised in this chapter is how such claims fit in the international legal framework. After a general sketch of that legal framework, the question how historical claims fit in will be assessed, after which this section ends with some words on specific problems relating to colonial takings as a *sui generis* category.

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53 F. Shyllon, 'Collective Cultural Rights as Human Rights Simpliciter: The African and African Charter Example' in A. Jakubowski (ed) *Cultural Rights as Collective Rights, An International Law Perspective* (2016) Brill, 205: 'In African customary law corporate ownership has always attached to sacred objects, ancestral altart, shrines, sacred groves and other objects, tangible and intangible, of material culture that we now call cultural heritage or cultural property.'

54 Inalienability indicates that the object is so important that it cannot be transferred.

55 *Association Survival International France v SARL Néret-Minet Tessier Sarrou* (2013) *Tribunal de Grande Instance de Paris*, No RG 13/52880 BF/No 1.

56 Kuprecht (2014) 111; L. Nicolazzi, A. Chechi and M.A. Renold, 'Case Hopi Masks – Hopi Tribe v Néret-Minet and Estimations & Ventes Aux Enchères' (2015) Platform ArThémis, Art-Law Centre, University of Geneva.

57 NAGPRA. On 'cultural affiliation', see K. Kuprecht, 'The Concept of 'Cultural Affiliation' in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights' (2012) 19 International Journal of Cultural Property 33.

3.2 International law standards

Cultural objects have a protected status in international law because of their intangible 'heritage' value to people: as symbols of their identity. It is precisely this identity that is often targeted in looting and plundering practices. The Arch of Titus in Rome, depicting the spoils taken after the sacking of the Temple in Jerusalem, is a textbook example of this scenario.[58] Identity was at stake in Nazi-looting practices and, similarly, in the colonial context. European powers, for example, justified their presence in Africa by referring to their religious duty to bring to the 'natives' the 'blessings of civilization.'[59]

That being so, it is remarkable how old the notion is that harming other people's cultural objects is uncivilised. Cicero, in his speeches on the case against the Gaius Verres, argues that an honorable Roman should show respect for the culture of conquered people; while pillage was allowed (*ius praedae*), one should not appropriate religious and historical items of special importance to their owners.[60] Early examples of Hindu, Muslim, precolonial African, and Japanese rules protecting sites and objects of spiritual and cultural significance illustrate its global nature.[61] In the European setting, this rule gained legal importance through the writings of the founders of international law like Hugo Grotius and Emer de Vattel. To cite Grotius,

> [t]here are some things of such a nature, as to contribute, no way, to the support and prolongation of war. ... Polybius calls it brutal rage and madness to destroy things, the destruction of which does not in the least tend to impair an enemy's strength, nor to increase that of the destroyer. Such are porticos, temples, statues, and all other elegant works and monuments of art. Cicero commends Marcellus for sparing the public and private edifices of Syracuse, as if he had come with his army to protect them rather than to take the place by storm.[62]

The obligation to respect cultural objects implicates a prohibition to take them away. The corollary of this rule is a duty to return (restitute) pillaged artefacts:

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58 M.M. Miles, 'Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art' (2002) 11 International Journal of Cultural Property 28.

59 General Act of the Berlin Conference on West Africa art 6.

60 Miles (2002) 31. Cicero made a distinction between ordinary booty and objects that should not be seized – those dedicated to gods or belonging to a sanctuary, temple, or shrine. Interesting is also Cicero's distinction between 'good' uses of art (public, commemorative, and religious) and 'bad' uses of art (private, consumptive, and decadent).

61 Referred to by F. Bugnion, 'The Origins and Development of the Legal Protection of Cultural Property in the Event of Armed Conflict' (2004), Speech at the Fiftieth Anniversary of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Geneva; Vrdoljak (2006) 64; Shyllon (2016) 205. See hereafter for the 'special' protected status of religious objects.

62 Usually Grotius is quoted with regard to his confirmation on the rights to spoils; however, this is his 'moderation' in the footsteps of Polybius and Cicero. H. Grotius, *De Jure Belli Ac Pacis (On the Law of War and Peace)* (1625) Book III chapter 12.

'[W]hat is stolen should be returned.'[63] Over time, the obligation to return looted artefacts gained force as the international standard. In this development, the 1815 Congress of Vienna is often quoted as a turning point; at that moment, the European powers agreed, as a principle of justice, on the obligation to restitute artefacts that had been looted by Napoleon.[64] During the negotiations, Viscount Castlereagh, on behalf of the British delegation, stated that it was a legal duty to return the spoils of war taken by Napoleon to their place of origin in order to 'effectuate what justice and policy require.'[65] In other words, not winners takers and reparation for war damages but, rather, restitution as the legal standard for looted artefacts. And, indeed, the duty to return looted artefacts was what Judge Croke, in the much-cited *Marquis de Sommerueles* case, held in 1813 to be part of the 'Law of Nations, as practiced by all civilized countries.'[66]

The protected status of cultural objects was codified in the first multilateral treaty on the laws of war, the 1899 Hague Regulations Concerning the Laws and Customs of War on Land.[67] Eventually, after the massive looting during World War II, specific treaties on the protection of cultural objects were concluded: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention), and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention).[68] To summarise, in broad terms, the norm in these treaties is that cultural objects enjoy special protection, both in times

63 E.g., W.W. Kowalski, 'Restitution of Works of Art Pursuant to Private and Public International Law' in *Collected courses of the Hague academy of international law*, vol. 288 (2002) Brill Nijhoff, 28 (the duty to return stolen objects can be found in the oldest known legislation, for example, Eshnunna law going back to the middle of the twenty-third century BC).

64 E.g., A.F. Vrdoljak, 'Reparations for Cultural Loss' in F. Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (2008) Oxford University Press, 26.

65 'Note Delivered by Viscount Castlerough to the Allied Ministers, and Placed upon their Protocol, Respecting the Restitution of the Works of Art' (Paris, 11 September 1815). 'Parliamentary Debates from the Year 1803 to the Present Time' (1816) 32 Hansard 297.

66 Ordering the restitution of artefacts, captured by a British vessel, on the argumentation that these are not the property of 'this or that nation, but of mankind at large.' *The Marquis de Somerueles* case [1813] Stewart's Vice-Admiralty Reports 482, cited by Vrdoljak (2008) 28.

67 Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force (also for Germany) 4 September 1900) 187 CTS 227 (Hague Regulations) art 56.

68 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954) 249 UNTS 240; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970) 823 UNTS 231 (1970 UNESCO Convention); Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995) 2421 UNTS 457 (1995 UNIDROIT Convention).

of war and peace; the transfer of cultural objects during foreign occupation is prohibited; and works of art exported in violation of this prohibition should be returned. Under certain conditions, a good faith new possessor in whose hands the object is found may be entitled to compensation on its return. Such treaty rules, however, are non-retroative and need implementation on the national level to have effect.

3.3 Privileged status of objects of spiritual importance

Under these standards, objects of spiritual or religious importance have a privileged position. In the view of Grotius:

> '... there is still greater reason why it [the protective rule, EC] should be obeyed in respect to things devoted to the purposes of religion. Thucydides says that it was a law among the Greeks of his time, in all their invasions of each other's territories, to forbear touching the edifices of religion: and Livy likewise observes that, upon the destruction of Alba by the Romans, the temples of the Gods were spared.'[69]

In many cultures, such objects are commonly owned or inalienable and form a special category of property as *res extra commercium*.[70] For today's cases, even John Merryman, the proponent of a liberal art trade, makes an exception for 'objects of ritual or religious importance to living cultures' that should 'remain with or be returned to those cultures.'[71] As an example, Merryman cites the case of the Afo-a-Kom, a statue that embodies the 'spiritual, political and religious essence' of the people of the Kom kingdom in Cameroon, which was found in the hands of a US collector in the 1970s.[72]

Given the holistic and spiritual vision of life by indigenous peoples, based on common material and spiritual, intergenerational values, this distinction is of significance in the context of colonial takings from local (indigenous)

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69 Grotius (1625) bk II ch 12 VI.

70 The idea that cultural objects in general should not be subject to normal property law is proposed at times by various scholars. See, e.g., P.T. Stoll, 'Where Should Nefertiti Go? Reflections on International Cultural Law' in H.P. Hestermeyer and others (eds) *Coexistence, Cooperation and Solidarity* (2012) Martinus Nijhoff.

71 J.H. Merryman, 'Cultural Property Internationalism' (2005) 12 International Journal of Cultural Property 11-39.

72 Ibid. 13, n. 9, 10. *Nota Bene*, the Afo-A-Kom was returned after compensation of the new possessor for his expenses. See A.L. Bandle, A. Chechi and M.A. Renold, 'Case Afo-A-Kom – Furman Gallery and Kom People' (2012) Platform ArThémis, Art-Law Centre, University of Geneva <https://plone.unige.ch/art-adr/cases-affaires/afo-a-kom-2013-furman-gallery-and-kom-people>.

peoples.[73] Legal instruments in the field of indigenous peoples' rights, like NAGPRA and the UNDRIP, make this distinction and will be discussed in the third section of this chapter. This privileged status is also confirmed in Article 5(3) of the 1995 UNIDROIT Convention, which holds that arrangements should be made for the return of a cultural object 'if the … removal of the object … significantly impairs … the traditional or ritual use of the object by a tribal or indigenous community.'[74]

3.4 The legal framework for historical claims

Claims to artefacts lost during the colonial era fall within the category of 'historic claims.' In the present context, such claims include those that are based on a loss that predates international conventions that arrange for restitution. The 1995 UNIDROIT Convention's provision mentioned above regarding objects of ritual importance, for example, applies to losses after the Convention entered into force in the relevant states.[75] Here, the Operational Guidelines to the 1970 UNESCO Convention, which were adopted in May 2015, are instructive:

> The general rule of public international law embodied in Article 28 of the Vienna Convention on the Law of Treaties does not provide for retroactive application of treaties. ... However, the Convention *does not in any way legitimize any illicit transaction of whatever nature which has taken place before the entry into force of this Convention* nor limit any right of a State or other person to make a claim under specific procedures or legal remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.[76]

73 F. Lenzerini, 'Reparations for Wrongs against Indigenous Peoples' Cultural Heritage' in A. Xanthaki and others (eds) *Indigenous Peoples' Cultural Property Claims* (2017) Brill, 327-28; Vrdoljak (2008) 199 on Indigenous peoples' culture: 'a holistic conceptualization ... which covers land, immoviable and movable heritage, tangible and intangible elements.' See also the Study of the Expert Mechanism on the Rights of Indigenous Peoples (2012) UN Doc A/HRC/21/53 para 52.

74 1995 UNIDROIT Convention.

75 Ibid. art 10(2).

76 Operational Guidelines for the implementation of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted at 3d Meeting of States Parties held 18-20 May 2015 by Resolution 3.MSP 11), 100-1 (emphasis added). The 1995 UNIDROIT Convention (n. 68), art 10(3), has a similar wording: 'This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention.'

In other words, codification should not be understood as a cut-off line.[77] The legality of a loss should be assessed on the basis of the law in force at the time – the concept of intertemporal law under international law.[78] A first observation, if we revisit the evolution of the law in this field, is that the protected status of (sacred) cultural objects was recognised in various cultures and by early scholars, and was included in early peace agreements and international instruments.

3.5 Legality of seizure under the laws of war?

The question of whether the loss of the Bangwa Queen was unlawful according to contemporary standards depends, first, on how to qualify colonial conquest and rule; can it be compared with a situation of an armed conquest, war, and belligerent occupation? In the Bangwa case, this question can be limited to an evaluation of the character of the 1899 expedition of Conrau and subsequent military actions, as it remains unclear exactly how the Bangwa Queen was lost.

At the time of the Berlin Conference on West Africa in 1885, the division of African territories amongst European nations – and the appropriation of resources – was justified by relying on the *terra nullius* argumentation and the 'religious duty' to bring civilization to Africa.[79] Moreover, indigenous peoples in Africa were excluded from the 'family of civilized nations' and from protection of international law well into the twentieth century.[80] Although such views may explain historic events, they cannot be invoked to justify their legality and certainly not if such acts have a continuing effect today.[81] In the 1975 *Western Sahara* case, the International Court of Justice rejected the notion of *terra nullius* for inhabited territories altogether.[82] The correct perspective, as argued by Mamadou Hébié, is that colonial sovereign rule in Western Africa

77 As the '1970 threshold' is often used. See, e.g., the Association of Art Museum Directors Guidelines on the Acquisition of Archaeological Material and Ancient Art (revised 2013): 'Member museums normally should not acquire a Work unless provenance research substantiates that the Work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970.'

78 As developed in *Island of Palmas (The Netherlands v USA)* [1928] Arbitral Tribunal Award, reprinted in (1949) 2 United Nations Reports of International Arbitral Awards 829.

79 See n. 35, above.

80 Vrdoljak (2006).

81 The legality or illegality of historical events must be judged according to the law in force at the time in question, but the continuing effects of these events can be judged by more recent standards. Institut de Droit International, 'The Inter-Temporal Problem in Public International Law', Resolution from the Session of Wiesbaden (1975) 537; D Shelton, 'Reparations for Indigenous Peoples: The Present Value of Past Wrongs' in F Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (2008) Oxford University Press 2008, 62-63.

82 *Western Sahara* (Advisory Opinion) ICJ Rep 1975, 12.

in the event of opposition from local rulers, as in the Bangwa territory, was established by means of conquest.[83] In other words, this is a situation that, by all means, can be compared to an armed conflict.

The lawfulness of the appropriation of cultural objects would then depend on what (general) contemporary international law has to say on this subject. For that, we have to revert to the rules of warfare. With respect to those, the 1863 Lieber Code is usually quoted as the first document to codify the laws of war; it provides an exemption of cultural objects from appropriation by parties in a conflict.[84] This special status was repeated in both the Brussels Declaration of 1864 and the Oxford Manual on the Laws of War on Land of 1880.[85] Although none of these are binding treaties, they are considered to reflect customary international law at the time. In fact, the provisions regarding cultural objects have almost the same wording and, afterwards, soon found their way into the Hague Regulations of 1899 and 1907, which were binding.[86] The Hague Regulations read:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[87]

At what exact moment the prohibition of looting and the ensuing obligation to return looted objects gained customary status is a matter of legal debate.[88]

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83 M. Hébié, 'The Role of the Agreements Concluded with Local Political Entities in the Course of French Colonial Expansion in West Africa' (2016) 85 British Yearbook of International Law 21.

84 Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (adopted 24 April 1863) <https://archive.org/stream/pdfy-NG4E2nsEimXkB5mU/The Lieber Code Of 1863_djvu.txt> accessed 18 November 2017 (Lieber Code) art 36: 'If such works of art. … The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated or wantonly destroyed or injured.' It was prepared by Prussian Francis Lieber who, before emigrating to the United States, had surveyed Waterloo. Miles (2002) 44.

85 The Lieber Code of 1863 is seen as reflecting customary law of the time and, with the Brussels Declaration (1874) and the Oxford Manual on the Laws of War on Land (adopted 9 September 1880) (Oxford Manual), it followed the approach that influenced the Hague Peace Conference of 1899 and 1907, where the rules of the protection of cultural property in armed conflict were codified. R. Wolfrum, 'Cultural Property, Protection in Armed Conflict' (2010) Max Planck Encyclopedia of Public International Law.

86 Hague Regulations.

87 Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (adopted 18 October 1907) 205 CTS 331 art 56. The Hague Regulations have the same wording.

88 K. Siehr, 'International Art Trade and the Law' in The Hague Academy of International Law (ed) *Collected Courses of The Hague Academy of International Law*, vol 243 (1993) 131: 'It has now been well established that for 150 years any kind of pillage, capture or acquisi-

It is well accepted, however, that at the time of the codification of the 1899 Hague Regulations this was the case. For example, Woljciech Kowalski concludes:

> Through time, a ban on looting works of art became customary international law, and eventually, found its way into regulations of the codified law of war. The obligation of the restitution of a looted work of art correlates with the ban on pillaging. As early as the nineteenth century, it was based on the principle of identification, … as well as on the principle of territoriality, according to which an item is returned to the place from which it was taken. In many cases, when claims were examined, the period of time that had passed since the loss of the object was not taken into account. ... All the principles relating to the restitution of works of art were fully recognized and developed in the peace treaties signed after World War I.[89]

As to the legality of punitive military actions, the 1880 Oxford Manual is instructive:

> Impositions in kind (requisitions) demanded from communes or inhabitants should be in proportion to the necessities of war as generally recognized, and in proportion to the resources of the country. Requisitions can only be made on the authority of the commander in the locality occupied.[90]

In other words, if the Bangwa Queen was taken by seizure or theft during the annexation of the Bangwa area in 1899, such an appropriation would

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tion of works of art as booty during times of war, armistice or occupation is prohibited by public international law. Still open, however, is the question as to how works of art have to be allocated in cases of succession of States' (159). Zhang, on the basis of an intertemporal law analysis concludes that the rule against plunder was founded in the laws and customs of war in the eighteenth century, became well established in the nineteenth century, and further developed in the twentieth century. Generally, scholars argue on an emerging customary rule in the nineteenth century: de Visscher, *International Protection of Works of Art and Historic Monuments* (1949) Washington, DC: Department of State, Division of Publications, Office of Public Affairs ('accepted by all nations during the two Hague Conventions in 1899 and 1907'); Merryman (2005) ('since the late 19th century'); W. Sandholtz, *Prohibiting Plunder: How Norms Change* (2007) Oxford University Press, 39-45 ('emerges after 1815 and was transmitted into general international norms at the end of the 19th century'); S.E. Nahlik, 'International Law and the Protection of Cultural Property in Armed Conflicts' (1976) 27 Hastings Law Journal 1071-72 ('the rules regarding protection of cultural property, already firmly established in practice and in doctrine, and thus in customary law, have appeared, since the middle of the 19th century, in all the consecutive stages of the codification of the laws of war'). See Y. Zhang, 'Customary International Law and the Rule Against Taking Cultural Property as Spoils of War' (2018) 17 Chinese Journal of International Law 944-45. The main problem in proving a well settled practice and *opinion juris* is exactly that this rule was not applied with regard to colonial takings (see discussion later in this article).

89 W.W. Kowalski, *Art Treasures and War* (1998) Institute of Art and Law, 80.

90 Oxford Manual (n. 85) art 56.

arguably be unlawful in contemporary international law. As noted above, the German annexation of the Bangwa area commenced with the expeditions of Conrau, illustrated by the fact that he carried the German flag.[91] Article 1 of the 1899 Hague Regulations states in this regard that the laws apply not only to the military but also to others with 'a fixed distinctive emblem recognizable at a distance.'[92] Notwithstanding justifications at the time, one would expect that such standards under today's inter-temporal law standards would apply to European takings in Africa in 1899-1901.

3.6 Colonial takings a *sui generis* category?

Although the seizure of artefacts in the course of a military action at the close of the nineteenth century may well be unlawful under the laws of warfare, not all acquisitions can be seen in that light. Often, the exact circumstances are unclear, as in the Bangwa case. As Ana Filipa Vrdoljak and Andrzej Jakubowski propose, the return of cultural objects after decolonization may therefore better fit in with the concepts of state succession or the right of self-determination – the restitution of dispersed cultural objects after a period of foreign rule or changes in territorial sovereign rule.[93] After the dissolution of the Austrian-Hungarian Empire in Europe, for example, a legal framework was set up by which cultural objects were redistributed to successor states on the basis of territoriality and the 'reconstruction of artistic and historic patrimony.'[94]

After World War II, such a general legal obligation to return cultural property on the basis of territoriality – understood as a bond between an object, land, and people – was confirmed. For example, the 1947 Peace Treaty with Italy provided for the return of cultural objects to Yugoslavia that were also taken in the period before World War II on the basis of territoriality, and the Allied restitution system, likewise, arranged for the return of artefacts taken by the Nazis from occupied territories, irrespective how such objects had been

91 Cadman (1922) 36: 'This German … again took up his quarters in FONTEM. Chief FONTEM was now given a German flag to fly.'

92 Hague Regulations, art 1 (the laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps if that person 'has a fixed distinctive emblem recognizable at a distance').

93 Vrdoljak (2006) 2: 'From the Congress of Vienna in 1815 to the mid twentieth century, victorious European powers sanctioned the restitution of cultural objects to territories restored following the collapse of empires. However, this recognition of the need to return 'spoliations appertaining to those territories' following independence did not extend necessarily to the dismantling of their own empires in the late twentieth century.' A. Jakubowski, *State Succession in Cultural Property* (2015) Oxford University Press.

94 Jakubowski (2015) 6, citing De Visscher (1949).

removed and notwithstanding later acquisition by good faith new possessors.[95] In fact, such state practice convinced scholars such as Woljciech Kowalski that restitution of dispersed cultural patrimony on the basis of territoriality was a customary rule of international law.[96]

And, indeed, in the period after decolonization, the 1973 UN General Assembly resolution 'on restitution of works of art to countries victim of expropriation' was promising for former colonies.[97] It linked the return of cultural objects to independence, being a necessary element of the cultural development of new states.[98] A 1975 Dutch-Indonesian agreement to return objects 'directly linked with persons of major historical and cultural importance or with crucial historical events' may be seen in this context.[99] Noteworthy, but exceptional in its acknowledgement of a legal duty, is the return to Libya of the Venus of Cyrene by Italy, after the Italian Supreme Administrative Court ruled that the right of self-determination of former colonies implicates that cultural objects should be returned.[100]

On the whole, however, colonial collections were not returned. Hence, a separation between two scenarios of restitution of dispersed cultural objects became the legal reality. Colonial takings were to be discussed as a matter of 'return' on moral grounds – in the setting of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of

95 See Treaty of Peace with Italy (signed 10 February 1947) 49 UNTS 3 art 12. Vrdoljak (2006) 140–50: Vrdoljak discusses the 1943 Interallied Declaration; see also E. Campfens, 'Sources of Inspiration: Old and New Rules for Looted Art' in E. Campfens (ed) *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes* (2015) Eleven International Publishing, 20-21 <https://www.restitutiecommissie.nl/bestanden/fair_and_just_solutions.html>.

96 Jakubowski (2015); Kowalski (1998).

97 UNGA Res. 3187 (XXVIII) (18 December 1973). See 'Restitution of Cultural Property: Resolutions Adopted by the United Nations General Assembly about Return and Restitution of Cultural Property' (n. 2).

98 A. Chechi, *The Settlement of International Cultural Heritage Disputes* (2014) Oxford University Press, 273: '[T]he return of cultural assets still encounters the resistance of current possessors, though it is generally recognized that the return of objects vital to the cultural collective identity of formerly subjugated peoples is essential to the realization of their right of self-determination and full political emancipation.'

99 J.M. van Beurden, *Treasures in Trusted Hand: Negotiating the Future of Colonial Cultural Objects* (2017) Sidestone Press, 123-53 (on the difficult negotiations leading up to this agreement). P.H. Pott and M.A. Sutaarga, 'Arrangements Concluded or in Progress for the Return of Objects: The Netherlands-Indonesia' (1979) 31 Museum International 38.

100 *Consiglio di Stato* (23 June 2008) No 3154. On the verdict, the Consiglio di Stato stated that the principle of self-determination of peoples had come to include the cultural identity as well as the cultural heritage linked either to the territory of a sovereign state or to peoples subject to a foreign government. A. Chechi, 'The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene' (2008) 18 Italian Yearbook of International Law 159.

Origin or Its Restitution in Case of Illicit Appropriation (ICPRCP)[101] – as opposed to restitution on legal grounds in the European context. Vrdoljak provides insight into a process where former colonial states came to act on the basis of the paradigm that it is in the best interest of civilization for them to remain custodians of the material culture of their former colonies.[102] The 2002 Declaration on the Value and Importance of Universal Museums may be seen in this light.[103]

3.7 State practice and recent European developments

Increasingly, former colonial powers do honour claims for the return of colonial takings on an *ad hoc* basis. Such returns are usually portrayed as exceptions to the general rule under which Western states have gained ownership and a matter of 'cultural diplomacy.' For example, in France in 2002 the mortal remains of Saartjie Baartman were repatriated to South Africa;[104] in 2010, a *mokomokai*, a mummified tattooed Maori human head, was returned to the New Zealand Te Papa Tongarewa Museum;[105] and, in 2011, historically important manuscripts were returned to Korea on the basis of a renewable five-year loan agreement.[106] The 2018 decision to return statues and regalia from the Kingdom of Dahomey to Benin in 2018, mentioned in the introduction, might well be the first example of a return of important cultural objects – beyond the category of human remains – to an African country based on a wider policy.[107] In their November 2018 report to the French president, Felwine Sarr and Bénédicte Savoy recommend a generous French policy of restitution of

101 Its task is to assist member states with repatriation requests that concern cultural property of 'fundamental significance from the point of view of the spiritual values and cultural heritage' of their people and was 'lost as a result of colonial or foreign occupation or as a result of illicit appropriation.' Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (28 November 1978) UNESCO Doc CLT/CH/INS-2005/21 (Statutes on the Return of Cultural Property).

102 E.g., Vrdoljak (2006) 302.

103 A declaration by eighteen major Western museums stating their collections, however acquired, are best seen and exhibited in the setting of encyclopedic museums. See n. 7.

104 French State Law No 2002-323 (6 March 2002); see also Sarr and Savoy (2018) 73.

105 French State Law No 2010-501 (18 May 2010) <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022227321> accessed 25 April 2019.

106 Décret No 2011-527 Portant publication de l'accord entre le Gouvernement de la République Française et le Gouvernement de la République de Corée relatif aux manuscrits royaux de la Dynastie Joseon (Ensemble une Annexe) (7 February 2011) <https://www.legifrance.gouv.fr/eli/decret/2011/5/16/MAEJ1111118D/jo> accessed 18 March 2019.

107 'Remise du Rapport Savoy/Sarr sur la Restitution du Patrimoine Africain' (n. 5).

> any objects taken by force or presumed to be acquired through inequitable conditions from Africa over the last 150 years, including objects taken 'through military aggressions, whether these pieces went on directly to France or whether passed through the international art market before finding their way into French collections' as well as objects taken by 'active administrators' or through 'scientific expeditions prior to 1960.[108]

Whether and how these recommendations will be implemented in France remains to be seen, as well if a future policy framework will affect a private collection like the Dapper Foundation.[109] In Germany, both the 2018 Museum Association's Guidelines as well as the 2019 governmental policy framework underline the importance of research, dialogue and cooperation with source communities.[110] The governmental policy framework explicitly also aims to enable the return of cultural objects that were acquired in a way that 'by today's legal or ethical standards is not justifiable.'[111] The return of grave finds by the Berlin Museums Foundation (SPK), mentioned in the introduction, on the grounds that the loss was 'unlawful' in this regard may be an example of a change in moving toward a more structured legal framework.

4 New horizons

For cases like the Bangwa Queen, a traditional legal approach provides no ready solutions. In addition to the challenge of establishing the legality or illegality of a loss so long ago, hurdles arise in terms of accountability and access to justice. If the appropriation of the Bangwa Queen could be held to be unlawful under customary international law, and is attributable to the state, this would amount to an international law obligation by the state responsible

108 Sarr and Savoy (2018) 61.

109 Interestingly, the March 2019 German Policy Framework – setting standards for a proactive stance toward claims regarding colonial takings – requires also non-state institutions, collectors, and the art trade to act in the spirit of the guidelines: 'Wir fordern alle öffentlichen Träger von Einrichtungen und Organisationen, in deren Beständen sich Sammlungsgut aus kolonialen Kontexten befinden, aber auch nichtstaatliche Museen, Sammlerinnen und Sammler sowie den Kunsthandel dazu auf, im Sinne dieser Eckpunkte an der Aufarbeitung der Herkunftsgeschichte von Sammlungsgut aus kolonialen Kontexten aktiv mitzuwirken und die jeweils erforderlichen Maßnahmen hierfür zu ergreifen.'

110 'Guidelines on Dealing with Collections from Colonial Contexts' (July 2018) 63-71, 94-100 <https://www.museumsbund.de/publikationen/guidelines-on-dealing-with-collections-from-colonial-contexts-2/> accessed 18 March 2019. The guidelines focus on research, transparency, mediation, and alternatives to restitution such as loans or joint research projects. See also the Government policy framework ('Eckpunkte zum Umgang mit Sammlungsgut aus Kolonialen Kontexten' (n. 4)).

111 See the seventh principle in 'Eckpunkte zum Umgang mit Sammlungsgut aus Kolonialen Kontexten' (n. 4) 4.

for the looting.[112] This is relevant for Bangwa figures that are still in Berlin; however, the Bangwa Queen is not in possession of the state responsible for the taking but, rather, in the hands of a third party, the Dapper Foundation. Another hurdle is access to justice: which court assumes jurisdiction over such a claim? Claims based on a loss of property that occurred so long ago will most likely be held inadmissible *ratione temporis*.[113] In other words, an approach that focuses on the unlawfulness of the loss at the time will most likely lead to the conclusion that historic claims are stale. This state of affairs is increasingly being challenged by 'softer' legal norms that address the intangible value of artefacts for people today and the continuing injustice of remaining deprived of certain objects.

4.1 Soft law instruments: Signs of evolving norms?

Since the end of last century, the adoption of soft law instruments has illustrated a need to find solutions for restitution claims that are time barred under positive law. Governmental declarations and private ethical codes of conduct tend to have a similar pattern and focus on (1) good faith negotiations with source communities or former owners (dialogue) and (2) equitable solutions for title disputes that honour the interests of former owners as well as the interests of new (innocent) possessors.[114]

For example, the 1998 Washington Conference Principles on Nazi-Confiscated Art (Washington Principles) follow this outline.[115] This document concerns a set of principles signed by over 40 states and underlines the importance of finding 'fair and just solutions' for title claims to works of art that were confiscated by the Nazis or sold under duress by former owners in a setting

112 A breach of an international norm that is attributable to a state leads up to the obligation for that state to make reparations. See *Factory of Chorzow (Germany v Poland)* (Merits) [1928] PCIJ Series A No 17, 47; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Act' (2001) UN Doc A/56/10.

113 As the European Court of Human Rights did it in a claim regarding the Parthenon Marbles in 2016. *Syllogos ton Athinaion against the United Kingdom* [2016] Application No 48259/15; see also *Certain Property (Liechtenstein v Germany)* (Judgment) ICJ Reports 2005, 6, in which the International Court of Justice denied a claim on a painting confiscated in the post-World War II period.

114 On equitable (cooperative) solutions, see M.A. Renold, 'Cultural Co-Ownership: Preventing and Solving Cultural Property Claims' (2015) 22 International Journal of Cultural Property 163.

115 'Washington Conference Principles on Nazi-Confiscated Art' (1998) <https://www.state.gov/p/eur/rt/hlcst/270431.htm> accessed 18 March 2019 (Washington Principles) (released in connection with the Washington Conference on Holocaust Era Assets, Washington, DC).

of persecution.[116] This instigated a practice of settlements and returns, initially restricted to national public collections but soon followed by the private sector, notwithstanding legal obstacles under positive law. Today, works that are 'tainted' by a possible history of Nazi looting are unsalable on the international art market. The reputation of a work of art and its market value has come to fill in a gap where the law is lacking. In some European countries, government committees were installed to act as mediators. This extra-legal 'ethical' approach, however, does have a drawback: the field is hampered by a lack of clear rules and compliance mechanisms.[117] It has been suggested that a similar instrument to the Washington Principles should be developed for colonial takings, which would, indeed, underline a political will to act.[118] It should be noted, however, that the Washington Principles themselves are not more specific or legally binding as other existing informal instruments in the field. Some examples are provided below, while the most relevant instrument in this field, the UNDRIP, will be discussed later in this article.

4.2 International Council of Museums Code and the International Law Association Principles

Museums are expected to adhere to the ethical principles as adopted in the 1986 International Code of Ethics by the International Council of Museums (ICOM), an instrument of transnational private regulation.[119] Similar to the approach outlined above, these guidelines state that museums, with regard to restitution issues, should collaborate with source communities. Insofar as this concerns claims, the provisions implicate a cooperative stand, preferably on a non-governmental level. The relevant provisions read:

> Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable

116 Ibid. principle 8: 'If the pre-war owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.'

117 E. Campfens, 'Nazi-Looted Art: A Note in Favour of Clear Standards and Neutral Procedures' (2017) 22 Art Antiquity and Law 315.

118 Van Beurden (2017). See also H. Parzinger, 'Bauen Wir Museen in Afrika!' (25 January 2018) *Frankfurter Allgemeine Zeitung*.

119 The ICOM Code of Professional Ethics was adopted by the General Assembly of the International Council of Museums on 4 November 1986, retitled 'ICOM Code of Ethics for Museums' in 2001, and revised in 2004. See 'ICOM Code of Ethics for Museums' (2004) <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>, ICOM Code 6.2 (Return of Cultural Property), and ICOM Code 6.3 (Restitution of Cultural Property).

> local, national and international legislation, in preference to action at a governmental or political level.
>
> When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international law and international conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to cooperate in its return.

The 2006 Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, adopted by the International Law Association (ILA), also emphasise a general duty of institutions and governments to enter into 'good-faith negotiations' regarding restitution claims by persons, groups or states.[120] The principles also list what should be taken into account during those negotiations: '[T]he significance of the requested material for the requesting party, the reunification of dispersed cultural material, accessibility to the cultural material in the requesting state, and protection of the cultural material.'[121] In as far as it concerns the outcome, the focus is on 'caring and sharing' and, as alternatives to restitution, the principles mention loans, the production of copies, and shared management and control.[122] Two categories are singled out: Principle 4 sets the obligation 'to respond in good faith and to recognize claims by indigenous groups or cultural minorities whose demands are not supported by their national governments,' whereas Principle 5 confirms the special status of human remains with a straightforward obligation of repatriation.

Apart from such guidelines of an operational character, numerous UN and UNESCO soft law declarations on the interstate level have been adopted that underline the importance of the return of a representative part of a country's lost cultural patrimony.[123] In this regard, the ICPRCP was established in 1978 to assist member states with return requests that concern cultural property 'which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation.'[124] In various UN resolutions,

120 'Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material', Report of the International Law Association Seventy-second Conference (2006) Annex (Principles of Cooperation), reprinted in JAR Nafziger, 'The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material' (2007) 8 Chicago Journal of International Law 147. Nafziger states that current practice is the jurisprudential basis.

121 Ibid. principle 8.

122 Ibid. principle 3.

123 'Restitution of Cultural Property: Resolutions Adopted by the United Nations General Assembly about Return and Restitution of Cultural Property' (n. 2).

124 Statutes on the Return of Cultural Property (n. 101) art 2.

attention is drawn to the services of the ICPRCP, and the 2015 Operational Guidelines to the 1970 UNESCO Convention repeat this concern.[125] Notwithstanding this appreciation and the development of a special mediation procedure, the relatively low number of cases referred to the committee implies that the state-centric approach of the ICPRCP creates a (political) setting that is not *per se* suitable to solve these matters.[126] It therefore mainly acts as a forum for best practice examples and for governments to state certain claims.

4.3 The right to one's cultural objects as a human right?

Whereas return claims that concern colonial takings are still usually set aside as a matter of ethics, not the law, the wider legal framework for cultural objects has undergone changes. This 'humanization' of cultural heritage law may be understood as the increased attention for the intangible and social aspects of artefacts, as opposed to property and preservation, and a shift in focus from state interests to the interest of communities.[127] The relevance of this change for the present case surfaces in the approach taken in the UNDRIP, but, first, what follows is a short introduction to such changing notions on the intersection of human rights and cultural property law.

A clear example can be found in the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society (Faro Convention). It quotes in its preamble 'the need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage' and defines cultural heritage as a 'group of resources inherited from the past which people identify, *independently of ownership*, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions.'[128] As right holders to cultural heritage, the Faro Convention introduces 'heritage

125 UNGA Res. 67/80 (12 December 2012) 18. Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (n. 76).

126 Chechi (2014) 104-6. The General Conference of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) adopted, at its thirty-third session, adding mediation and conciliation to the mandate of the Intergovernmental Committee, Doc 33 C/Resolution 44 (October 2005).

127 As opposed to the state-centered property approach of cultural objects in the UNESCO conventional system. On this, see, e.g., F. Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 European Journal of International Law 9: '[B]ringing the focus from the protection of the cultural object to the social structures and cultural processes that have created and developed the 'intangible' heritage. States remain the contracting parties to the convention but the substantive addressees are the cultural communities and human groups, including minorities, whose cultural traditions are the real object of the safeguarding under international law.'

128 Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005) CETS No 199 (Faro Convention) (emphasis added). As of 13 February 2019, there were 10 signatories (France is not amongst them).

communities.'[129] These are 'people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.' This concept facilitates the acceptance of a collective title to cultural objects by communities and is reminiscent of the 'cultural affiliation' concept adopted in NAGPRA that links objects to communities as a title for rights to cultural objects.[130] Furthermore, in as far as it concerns competing claims to cultural heritage, the Convention requires states to 'establish processes for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities.'[131] This is in line with the obligation to enter into a dialogue – good faith negotiations – in the soft law instruments discussed above. Although the Faro Convention does not create enforceable rights, but, rather, voices policy aims for governments, it opens the door to a new understanding of cultural objects and their title holders.[132]

4.4 The right of access to culture

In the quest for a legal framework for cases like the Bangwa Queen, of key importance is the evolution of a right of 'access to one's culture' as developed from the right to culture in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[133] According to General Comment no. 21 on the 'right of everyone to take part in cultural life' of Article 15(1)a of the ICESCR,[134] the right to take part in cultural life has come to include 'access to cultural goods.'[135] Moreover, this obliges states to adopt 'specific measures aimed at achieving respect for the right of everyone … to have access to their own cultural ... heritage and to that of others.'[136] The 2011 report of the independent expert in the field of cultural rights, Farida Shaheed, gives a further explanation of this right and concludes that

> [t]he right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and

129 Ibid. art 2(b).
130 Kuprecht (2012). Further discussion of NAGPRA later in this article.
131 Faro Convention (n. 128) art 7(b).
132 E.g., the Netherlands is not signatory, but it did introduce the Faro Convention's definition of cultural heritage in art 1(1) of its new Heritage Act Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (2015).
133 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 UNTS 3 (ICESCR) art 15 para 1(a).
134 Committee on Economic, Social and Cultural Rights, General Comment No 21 (2009) E/C.12/GC/21.
135 Ibid. para 15.
136 Ibid. paras 49(d), 50.

> the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage.[137]

Similar to the concept of 'heritage communities' in the Faro Convention, Shaheed notes that 'varying degrees of access and enjoyment may be recognized, taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages.' She notes the following hierarchy:

- 'source communities,' people who are keeping cultural heritage alive and/or have taken responsibility for it;
- individuals and communities, including local communities, who consider the cultural heritage in question an integral part of the life of the community, but may not be actively involved in its maintenance;
- scientists and artists; and
- members of the general public accessing the cultural heritage of others.[138]

This would implicate, in the event of disputes, a weighing of interests that different right holders may have in the same object.

In this regard, the reference to a right of everyone to have access to one's own culture in recent Western-European policy instruments is noteworthy. French President Macron, in his November 2017 policy announcement, for example, underlined the need that Africans have to be able to access their own culture and, hence, it cannot be accepted that most of that is in European collections. Likewise, and even more poignant, the German policy framework of March 2019 gives as rationale for this new policy that 'all people should have the possibility to access their rich material culture […] to connect with it and to pass it on to future generations.'[139] It mirrors the development of 'humanisation' of cultural property law, described above.

4.5 UNDRIP

While the right of 'access to culture' in the binding ICESCR may seem vague and unspecified,[140] the non-binding UNDRIP is clear and specific in its obligations. Since its provisions can be seen as an interpretation of the right of access

137 Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights (Farida Shaheed)' (2010) Doc A/HRC/14/36.

138 Ibid. 16 para 62.

139 'Eckpunkte zum Umgang mit Sammlungsgut aus Kolonialen Kontexten' (n. 4).

140 Cultural rights are said not to lay any concrete obligation on states but, rather, to impose political commitments. A. Jakubowski, 'Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights' in A. Jakubowski (ed) *Cultural Rights as Collective Rights, An International Law Perspective* (2016) Brill, 157.

to culture in as far as it concerns indigenous peoples' cultural heritage, this is an important instrument.[141]

Already the International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries of 1989 entitled indigenous peoples to rights with regard to their cultural heritage,[142] however UNDRIP extends this to specific rights with regard to lost cultural objects.

In Article 11(2) of UNDRIP, this is defined as a right of 'redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.'[143] Article 12 deals with rights to objects of special importance – namely, a right to 'use and control' where it concerns lost ceremonial objects, while for human remains a straightforward right to repatriation applies.[144] Since the loss of the Bangwa Queen appears to have been 'in violation of the Bangwa laws, traditions and customs,' and it concerns a ceremonial figure, this loss would fall under the definition of Article 12 of the UNDRIP, resulting in certain rights to 'use and control.'

4.5.1 Defining 'indigenous people'

The UNDRIP deliberately abstains from defining indigenous peoples, following the advice of Special Rapporteur Erica-Irene Daes who suggested that 'justice would best be served by allowing the scope of this concept to evolve flexibly over time, through practice.'[145] In 2010, the following criteria were suggested by the ILA's Working Committee on Indigenous Peoples' Rights:

- *self-identification*: self-identification as both indigenous and as a people;
- *historical continuity*: common ancestry and historical continuity with pre-colonial and/or pre-settler societies;

141 According to General Comment No 21 (n. 134): the right of 'access to culture' includes the rights as listed in the UNDRIP (see paras 7 and 37). See also A. Xanthaki, 'Culture: Articles 11(1), 12, 13(1), 15, and 34', *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (2018) Oxford University Press, 275.

142 See also International Labour Organization (ILO) Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989) 28 ILM 1382 (Convention No 169) art 4. It requests states to take special measures to 'safeguard' the cultures of indigenous peoples.

143 UNDRIP (n. 9) art 11(2).

144 Ibid. art 12(1): 'Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; … the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. (2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.'

145 Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, 'Discrimination against Indigenous Peoples: Protection of the Heritage of Indigenous People', Final Report (1995) Doc E/Cn.4.2/1995/26.

- *special relationship with ancestral lands*: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will often form the basis of the cultural distinctiveness of indigenous peoples;
- *distinctiveness*: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;
- *non-dominance*: forming non-dominant groups within the current society;
- *perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities.[146]

Within the context of a complaint by the Endorois people from Kenya, the African Commission on Human and Peoples' Rights gave its view on this matter in 2009 and noted that indigenous communities can be distinguished by the link between people, their land and culture, and self-identification as a distinct community.[147] The commission agreed that the Endorois 'considered themselves to be a distinct people, sharing a common history, culture and religion' and, therefore, were entitled to the protection of their collective rights under the African Charter.[148] Given the fact that the Bangwa identify themselves as an indigenous people,[149] and would seem to meet the ILA criteria, there is no reason to assume they would not be entitled to the special protective framework of the UNDRIP.

4.5.2 Legal status

The UNDRIP was adopted after 20 years of negotiations.[150] France voted in favour it at the adoption. In May 2016, Canada officially removed its objector status, while the other three objectors have also, to various degrees, changed their vote.[151] While it is not binding as a UN General Assembly declaration, the UNDRIP's strong status follows from the reference to it in General Comment

146 International Law Association, 'Rights of Indigenous Peoples', Interim Report (2010) 7.

147 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on Behalf of Endorois Welfare Council) v Kenya* (2010) Communication No 276/2003; see also A.F. Vrdoljak, 'Standing and Collective Cultural Rights' in A. Jakubowski (ed) *Cultural Rights as Collective Rights, An International Law Perspective* (2016) Brill 281.

148 Ibid. African Charter on Human and Peoples' Rights (adopted 27 June 1981) 21 ILM 58 (African Charter).

149 Communication with the author (on file with the author).

150 By a majority of 144 states in favor, four votes against (Australia, Canada, New Zealand, and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

151 On 3 April 2009, Australia's government endorsed the UNDRIP. On 19 April 2010, New Zealand's support became official. On 16 December 2010, President Barack Obama declared that the United States would 'lend its support' to the declaration. In 2016, Canada officially adopted the declaration and promised to implement it fully.

no. 21 as forming part of the right of access to culture.[152] According to authors like Frederico Lenzerini, the right of indigenous peoples to reparation for the loss of their cultural heritage has, today, crystallised into a principle of customary international law.[153] For the time being, however, this still contrasts with European practice, as the outcome in the 2013 and 2014 French Hopi Katsina cases illustrates.[154] Irrespective of its binding status as customary law, states that have adopted the UNDRIP are under an obligation to work towards fulfilling its aims.[155] This means that states are expected to assist indigenous peoples in providing 'redress through effective mechanisms' and to 'enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.'

Interestingly, from a 2015 study by the Expert Mechanism on the Rights of Indigenous Peoples, it appears that the UNDRIP is aimed not only at state collections but also at private collections: 'While the role of public authorities is crucial to ensuring such repatriation, the repatriation of ceremonial objects and human remains requires the cooperation of the places where the objects and remains are stored, such as museums and auction houses.'[156] Such efforts could lead to a similar pattern as occurred in the field of Nazi-looted art claims; while the Washington Principles were initially thought to be aimed and implemented at state-controlled collections, they soon had their effect on the private sector.

4.5.3 Access to justice and wider developments

In several settler states, policies or laws have been adopted in response to indigenous peoples' cultural property claims that follow an approach in line with the UNDRIP. The United States took a pioneering step in this regard with the adoption of NAGPRA, introducing the 'cultural affiliation' prong to allocate rights to (indigenous) cultural objects on the basis of (1) a shared group identity and (2) the (continued) existence of an identifiable indigenous group for

152 General Comment No 21 (n. 134).

153 Lenzerini (2017) 343; W van Genugten and F Lenzerini, 'Legal Implementation and International Cooperation and Assistance: Articles 37-42' in J. Hohmann and M. Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (2018) Oxford University Press.

154 And the fact these claims are seen as merely 'moral.' E.g., see the reference to the UNDRIP as non-binding in the German Museum Association, Guidelines on Dealing with Collections from Colonial Contexts (n. 110) 70-71.

155 If the UNDRIP could be viewed as a first step toward a binding instrument. See Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 art 18.

156 Study by the Expert Mechanism on the Rights of Indigenous Peoples on the 'Promotion and Protection of the Rights of Indigenous Peoples with Respect to Their Cultural Heritage' (2015) UN Doc A/HRC/30/53 (Study by the Expert Mechanism) 72.

property claims.[157] Where NAGPRA is effective only within the domestic US territory and applies to federal institutions, other settler states have adopted policies to pursue repatriation claims of objects containing human remains on behalf of their indigenous peoples from abroad.[158] A 2019 draft Canadian bill on the subject, the Indigenous Human Remains and Cultural Property Act, planned to take things one step further. It promotes the return of indigenous human remains as well as cultural property, *wherever situated*, to the indigenous peoples of Canada.[159] If this Bill would become law in the future, it would implicate that Canadian authorities will actively pursue the international repatriation of indigenous Canadian cultural objects.

The fact that a human rights law approach is not restricted to indigenous peoples' cultural property claims may be illustrated furthermore by China, which publicly invoked in April 2018 the 'cultural rights of the Chinese people' in a claim to artefacts seized from the Old Summer Palace in the nineteenth century that were on auction in the United Kingdom.[160] Although the request was to no avail, in this instance, the influential role and active stance of the Chinese government in its efforts to reclaim lost cultural objects makes this claim noteworthy.

4.5.4 Access to justice

For African communities like the Bangwa who are not supported by strong governments, access to justice poses an additional obstacle. What forum could evaluate a human rights claim based on the argument that the continued deprivation of sacred cultural objects is an infringement of the right to 'access to culture' and the UNDRIP? Since 2013, the Optional Protocol to the ICESCR offers a complaints procedure. This procedure, however, appears to be limited

157 Kuprecht (2014) 55-56.

158 In New Zealand in 2003, a repatriation policy was developed of ancestral remains on behalf of Maori and Moriori. The National Te Papa Museum has, since then until 1 May 2017, repatriated 420 ancestral remains from overseas institutions. Furthermore, in 2011, the Australian government adopted a policy to facilitate the repatriation of ancestral remains. See also Study by the Expert Mechanism (n. 156).

159 Bill C-391 on the Canadian Indigenous Human Remains and Cultural Property Act (February 2019) <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-391/third-reading> (accessed 15 January 2021). After publication of this article in IJCP, in September 2019, this bill had not become law. Acc. to information kindly provided by the Department of Canadian Heritage, it remains to be seen whether the issue will be taken up in the future.

160 On 10 April 2018, China's National Cultural Heritage Administration (NCHA, formerly SACK) called on the auction house to 'abide by the spirit of international agreements and code of professional ethics, as well as respecting the cultural rights and national feelings of the Chinese people.' See the website of the National Cultural Heritage Administration, an administrative agency of the Ministry of Culture and Tourism of the People's Republic of China (in Chinese) <http://www.sach.gov.cn/art/2018/4/10/art_722_148344.html> accessed 30 October 2018. I thank Maud Yu for her assistance finding and translating this source.

to nationals or groups in the state responsible for the alleged violation.[161] In the Bangwa case, it concerns an African community claiming an object from a French foundation.

What about developments in the regional human rights systems? With respect to the European human rights system, one stumbling block may be that the European Convention on Human Rights does not include a right to culture.[162] The right (of access) to tangible cultural objects has been addressed in case law but always from the perspective of the right to property of Article 1 of the First Protocol.[163] In the *Nowakowski* case, for example, the European Court of Human Rights (ECtHR) did acknowledge the 'sentimental' value of a cultural object to a certain person – in this case, a collection of fire arms that had been confiscated by Polish authorities – and gave that interest preference over other (public) interests.[164] Whether the ECtHR would be ready to acknowledge historical claims remains to be seen. In its rejection of a claim brought by an Athenian organization for the return of the Parthenon Marbles in 2016, the ECtHR deemed the claim inadmissible, amongst others, under referral to the considerable time that had passed since the loss of the marbles.[165] In the light of recent developments in the field of colonial takings and the status of UNDRIP, a claim to sacred cultural objects lost by indigenous people might be another matter. Obviously, a problem is that this system is meant for states parties to the European Convention.

The African human rights system acknowledges in the African Charter the right to culture and expressly refers to communal traditional values and communal rights, which implicates that respect for indigenous customs and laws is guaranteed by this human rights system, as underlined by the *Endorois*

161 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008) UN Doc A/RES/63/117 art 2: 'Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant *by that State Party*.'

162 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950) 213 UNTS 222 (ECHR). In the case law, rights that may fall under the notion of 'cultural rights' were recognised. Jakubowski (2016) 158.

163 Ibid. 178-79. First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952) ETS 9 art 1: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

164 *Nowakowski v Poland* (Jugdment, 2012) Application No 55167/11, discussed by Jakubowski (2016) 176.

165 *Syllogos ton Athoinon against the United Kingdom* (n. 113). The court held that the claim for the United Kingdom (UK) government to engage in mediation was inadmissable, *ratione tempore* as well as *ratione materiae*, as none of the invoked articles 'would give rise to any right for an association in the postion of the applicant to have the Marbles returned to Greece or to have the UK engage in international mediation.'

case mentioned above.[166] And, although the inter-American human rights system has no direct relevance, the jurisprudence of the Inter-American Court of Human Rights – including the 2015 case *Kaliña and Lokono Peoples v Suriname* – is noteworthy in its recognition of pre-existing indigenous peoples' collective property rights and the participatory solutions found.[167] However, as in the African example, these cases dealt with indigenous peoples' land rights, not with cultural property.

Lastly, an interesting roadmap for indigenous peoples on how to proceed with claims regarding cultural objects in foreign museums was given by the Colombian Constitutional Court in a 2017 case concerning the 'Quimbaya Treasure.'[168] In its ruling, the court ordered the Columbian government to pursue restitution from Spain of a treasure of 122 golden objects, taken at the close of the nineteenth century, on behalf of the indigenous Quimbaya people. The court argued that, by today's standards of international law – and, here, it was referring to human rights law (UNDRIP) as well as cultural property law (the 1995 UNIDROIT Convention and other conventions) – indigenous peoples are entitled to the restitution of their lost cultural heritage. How such a claim is pursued by the Colombian government is left to the discretion of the government. In the first reaction to the subsequent request by the Colombian authorities for a dialogue on the return of the Quimbaya Treasure, the Spanish authorities declined on the grounds that the Quimbaya Treasure has become Spanish patrimony and is inalienable.[169] As seen earlier, this is not an uncommon European reaction. The 2018 decision by President Macron to return statues and regalia taken during a punitive colonial expedition from the Kingdom of Dahomey to Benin,[170] for example, had earlier been denied by French authorities according to the inalienability of French public collections.[171]

Notwithstanding the uncertain state of the law, developments in the field of human rights law do unmistakably point in a certain direction. That direction is toward the acknowledgement of heritage interests of communities – and their rights – with regard to certain categories of involuntarily lost cultural objects, irrespective of a proven illegality of the acquisition at the time.

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166 African Charter (n. 148) art 17(2): 'Every individual may freely take part in the cultural life of his community, and 17 (3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.'

167 E.g., *Kalina and Lokono Peoples v Suriname* (Merits, Reparations and Costs) (2015) Inter-American Court of Human Rights, Series C, No 309. Within the scope of the right to property and political rights. Implementation of these rulings by state parties is problematic.

168 Judgment SU-649/17 (2017) (Republic of Colombia, Constitutional Court).

169 For a critical discussion, see D. Mejia-Lemos, 'The 'Quimbaya Treasure,' Judgment SU-649/17' (2019) 113 American Journal of International Law 122. Indeed, basing such a right on UNESCO 1970 or 1995 UNIDROIT, Conventions that were explicitly not meant for losses before implementation by states parties, is remarkable.

170 'Remise du Rapport Savoy/Sarr sur la Restitution du Patrimoine Africain' (n. 5).

171 Dagen (2017).

5 Concluding remarks

> With German colonial rule the chiefs began their subservience to an outside authority. ... Gone was their invincibility. … Gone too, were many of the royal ancestor statues which formed a link with the past and were an essential feature of the Lefem. [T]oday they stare glumly from their pedestals in the alien Lefems of European and American museums.[172]

This chapter has analysed the legal framework for a claim regarding an African ancestral sculpture known as the Bangwa Queen that was taken in the course of colonial annexation of the Bangwa territory in 1899. Often it is argued that, according to the law at the time, such acquisitions were lawful, a conclusion that has been challenged for the present case. Nevertheless, even if one could argue that a specific loss was unlawful, the traditional legal framework is not well suited for claims like the Bangwa case. An important reason is that former colonial powers, on the whole, did not acknowledge a legal obligation to return cultural objects taken from their former colonies, as it was in similar instances in the European context.

In the meantime, views on the possession of 'tainted' cultural objects have changed, resulting in the adoption of soft law instruments and professional guidelines. These instruments promote equitable solutions for claims regarding artefacts looted in the past, even in the absence of a clear basis for claims in positive law and notwithstanding later acquired ownership rights by new possessors. The rationale of such norms lies in the intangible 'heritage' value of the artefacts for individuals or communities: as symbols of an identity. Evolving human rights law, was argued, mirrors this development. In this sense, international cultural property law can be said to be evolving from a property framework towards a human rights framework.[173] A human rights law approach to restitution claims can be understood as the acknowledgement of a right to possess, access, or control involuntarily lost cultural objects on the grounds of their intangible heritage value for specific people, independent of ownership. It relies, in other words, on a continuing human rights violation of remaining separated from certain objects (and therefore being denied access), as opposed to a focus on the unlawfulness of the acquisition in the past in an ownership-focused approach. A noteworthy element is that communities may be collective right holders.

As discussed in this chapter, a human rights law approach as adopted in the UNDRIP provides useful tools to address claims to cultural objects lost in the course of colonization. The UNDRIP contains a right of redress with respect

172 Lockhart (1998) 29. The part '[t]hese the Germans looted' is left out given that the exact circumstances of the loss are unclear.

173 See also K.L. Alderman, 'The Human Right to Cultural Property' (2011) 20 Michigan State University College of Law International Law Review 81.

to cultural objects taken without the 'free, prior and informed consent' of indigenous peoples. Depending on the cultural importance of the artefact at stake, redress may vary from a right to 'access and control' to a straightforward right to repatriation of human remains. To fulfil this aim, states are expected to provide assistance – 'effective mechanisms in conjunction with indigenous peoples' – in addressing claims. States might want to consider, in this light, adopting policy measures and setting up claims procedures.[174] Given the strong legal status of the UNDRIP, such human rights claims may also find their way to regular courts of law.

For claims such as the one involving the Bangwa Queen, this approach would mean that her present-day spiritual importance to the Bangwa people is a point of focus, instead of the legality of the events in the past. This is important for cases where present possessors could hardly be held accountable for acts in the past. In this respect, the 2015 study by the Expert Mechanism in the field of Indigenous cultural rights underlines that states should work toward a general acceptance of the UNDRIP's aims beyond collections under their direct authority.[175] A human rights law approach may thus also pave the way to creative solutions, beyond an all-or-nothing-outcome in a property focused approach.

Summarising the findings in this chapter, the following arguments would seem to support the Bangwa people in their quest for their lost Bangwa statues:

- Cultural objects have a protected status under international law and pillage of such objects is prohibited by customary international law, arguably since the end of the nineteenth century.
- Pillage of cultural objects in the course of colonial (military) expeditions falls under the scope of this prohibition and was unlawful.
- Sacred objects of ceremonial importance to a living culture have an enhanced protected status under these rules.
- The UNDRIP is considered to be an interpretation of the right to culture in the ICESCR insofar as it concerns indigenous peoples' cultural property, and provides a legal basis for claims if these were taken 'without their free, prior and informed consent or in violation of their laws, traditions and customs.'
- States that adopted the UNDRIP have committed themselves to its aims and should provide assistance – 'effective mechanisms in conjunction with indigenous peoples' – in addressing claims, which implies that state authorities should support equitable solutions that honour the rights of indigenous peoples to access and control their ceremonial objects.

174 As the German government announced its recent policy framework.

175 Reiterated in 'Eckpunkte zum Umgang mit Sammlungsgut aus Kolonialen Kontexten' (n. 4).

Usually, it is said that such cases are a matter of ethics and not law. Indeed, an ethical approach and alternative dispute resolution may provide for a constructive non-adversarial setting for culturally and politically sensitive claims. Nevertheless, general standards are needed to see that similar cases are dealt with similarly. For this reason – and as a guarantee for access to justice for less powerful parties – this chapter proposes a human rights law approach to claims that often are set aside as being merely moral in nature.

Fon Asunganyi, reigning Chief of Fontem in the 1890s (deceased 1951). Image taken in the 1940s, courtesy royal family through Chief C. Taku.