

# COUNTRY REPORTS

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## Pioneering Belgium: Parliamentary Legislation on the Restitution of Colonial Collections

**Abstract:** The Bill of 3 July 2022 to recognize the alienability of goods linked to the Belgian State’s colonial past and to determine a legal framework for their restitution and return (“the Restitution Bill”) puts Belgium at the forefront of international restitutions of colonial collections. With the parliamentary approval,

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and therefore democratically backed adoption of the Restitution Bill, Belgium is about to write history by being the first country in the world with a legislative framework allowing for large-scale restitutions of colonial collections. The situation, however, is not all roses, as the new legislation keeps its scope quite narrow (only cultural objects from former Belgian colonies, and no archives or human remains) and excludes local communities within the State of origin from being involved in restitution proceedings. Moreover, the Bill's initial draft had to be watered down significantly to give the Government maximum freedom in negotiating bilateral restitution agreements. The relative lack of procedural rules renders the process less transparent and more political. In sidestepping the issue, the actual restitution procedure will depend almost entirely on the terms of each of the bilateral agreements, thus giving more leeway to political squabbling.

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**Keywords:** restitution, colonial collections, inalienability, bilateral treaties, illegitimate acquisition

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## Introduction

On 25 April 2022, the Federal Government of Belgium submitted a long-awaited piece of legislation to the Chamber of Representatives for parliamentary approval.<sup>1</sup> The Bill Recognizing the Alienability of Goods Linked to the Belgian State's Colonial Past and Determining a Legal Framework for Their Restitution and Return<sup>2</sup> (hereafter "the Restitution Bill") swiftly passed its first reading in May 2022, as the parliamentary commission rejected the only amendment tabled.<sup>3</sup> Both on second reading and in the Plenum, the text of the Bill was left unchanged.<sup>4</sup> On 30 June

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<sup>1</sup> Besides individual MPs, government is also entitled to initiate legislation in Belgium (Art. 36 *juncto* 75 of the Belgian Constitution).

<sup>2</sup> Chambre des représentants de Belgique, *Projet de loi reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour*, 25 April 2022, Doc. 55 2646/001, <https://www.lachambre.be/FLWB/PDF/55/2646/55K2646001.pdf> [accessed: 10.10.2022].

<sup>3</sup> Chambre des représentants de Belgique, *Projet de loi reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour. Rapport de la première lecture fait au nom de la Commission de la Mobilité, des Entreprises publiques et des Institutions fédérales*, 23 May 2022, Doc. 55 2646/003, <https://www.lachambre.be/FLWB/PDF/55/2646/55K2646003.pdf> [accessed: 10.10.2022].

<sup>4</sup> Chambre des représentants de Belgique, *Projet de loi reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour. Texte adop-*

2022, the Chamber of Representatives formally adopted the Restitution Bill.<sup>5</sup> The Bill received royal assent on 3 July – its official adoption date – and was published in the *Moniteur belge* on 28 September 2022, entering into force ten days later.<sup>6</sup> Belgium’s Restitution Bill for colonial heritage is the first of its kind to be adopted by a former colonial power.

The Belgian Restitution Bill marks another milestone in the country’s efforts to come to terms with its colonial past, following the establishment of the Special “Truth and Reconciliation” Commission on Congo, Rwanda, and Burundi in July 2020. The Commission’s first so-called “preparatory report”, issued in October 2021,<sup>7</sup> already commented extensively on heritage and restitution. Yet the Commission’s work is still ongoing, now focusing entirely on transitional justice and reparations.

In earlier publications, we discussed a number of initiatives of politicians, scholars, and civil society that helped pave the way for the Belgian Restitution Bill.<sup>8</sup> The topic’s ubiquity in Belgian politics is certainly rooted in President Emmanuel Macron’s famous 2017 speech in Ouagadougou. That speech, together with other actions and movements (#BlackLivesMatter or Rhodes Must Fall), resulted in a series of *ad hoc* restitutions from former colonial powers, such as France,<sup>9</sup> Germany,<sup>10</sup>

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*té en deuxième lecture par la Commission de la Mobilité, des Entreprises publiques et des Institutions fédérales*, 3 June 2022, Doc. 55 2646/006, <https://www.lachambre.be/FLWB/PDF/55/2646/55K2646006.pdf> [accessed: 10.10.2022].

<sup>5</sup> Chambre des représentants de Belgique, *Projet de loi reconnaissant le caractère aliénable des biens liés au passé colonial de l’État belge et déterminant un cadre juridique pour leur restitution et leur retour. Texte adopté par la séance plénière et soumis à la sanction royale*, 30 June 2022, Doc. 55 2646/007, <https://www.lachambre.be/FLWB/PDF/55/2646/55K2646007.pdf> [accessed: 10.10.2022].

<sup>6</sup> *Loi du 3 juillet 2022 reconnaissant le caractère aliénable des biens liés au passé colonial de l’État belge et déterminant un cadre juridique pour leur restitution et leur retour* [Bill of 3 July 2022 Recognizing the Alienability of Goods Linked to the Belgian State’s Colonial Past and Determining a Legal Framework for Their Restitution and Return], *Le Moniteur Belge*, 28 September 2022, no. 2022042012.

<sup>7</sup> Chambre des représentants de Belgique, *Commission spéciale chargée d’examiner l’État indépendant du Congo et le passé colonial de la Belgique au Congo, au Rwanda et au Burundi, ses conséquences et les suites qu’il convient d’y réserver. Rapport des Experts*, 26 October 2021, Doc. 55 1462/002, <https://www.lachambre.be/FLWB/PDF/55/1462/55K1462002.pdf> [accessed: 10.10.2022].

<sup>8</sup> See M.-S. de Clippele, B. Demarsin, *Retourner le patrimoine colonial – proposition d’une lex specialis culturae*, “*Journal des tribunaux*” 2021, Vol. 19(6857), pp. 345-353; B. Demarsin, M.-S. de Clippele, *Georganiseerde terugkeer van koloniaal erfgoed. Wetgeving biedt historische kans om geschiedenis te schrijven*, “*Nieuw Juridisch Weekblad*” 2021, Vol. 449(30), pp. 706-715; eadem, *Restitutie van koloniaal erfgoed: Forever young, of terug van nooit echt weggeweest*, in: P. Melin et al. (eds.), *The Art of Moving Borders: Liber Amicorum Hildegard Schneider*, Eleven, The Hague 2022.

<sup>9</sup> See, e.g., V. Mallet, *France Returns 26 Looted Treasures and Works of Art to Benin*, “*Financial Times*”, 9 November 2021.

<sup>10</sup> See, e.g., *Germany to Return Looted Artifacts to Africa*, “*DW*”, 29 June 2022, <https://www.dw.com/en/germany-to-return-looted-artifacts-to-africa/a-62300419> [accessed: 20.09.2022].

the Netherlands,<sup>11</sup> the UK,<sup>12</sup> and Belgium.<sup>13</sup> However, Belgium has moved toward a more systematic approach, as the country seized the momentum to enact colonial heritage restitution legislation. With the parliamentary adoption of the Restitution Bill, it looks like the “Copernican revolution” we earlier called for<sup>14</sup> is actually happening. Belgium is about to write history by being the first country in the world to adopt legislation allowing for large-scale restitutions of colonial collections.

The situation, however, is not all roses, as the new legislation keeps its scope quite narrow (only cultural objects from former Belgian colonies, and no archives nor human remains) and excludes local communities within the State of origin from being involved in restitution proceedings. Moreover, the Bill's initial draft had to be watered down significantly in order to give the Government maximum freedom in negotiating bilateral restitution agreements. The relative lack of procedural rules renders the process less transparent and more political. In sidestepping the issue of an overarching process, the actual restitution procedure will depend almost entirely on the terms of each of the bilateral agreements, thus giving more leeway to political squabbling.

In this article we comprehensively analyse the Restitution Bill of 3 July 2022. Firstly, we go over its general design. Next, we outline its scope. Thirdly, we explain the procedure to be followed. Fourthly, the specific matter of inalienability is examined. In conclusion, some reflective comments are offered.

## Restitution through Bilateral Cooperation Agreements with Former Belgian Colonies

From the very outset (see Article 2), the Federal Government has portrayed its legislative initiative as a deliberate attempt to foster dialogue and cooperation between the Belgian State and its former colonies (the Democratic Republic of Congo [DRC], Rwanda, and Burundi, see below). The proposed framework does not, by any means, intend to make a general judgment on the colonial period, as the Explanatory Memorandum clearly specifies. Its aim is rather to contribute to further research on (certain aspects of) this period of political domination and the result-

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<sup>11</sup> See, e.g., S. Cascone, *The Dutch Government Just Promised to Return Any Stolen Colonial-Era Objects in Its Collections Back to Their Countries of Origin*, “Artnet News”, 4 February 2021, <https://news.artnet.com/art-world/netherlands-restitution-guidelines-1941734> [accessed: 20.09.2022].

<sup>12</sup> See, e.g., H. McGivern, *Cambridge University College Becomes First UK Institution to Return Looted Benin Bronze to Nigeria*, “The Art Newspaper”, 28 October 2021, <https://www.theartnewspaper.com/2021/10/28/cambridge-university-college-becomes-first-uk-institution-to-return-looted-benin-bronze-to-nigeria> [accessed: 20.09.2022].

<sup>13</sup> See, e.g., R. Maclean, E. Peltier, *Belgian King Returns Mask to Congo in Landmark Visit*, “The New York Times”, 8 June 2022.

<sup>14</sup> M.-S. de Clippele, B. Demarsin, op. cit., pp. 345-353.

ing acquisition of heritage objects by the Belgian State.<sup>15</sup> In taking this approach, the legislator is extremely careful not to suggest any legal/official recognition of past *wrongdoings*.

It is remarkable how the Explanatory Memorandum speaks of the *reconstitution* of cultural heritage,<sup>16</sup> a concept also used by Congolese experts during the 2021 visit to Kinshasa of Thomas Dermine, the Belgian Secretary of State<sup>17</sup> responsible for federal cultural institutions. On 5 December 2021, an international conference entitled “Reconstitution des biens culturels et la Renaissance Africaine”<sup>18</sup> was organized in Kinshasa as a follow-up of the first event in June 2020.<sup>19</sup> According to a Congolese newspaper, “restitution is very European-centric. It is the act of Europeans to give back. The important thing is to put it in the perspective of the Congo, which is to reconstitute a heritage that should not have been taken. It allows one to reconnect with the memory, the spirituality of one’s ancestors”.<sup>20</sup> Although intrinsically linked, the focus is not so much on amending past wrongdoings, but rather on reconciliation and reconnection with a country’s cultural identity.

Article 2 also phrases the Legislature’s ultimate ambition to set up bilateral scientific and cultural cooperation agreements with each State of origin. The Legislative Section of the Council of State, however, clearly had second thoughts about the pre-draft version of Article 2 in light of its compliance with Article 167 of the Belgian Constitution. The latter reserves the power to negotiate international treaties exclusively to the Executive. Any legislation that defines the essential elements to be found in future treaties is therefore constitutionally questionable. It can be seen as an attempt on the part of the Legislature to force the Executive to conclude a predetermined treaty, as well as to dictate its core provisions.<sup>21</sup> The Council of State nonetheless acknowledged that some aspects are to be determined by law, such as the conditions for the deaccessioning (and transferring to another State)

<sup>15</sup> Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/001, p. 4. In the Explanatory Memorandum there is only mention of *patrimoine* (“heritage”). The scope of the law (“movable goods in federal museums”) makes it clear it concerns only objects.

<sup>16</sup> *Ibidem*, p. 4.

<sup>17</sup> On the difference between a Secretary of State and a Minister, see Article 104 of the Belgian Constitution.

<sup>18</sup> Nzwamba, *Kinshasa: Colloque sur la reconstitution des biens culturels et la Renaissance Africaine*, 5 December 2021, <https://www.youtube.com/watch?v=VuJbKHH1I38> [accessed: 20.09.2022].

<sup>19</sup> A. Vercruisse, *Premier Forum National sur la Reconstitution des Archives et du Patrimoine Culturel de la R.D. Congo*, “Le nouvel Afrique”, 22 September 2020, <https://www.lenouvelafrique.net/news/2020/09/22/premier-forum-national-sur-la-reconstitution-des-archives-et-du-patrimoine-culturel-de-la-r-d-congo> [accessed: 20.09.2022].

<sup>20</sup> *RDC-Belgique: Mieux que la restitution, avancer sur la reconstitution du patrimoine culturel congolais - podcast*, “Actualite.cd”, 30 November 2021, <https://actualite.cd/2021/11/30/rdc-belgique-mieux-que-la-restitution-avancer-sur-la-reconstitution-du-patrimoine> [accessed: 20.09.2022].

<sup>21</sup> Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/001, pp. 37-39.

of goods pertaining to the public domain.<sup>22</sup> In response to this criticism, Article 2 has been rephrased, leaving the Federal Government the freedom to engage in bilateral treaties whenever it is deemed useful. However, a significant number of important provisions concerning the restitution procedure have been barred in the Bill's version that was put up for vote (see below). Instead, Article 2 explicitly mentions that the future bilateral agreements will complement the principles laid down in the statute.

Reverting to bilateral cooperation agreements is not however a neutral policy choice. In an earlier paper, we promoted the strategy of framing restitutions within a broader cooperation scheme as the most pragmatic option to assure their timeliness and to secure ideal material conditions for such operations.<sup>23</sup> Yet due to their typical focus on cultural diplomacy and political win State-to-State restitutions entail the risk of ignoring other stakeholders and their rightful claims. When it comes to heritage restitution, research shows that State negotiations risk being instrumentalized for political reasons, even to the point of eliminating the narrative of heritage justice entirely.<sup>24</sup> Dealings with individuals, communities, or institutions offer a better chance of healing past wounds and of securing rightful returns. Yet it seems difficult to directly engage with non-state actors, bypassing official state authorities in the country of origin.

Any Western claim that internal stakeholders are better qualified for overseeing the process of restitution may come across as neo-colonial, thus denying the State of origin full sovereignty over its domestic restitution policy (which could envision restitution to a specific community at a later stage). We therefore propose that any return of colonial collections should happen in close collaboration with the State of origin, while at the same time demands for restitution should be open to being initiated by individuals and communities, albeit with official state support.<sup>25</sup> This second track is absent in the text Parliament adopted, although it featured in the pre-draft. We believe this to be a missed opportunity to recognize the importance of communities and their right to cultural heritage (see below).

## The Disappointing Scope of Application

The Bill Parliament adopted is historic because it provides a general framework for the restitution and return of colonial collections. Unfortunately, its scope remains rather narrow, as many objects are either explicitly excluded or fail to qualify on policy grounds, as explained below.

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<sup>22</sup> Ibidem, p. 39.

<sup>23</sup> M.-S. de Clippele, B. Demarsin, op. cit., p. 351.

<sup>24</sup> V. Tünsmeier, *Repatriation of Sacred Indigenous Cultural Heritage and the Law: Lessons from the United States and Canada*, Springer, Cham 2022, pp. 460-466.

<sup>25</sup> M.-S. de Clippele, B. Demarsin, op. cit., p. 351.

## Only movable goods owned by the Federal State

The material scope of the Bill is limited to movable property held in federal institutions and owned by the Belgian State (Article 3, 1<sup>o</sup>). Human remains and archives are explicitly excluded.

In the Explanatory Memorandum, the legislator specifies that any restitution of a collection item is prompted by its archaeological, historical, artistic, scientific, or technical value/interest for the State of origin or the communities within that country.<sup>26</sup> For some reason this list of values/interests does not feature in the actual Restitution Bill, but merely in the non-binding explanations. Nevertheless from a legalistic point of view objects that fail to present the heritage values listed in the Memorandum, but that are important for ritual, religious, or social reasons, may still be eligible for restitution. While this can be viewed as positive, it would have been better if the Explanatory Memorandum's list included the interpretation offered above. After all, such a broader approach would tie in with the way a lot of colonial objects are perceived in their countries and communities of origin, where they are not necessarily considered as art or cultural objects, even though they surely have a social or ritual/religious value that renders their return equally important.

In accordance with Article 3, 1<sup>o</sup>, the adopted legislation only concerns artefacts that are held in a federal institution and owned by the Belgian State. It does not concern other public collections on Belgian soil, such as those owned and administered by the federated entities (Regions and Communities<sup>27</sup>) or local authorities (provinces and municipalities<sup>28</sup>). Privately-owned objects are equally excluded. By no means will a private collector be impacted by the Restitution Bill. Consequently, objects that are deposited or on display in federal institutions but without being owned by the Belgian State automatically fall outside the legislation's scope. Federal institutions, such as the Royal Museum of Fine Arts, the Royal Museum of Art and History, the Royal Belgian Institute of Natural History, or the Royal Museum of Central Africa undoubtedly hold such artefacts.<sup>29</sup>

Finally, the Restitution Bill explicitly excludes archives and human remains. To justify their exclusion, the Explanatory Memorandum states that these two types of goods may be returned or loaned directly upon negotiations with the States of origin or their institutions. The Memorandum incidentally observes that

<sup>26</sup> Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/001, p. 10.

<sup>27</sup> For an overview of the colonial collections in the French Community, see M.-S. de Clippele, Y. Zian, *Rapport sur l'avenir des collections extra-européennes conservées en Fédération Wallonie-Bruxelles*, Académie royale de Belgique, Bruxelles 2021, p. 190, <https://www.academieroyale.be/Academie/documents/RapportavenircollectionsextraeuropeennesconserveesFederationWallonieBrux31402.pdf> [accessed: 20.09.2022].

<sup>28</sup> See, e.g., the collection of the MAS in Antwerp.

<sup>29</sup> See, e.g., Royal Museum of Fine Arts of Belgium, *The Collection*, <http://www.fine-arts-museum.be/en/the-collection> [accessed: 20.09.2022].

this already happened in the past, in accordance with applicable law.<sup>30</sup> The justification provided, however, borders on ridiculous. How can direct restitutions of museum collections between two States take place any differently than through bilateral negotiations? While it is true that they need not be linked to an international cooperation agreement and could happen on the sole basis of a Royal Decree (*Arrêté royal*) adopted by the Federal Government (without parliamentary assent being required), nonetheless publicly owned human remains and archives still need to be deaccessioned from the public domain before they can be returned. Consequently, parliamentary approval remains very much required (see below), unless these objects could be qualified as extra-patrimonial – a claim that may be valid for human remains, but certainly not for archives. Moreover, from a heritage restitution point of view, splitting up cultural goods and archives is highly questionable. After all, archives allow for reconstituting and telling of the provenance story, which is often as precious, if not more so, than the object itself. Finally, the historical precedents the lawmaker refers to are utterly scarce: to date we do not know of any federal restitution case concerning human remains, and when it comes to archives the Federal Government has only transferred digitized files to Rwanda in February 2020.<sup>31</sup> At the same time it should be said that despite their exclusion from the Restitution Bill we are not pessimistic about the future, as there seems to be a wide political consensus to return human remains.<sup>32</sup> In addition, digitization provides interesting alternatives to sharing archives.<sup>33</sup>

### Only artefacts from former Belgian colonies acquired under Belgian occupation

Both geographically and temporally, the Restitution Bill's scope of application is strategically defined. Restitution may only concern artefacts acquired<sup>34</sup> in former Belgian colonies (Democratic Republic of Congo, Rwanda, Burundi)<sup>35</sup> dur-

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<sup>30</sup> Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/001, p. 10.

<sup>31</sup> See The Royal Museum for Central Africa, *Mining Archives Transferred to Rwanda*, <https://www.africamuseum.be/en/research/discover/news/rwandaminingarchives> [accessed: 20.09.2022].

<sup>32</sup> The Federal Agency for Scientific Policy funds a project on Human Remains Origin(s) Multidisciplinary Evaluation (HOME) (2019-2022), whose recommendations are expected in the Fall of 2022. See Royal Belgian Institute of Natural Sciences, *Executive Summary of the HOME Project*, <https://collections.naturalsciences.be/ssh-anthropology/home/project/executive-summary> [accessed: 20.09.2022].

<sup>33</sup> Recently, the General Archives of the Kingdom of Belgium undertook to publish a double volume guide on colonial archives. See P.-A. Tallier, M. Van Eeckenrode, P. Van Schuylenbergh (eds.), *Belgique, Congo, Rwanda et Burundi. Guide des sources de l'histoire de la colonisation (19<sup>e</sup>-20<sup>e</sup> siècle). Vers un patrimoine mieux partagé!*, Brepols, Turnhout 2021, <https://dial.uclouvain.be/pr/boreal/object/boreal:236627> [accessed: 20.09.2022].

<sup>34</sup> The notion of acquisition is to be understood as widely as possible: every mode of transfer of property, gratuitous or onerous, to the Belgian State (sale, gift, bequest, etc.) as well as acquisition by prescription.

<sup>35</sup> Other territories could also be taken into consideration. One could think of cultural property from China, where Belgium obtained a short-term concession in the port city of Tianjin (1902-1931), or from



ing the era of political and administrative domination by the Belgian State, from 26 February 1885 (signature of the Berlin Conference Act) until their independence (Article 3, 2°).

Consequently, goods acquired in a colonial context, yet from other countries, do not fall under the restitution policy laid down in the Restitution Bill. Expert reports<sup>36</sup> and ethical guidelines<sup>37</sup> generally suggest that restitution efforts should be oriented towards artefacts “stemming from a colonial context”, without any differentiation as to the country they were taken from. In earlier publications we have strongly endorsed such approach, as it would allow for the redress of colonial injustices in an unequivocal manner.<sup>38</sup> Why should the return of a Congolese mask be any different than the return of a piece of looted Chinese porcelain or a Luguru artefact from Tanzania? Of course most colonial collection items in Belgium stem from its former colonies, yet such an explicit limitation risks suppressing or obliterating the bigger story: colonization was an extractive and violent undertaking that allowed actors and institutions from a handful of Western countries to collect enormous amounts of goods thanks to military domination.<sup>39</sup> If the objective really is to amend for past injustices, like the Secretary of State claims in media interventions,<sup>40</sup> a geographical scope going beyond Congo, Rwanda, and Burundi would have been more appropriate.

In addition, the time frame is also limited: from 1885 onwards, until 27 January 1960 (for the DRC) and 1 July 1962 (for Rwanda and Burundi). Technically speaking, objects looted by the Association Internationale Africaine (AIA) or the later Association Internationale du Congo (AIC) prior to the recognition of the Congo Free State at the Berlin Conference are not up for restitution. A painful example is the Nkisi Nkonde statue that was violently taken by AIC officer Alexandre Delcommune in 1878.<sup>41</sup> One of the Boma Kings, Ne Kuko, immediately requested its return, but his claim was ignored. Instead, Delcommune brought

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Latin America or other African countries during failed attempts to colonize certain territories (San-Tomas de Castillo in Guatemala or the territory around Rio Nunez in Guinea), see F. Rasschaert, *La concession belge de Tianjin à travers les événements de Chine entre 1902 et 1931: une histoire peu connue*, MA thesis, Université catholique de Louvain, 2020.

<sup>36</sup> M.-S. de Clippele, Y. Zian, op. cit.

<sup>37</sup> See <https://restitutionbelgium.be> [accessed: 20.09.2022].

<sup>38</sup> M.-S. de Clippele, B. Demarsin, op. cit., pp. 350-351.

<sup>39</sup> B. Savoy, *Objets du désir, désir d'objets. Leçon inaugurale prononcée le jeudi 30 mars 2017*, Collège de France, Paris 2017; eadem, *Afrikas Kampf um seine Kunst: Geschichte einer postkolonialen Niederlage*, C.H. Beck, Munich 2021.

<sup>40</sup> See *Passé colonial: la Chambre adopte en première lecture le cadre juridique pour la restitution des biens*, “RTBF”, 18 May 2022, <https://www.rtbf.be/article/passe-colonial-la-chambre-adopte-en-premiere-lecture-le-cadre-juridique-pour-la-restitution-des-biens-10995266> [accessed: 20.09.2022].

<sup>41</sup> For thorough provenance research, see The Royal Museum for Central Africa, *Nkisi Nkonde Statue*, <https://www.africamuseum.be/en/learn/provenance/nkisi-nkonde> [accessed: 20.09.2022].

# COUNTRY REPORTS

Marie-Sophie de Clippele, Bert Demarsin

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the statue to Belgium, where it has been on display at the Royal Museum for Central Africa (also called the Tervuren Museum) since 1912. It is true however that an alternative reasoning may prevent such emblematic cases of colonial loot from falling outside the legislative scope. After all, the time of the looting is not the only parameter. For pre-1885 cases of looting, the moment of acquisition by the Belgian State turns out to be highly relevant. According to the Restitution Bill, the proceeds of pre-1885 looting would still qualify for restitution (*bien restituable*) if they entered the public domain sometime between 1885 and 1960 (in the case of the DRC) or 1962 (in the case of Rwanda and Burundi). They would, however, remain outside of the scope of application if their acquisition occurred only after the respective countries gained their independence. From a policy point of view, this seems most unfair and highly confusing given the fact the artefacts looted between 1885 and 1960/1962 fall under the Restitution Bill regardless of the moment they entered the state collections.<sup>42</sup>

## Scarce Procedural Rules Built on Scientific Examination and Split Restitutions

The Restitution Bill requires implementation through bilateral cooperation agreements. The legislator clearly opts for a negotiated return instead of a judicial restitution.<sup>43</sup> Accordingly, the power to grant restitutions resides with the Federal Government alone, to the detriment of the countries or communities of origin.

The procedure consists of two phases: a first scientific one to review the artefacts' provenance; and a second governmental one leading to the actual decision.

### Provenance research

Article 4 establishes the principle that all restitutions will take place in the context of a bilateral treaty, setting forth the procedure and modalities to scientifically review the illegitimacy (but not the illegality<sup>44</sup>) of the acquisition of all goods

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<sup>42</sup> It might then be returned because the Government decides so, despite the provenance showing that the Belgian State acquired the good in a legitimate way. "La commission pourrait, par ailleurs, être saisie d'un dossier de restitution visant un bien qui a été acquis par l'État belge postérieurement à la période de colonisation, par exemple à la faveur d'un legs ou d'un don, mais dont l'acquisition originaire a eu lieu durant ladite période. Dans cette hypothèse-ci, le critère temporel est examiné à l'aune de l'acquisition originaire du bien", Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/001, p. 12.

<sup>43</sup> For more on the various options for restitution, see, *inter alia*, M. Cornu, M.-A. Renold, *La mise en forme d'un intérêt commun dans la propriété culturelle: des solutions négociées aux nouveaux modes possibles de propriété partagée*, in: A.-L. Bandle, A. Chechi, M.-A. Renold (eds.), *La résolution des litiges en matière de biens culturels*, Schultess, Geneva 2012, pp. 251-263; M.-S. de Clippele, B. Demarsin, *op. cit.*, pp. 349-350.

<sup>44</sup> Which would be much harder to demonstrate, considering the law at the time of acquisition and the lack of ownership structures in colonized countries.

eligible for restitution (*bien restituable*). Acquisitions under duress or in a context of violence qualify as illegitimate according to the Restitution Bill. Apart from that hint, and the fact that only States can petition for restitution, there are no procedural rules to be found. They have in fact been barred following the Council of State's criticism (see above). As a result, the Restitution Bill remains silent on how this scientific review ought to take place, which is disappointing at the least, or even disturbing.

When it comes to procedure, the Restitution Bill does nothing more than reserve the right to start the restitution process to the State of origin or the Belgian State. Under the pre-draft regime "any person or legal entity with a standing (*un intérêt*) for restitution in favour of the country of origin"<sup>45</sup> was eligible to file a restitution request. Unfortunately this option – which would have allowed to take other stakeholders into consideration – has been abandoned.

But there is more, as the pre-draft went further on other procedural details as well. For instance, it required the establishment of a joint scientific commission composed of an equal number of experts coming from both countries for each bilateral treaty. The pre-draft specified that these experts were supposed to have a deliberative vote and would be complemented by two representatives of each State, having mere consultative votes as observers.<sup>46</sup>

By its lack of specific guidelines, the Restitution Bill as passed risks turning the scientific review into a political play, entirely dependent on the negotiating power of both parties. It is not even clear whether the scientific review should be based on the work of a commission, nor whether such commission, even if constituted, requires a balanced membership or whether its role is to issue an opinion on restitutability. As a result, it may well be that in practice only Belgian experts are to do the provenance research. In the event research turns out to be inconclusive (which might often be the case), the legal consequences are not defined, leaving a large margin of appreciation to the Belgian Government to decide on actual restitution. In our opinion, the commission should issue scientific opinions on the restitutability (a hypothesis in the pre-draft), as they are harder to set aside than reviews on mere provenance. We therefore deplore that Parliament decided to follow the non-binding advise of the Council of State. Hopefully, the preparatory documents (the pre-draft and Explanatory Memorandum)<sup>47</sup> will still frame future restitution efforts, resulting in balanced commissions with a clear mission to issue an opinion on restitutability based upon thorough provenance research.

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<sup>45</sup> Article 6 of the pre-draft, Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/001, p. 22.

<sup>46</sup> See Article 5, Paragraph 1 of the pre-draft, *ibidem*, p. 21.

<sup>47</sup> The Explanatory Memorandum gives very precise guidelines on the procedure, *ibidem*, pp. 10-16.

## Splitting ownership restitution and material return

Following the scientific review, the Government alone decides on deaccession and return of a restitutable good (Article 4). The Government's decision is discretionary in nature, but requires motivation. As any other administrative act, it is subject to a legality control. Thus one can easily imagine claims against decisions to grant or refuse restitution.<sup>48</sup>

According to Article 5, the State of origin regains legal ownership of an object immediately upon Government's decision in favour of restitution. This principle is one of the most original features of the Belgian Restitution Bill. It separates the material *return* from the object's *legal restitution*. Material *return* may thus happen later than *legal restitution*.

Symbolic issues (legal ownership) have been separated from the operational ones (conservation arrangements, transport, etc.), because the latter are said to have kept the issue of colonial heritage from moving forward for too long a period.<sup>49</sup> It may therefore well be that even after the Government's decision to return (which automatically shifts ownership), the good itself remains in the Belgian museum collections. The museum will serve as a custodian and the State of origin will be heard regarding the object's conservation, management, and display. The process of material return of the object will commence as soon as the new owner, i.e. the State of origin, requests it, following the procedure to be laid down in the bilateral agreement.

The legislator may have been inspired by the recent restitution agreement signed between the Free University of Brussels (ULB) and the University of Lubumbashi, where the legal restitution of human remains was agreed with a later material return.<sup>50</sup> Germany followed a similar approach with Nigeria in their restitution agreement signed in July 2022.<sup>51</sup> Once again, the text finally adopted in Parliament is less explicit than the pre-draft, which added that material return should happen within the framework of international heritage conventions ratified

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<sup>48</sup> See the case in Italy on the restitution of the Venus of Cyrene to Libya; it was a heritage association, Italia Nostra, that filed a suit in administrative courts, but failed to keep the statue in Italy, A. Chechi, *The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene*, "The Italian Yearbook of International Law Online" 2008, Vol. 18(1), pp. 159-181.

<sup>49</sup> Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/001, pp. 4-5.

<sup>50</sup> *L'ULB va restituer à l'université de Lubumbashi des restes humains de l'époque coloniale*, "RTBF", 15 October 2020, <https://www.rtb.be/article/l-ulb-va-restituer-a-l-universite-de-lubumbashi-des-restes-humains-de-l-epoque-coloniale-10609484> [accessed: 20.09.2022].

<sup>51</sup> See G. Harris, *'The Benin Bronzes Are Returning Home': Germany and Nigeria Sign Historic Restitution Agreement*, "The Art Newspaper", 4 July 2022, <https://www.theartnewspaper.com/2022/07/04/the-benin-bronzes-are-returning-home-germany-and-nigeria-sign-historic-restitution-agreement> [accessed: 20.09.2022]. See also A. Herman, *Benin Bronzes Joint Declaration Signed between Germany and Nigeria... but What About the UK?*, The Institute of Art and Law, 5 July 2022, <https://ial.uk.com/benin-bronze-joint-declaration/> [accessed: 27.07.2022].

by both States. This could offer a disputable argument to the Belgian State to refuse material return in the event the country of origin cannot guarantee sufficient protection against illicit trafficking, even if the DRC and Rwanda (not Burundi) have ratified the 1970 UNESCO Convention.<sup>52</sup>

Finally, the legislation specifically provides that no contractual or time-lapsed obligation may impede a decision for restitution. Inalienability clauses of goods gifted or bequeathed to museums would thus become invalid should these goods be considered restitutable.<sup>53</sup>

## The Novelty of the Alienable Public Domain

The Belgian Restitution Bill is innovative in another way, as it establishes a softened public domain regime for “restitutable goods”. As part of the public domain, these goods remain unseizable and imprescriptible. Yet they are no longer fully inalienable, as they can be disposed of for the purpose of gratuitous restitution. Even if this provision was not legally necessary, as we argued before it is a welcome clarification for many in the field. The provision recognizes the particular status of this specific type of heritage, given its history and the way the objects entered the public collections, as the Secretary of State explained in Parliament.<sup>54</sup>

Unlike the above, the Belgian Restitution Bill’s relation to the budgetary law of 2003<sup>55</sup> did require further clarification. That law, as amended in 2021,<sup>56</sup> provided that the transfer of movable property out of the public or private domain of the Federal State must be onerous, i.e. it must be sold and not gifted or transferred for free. It may exceptionally be made free of charge, but only in the cases strictly provided for in Paragraph 4 of Article 117. The latter did not include the transfer of cultural goods to foreign countries. Therefore, the Belgian Restitution Bill needed to derogate explicitly from the requirement of Article 117 to allow a return free of charge. We observe here that the same does not apply to archives or human remains, as they remain outside the legislative scope.

<sup>52</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

<sup>53</sup> B. Demarsin, *Was het ijdeldheid of ondankbaarheid?*, in: W. Pintens, A. Verbeke (eds.), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens*, Intersentia, Antwerp 2012, pp. 457-472.

<sup>54</sup> Chambre des représentants de Belgique, *Projet de loi...*, Doc. 55 2646/003, p. 6.

<sup>55</sup> *Loi du 22 mai 2003 portant organisation du budget et de la comptabilité de l’État fédéral* [Bill of 22 May 2003 on the Organization of the Budget and Accounting of the Federal State], *Le Moniteur Belge*, 3 July 2003, no. 2003003367.

<sup>56</sup> *Loi du 27 juin 2021 portant des dispositions fiscales diverses et modifiant la loi du 18 septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l’utilisation des espèces* [Bill of 27 June 2021 Containing Various Tax Provisions and Amending the Bill of 18 September 2017 on the Prevention of Money Laundering and Terrorist Financing and on Limiting the Use of Cash], *Le Moniteur Belge*, 30 June 2021, no. 2021021157, Art. 104.

## A Historical and Targeted Framework

Concise and rather well drafted, the ground-breaking Belgian Restitution Bill follows a pragmatic approach: advancing the cause by settling ownership and allowing actual returns to happen under the best circumstances. By separating return from restitution, the Bill might alleviate some concerns about object conservation – even if much more is at stake – in particular regarding the situation in Congo<sup>57</sup> and its recent decision to remove the museum collection of cultural goods in Kinshasa.<sup>58</sup>

Moreover, the legislation is targeted (as a result of a political compromise<sup>59</sup>) and has the advantage of having a clear scope. However, the Bill excludes communities and other stakeholders and sidesteps the question of reparations. The effort seems to be more about future relations with former colonized States than about justice for what happened in the past.<sup>60</sup> A collective of academics and activists deplored the fact that the legislator did not enter into dialogue with civil society and, most importantly, failed to involve former colonized States.<sup>61</sup> For some activists, it feels like Secretary of State Dermine acts like a “white saviour” and imposes top-down measures mostly for political gain.<sup>62</sup>

Finally, much still depends on the future bilateral treaties. Hopefully the negotiating States will remain inspired by the principles laid down in the pre-draft and set up joint scientific commissions with precise missions, notably on the notion of “illegitimate acquisition”. Otherwise, the Restitution Bill, as pioneering as it may be, is at risk of remaining a dead letter.

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<sup>57</sup> See a very interesting and thought provoking analysis by G. Lwanzo Kasongo, *Restitution du patrimoine culturel africain, et après? L'Etat congolais et l'urgence d'une politique de réappropriation du patrimoine culturel et de la promotion des droits culturels*, in: J. Baraka Akilimali (ed.), *L'État africain et la crise postcoloniale*, L'Harmattan, Paris 2021, pp. 331-356.

<sup>58</sup> C. Braeckman, *RD Congo: 35.000 œuvres patrimoniales à la recherche d'un toit*, “Le Soir”, 12 April 2022, <https://www.lesoir.be/435787/article/2022-04-12/rd-congo-35000-oeuvres-patrimoniales-la-recherche-dun-toit> [accessed: 20.09.2022].

<sup>59</sup> *La restitution d'objets au Congo ne fait pas l'unanimité en Belgique*, “RTBF”, 10 June 2022, <https://www.rtb.be/article/la-restitution-d-objets-au-congo-ne-fait-pas-l-unaninite-en-belgique-11010283> [accessed: 20.09.2022].

<sup>60</sup> In that respect, see the excellent analysis, also in international public law concerning the Belgian policy, M. Smets, *België en zijn restitutiebeleid voor koloniale collecties*, “Tijdschrift voor Bestuurswetenschappen en Publiek Recht” 2022, Vol. 4, pp. 268-274.

<sup>61</sup> *Carte blanche: la nouvelle loi sur la restitution, point final ou ouverture?*, “RTBF”, 9 June 2022, <https://www.rtb.be/article/carte-blanche-la-nouvelle-loi-sur-la-restitution-point-final-ou-ouverture-11009062> [accessed: 20.09.2022].

<sup>62</sup> *Expo Kinshasa (N)tóngá' bouwv brug tussen Brussel en Congolese hoofdstad*, “BRUZZ”, 14 September 2022, p. 36.

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Marie-Sophie de Clippele, Bert Demarsin

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