

# GUEST EDITORIAL

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## Colonial Loot and Its Restitution – Current Developments and New Prospects for Law

Fifty years after the UN General Assembly first urged the return of cultural objects to “countries victims of expropriation” (UNGA Resolution 3187, 18 December 1973), and twenty years after the 2002 Declaration on the Importance and Value of Universal Museums, in which museums justified their continued possession of colonial artefacts, the topic of restitution has entered a new phase. Several European states and heritage institutions

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have committed themselves to reviewing the provenance of colonial collections, and to returning artefacts unjustly taken. Widely publicized return ceremonies attest to the seriousness of these intentions. Even so, such returns are usually presented as voluntary gestures, a matter of moral commitment rather than legal obligation.

This renewed emphasis on return – and its framing as a matter of ethics, not law – raises a series of questions. Are there legal rules, whether of an international or domestic character, that obligate return, and identify what is considered colonial loot in this respect? What do the present frameworks for restitution actually offer in relation to important procedural questions: Who should be the appropriate recipients of these objects and the beneficiaries of these returns, and on what basis are such conclusions reached? What are the procedures on offer for those seeking to claim the restitution of colonial loot? Who gets to participate in these processes: Are the frameworks exclusively intergovernmental and diplomatic, or do they also involve the now sub-statal or transnational communities from which the objects originated? What frameworks have postcolonial states innovated to deal with the return of cultural objects and the complex places that they might occupy at the intersections of anticolonial, national, regional, and communal imaginations?

These are some of the questions that have inspired this timely volume. Collectively, the articles assembled here explore a variety of legal frameworks and normative rationales that contribute to the redress of the colonial wrongs that were manifested in the extraction of cultural objects. The volume includes over twenty contributions, ranging in their engagements from international law to several domestic jurisdictions. The states encompassed include, from Asia: China, Indonesia, Nepal, and Sri Lanka; from Western Africa: Nigeria; from Western Europe: Austria, Belgium, France, Germany, the Netherlands, Sweden, Switzerland, and the United Kingdom (with separate papers on England and Scotland); and from the Americas: the United States and Suriname. Together with an essay on Myanmar in the section “Varia” of this volume, the contributions illuminate aspects of cultural heritage restitution and protection in sixteen states, under both international law and customary and Indigenous legal frameworks.

Speaking directly to the question whether colonial loot and its restitution is a matter of law, and if so, what kind of law, the issue opens with an interview with Alexandra Xanthaki, the current UN Special Rapporteur in the field of cultural rights. Xanthaki, who assumed this office in October 2021, confirms that legal obligations, grounded in international human rights law, are indeed involved in the restitution of colonial takings, though they lack due elaboration and clarification. She also offers her thoughts on various related questions, including the appropriate rightsholders in a restitution process between national governments of post-colonial states and communities; the need for new legal instruments; and how to characterize recent developments surrounding the return of specific objects such as the Benin Bronzes.

The remaining contributions take two principal forms. One is that of a “case study”, with articles addressing various categories of cultural heritage, ranging from living Gods, to spiritually or historically important objects, to fossils. Although this places tangible heritage in the foreground, a common thread across all the contributions is that intangible (heritage) values are often – if not always – at the centre of restitution requests by source communities of these tangible objects. In other words, cultural objects derive their value from within a matrix of past and present meanings, which is also what makes restitution both an imperative as well as a challenge in processual terms. The second form the contributions take is that of a “country report”, in which contributors analyse the laws, policies, and practices in selected states, including former colonial powers as “holding” states, and postcolonial states to which such objects may be returned. These contributions illuminate not just the obligation to return, and the demands for return, but also the processual questions about how returns are being, can be, and/or will be organized.

Thus, the first set of articles begins with the article by Oluwatoyin Sogbesan and Tokie Laotan-Brown, who are, *inter alia* and respectively, the founders of the Àsà Heritage Africa Foundation and the Foundation for the Preservation of Cultural Heritage in Nigeria. Sogbesan and Laotan-Brown focus on the centuries-old Emwin Arre, i.e. the bronzes, ivories, beads, and other artefacts that were produced in the Benin Kingdom, a flourishing political entity until the 19th century, when it was absorbed into British colonial Nigeria. At present, the Kingdom endures in a symbolic form as one of the traditional states within Nigeria. By providing an account of the customary laws of the Benin Kingdom, the authors argue that the Emwin Arre should return to the Oba of Benin, since he has the ancestral mandate to preserve and transmit the culture of the Benin Kingdom to future generations. In their view, the interstate model for return – which is preferred in the policies of Western European states that most often have the obligation to repatriate these objects – in fact represents the “perpetuation of the Euro-American colonial project”. They argue that any restitution model should take into account local laws and customs.

The next article within this set also focuses on the Benin Bronzes. Authored by legal scholar Carsten Stahn, the article identifies the Benin Bronzes as a game-changer in Western European and North American discourses and practices surrounding the return of cultural objects. Stahn highlights the accumulation of factors, both long-term and contemporary, that have enabled this shift. He then offers an examination of the legal foundations of the obligation to return, drawing on approaches from tort law, equity, and human rights law, and countering the objections that “modern-day responsibility would blame ‘people living today’ for the wrongs of the past”. Although optimistic about the development of a new ethics of return, Stahn also cautions that the present moment might be captured by cultural nationalism, and return transformed into “a cosmetic ritual of self-purification”. To guard against these possibilities, he develops a relational cultural justice approach and argues for reforms on the macro-level, particularly by way of develop-

ment of an international framework with clarification of the criteria and processes for return, and based on consultations with multiple stakeholders, notably the affected communities, going beyond the state-centric UNESCO format.

The third article, a collaboration between legal scholar Paul P. Stewens and paleobiologists Nussaibah B. Raja and Emma M. Dunne, draws our attention to a lesser-known category of cultural objects: fossils. The article explains that many fossils found today in the major natural history museums of the world represent a species of colonial removal, with expeditions to acquire them often a by-product of mining and civil engineering projects in colonial territories. The authors argue that contrary to some perceptions, fossils too are cultural objects, and explore the legal basis for their return by drawing on the “right to take part in cultural life” provided in Article 15 of the International Covenant on Economic, Social and Cultural Rights. They particularly examine the case of the Broken Hill skull, one of the best-preserved skulls of an ancient human, which was recovered in 1921 at Broken Hill, near the town of Kabwe in Zambia during open cast mining by the British South Africa Company. The skull, which is currently held by the Natural History Museum in London, has been the subject of a series of requests for return by both the Kabwe Town Council and the State of Zambia. With a case pending before the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, the authors take the opportunity to explore this UNESCO Committee and its work as a possible dispute resolution forum for such claims.

In the next article, scholar Elke Selter, a specialist in international heritage politics with particular ethnographic expertise on Nepal, foregrounds statues – such as the idol of Uma-Maheshwor – that are regarded not just as spiritual objects but as living Gods. The Uma-Maheshwor idol was stolen in 1982 from the village of Dhulikel, just outside Kathmandu. It found its way to the Museum of Indian Art in Berlin, from where it was duly returned to Nepal and placed in the Patan Museum in Lalitpur. However, the status of this idol as a living God has generated a demand for a further return – to its original location where it can be interacted with via the usual rituals of worship. Against this backdrop, Selter traces new developments in Nepalese law and policy that – by focusing on satisfying these demands for restoration from museum to shrine – are calling attention to the importance of intangible heritage values in shaping the meaning of heritage objects and the concepts of how they should/can be restituted. Drawing on her fieldwork, Selter also explores how questions of the material preservation of objects might intersect with the preservation of intangible heritage. She closes with reflections on both the specific question of the eventual home of the Uma-Maheshwor idol, as well as what the developments in Nepal might mean for the wider restitution debate.

The next two articles in this set both focus on claims concerning Indigenous cultural heritage held in western museum collections. Legal scholar and art historian Karolina Prażmowska-Marcinowska focuses on two objects held by the Muse-

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um of Ethnography in Stockholm: the G'psgolox Totem pole, taken from the Haisla First Nation in British Columbia in 1929; and the Maasa Kova, a ceremonial deer head belonging to the Yaqui People of Sonora (Mexico) and Arizona, taken from them in the 1930s. The article explores the claims of repatriation that have been advanced in relation to both objects, the pertinent mechanisms for return that are on offer in international cultural heritage law, and the place of Indigenous peoples' rights within these frameworks. Her analysis focuses on the potential of alternative dispute resolution frameworks to advance claims for return, and particularly the promise of the UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples to act as "an effective body to facilitate the repatriation of Indigenous peoples' cultural heritage".

Next, legal theorist and attorney Agnieszka Plata examines the case of an Aboriginal shield held by the British Museum. Until 2018 this shield was believed to be an artefact taken by the Cook Expedition in 1770 at Kamay (Botany Bay, near Sydney). Following a demand for its repatriation from an Indigenous descendant of the Gweagal people from whom the shield was believed to have been taken, and further research into its possible origin and taking, the British Museum has argued that its provenance is unclear and does not conform to the above narrative. Relying on this incident to illustrate some of the processual difficulties that can arise in the context of returning cultural objects, Plata then makes the case for the application of a theory of "hard cases" to broaden the debate beyond the scope of positive law, and allow considerations of "fairness, affiliation of the object, or spiritual values" to guide decisions on their return.

In the seventh article of this first set, legal scholar Naazima Kamardeen and heritage scholar Jos van Beurden, respectively based in Sri Lanka and the Netherlands, explore a cultural object that was taken from Sri Lanka and is currently held in the Netherlands. The object in question is a ceremonial cannon, which was looted by soldiers of the Dutch East India Company from the King of Kandy in 1765, and which is currently in the collection of the Dutch Rijksmuseum Amsterdam. Drawing on this incident, and in a multi-layered assessment of the contexts that animate questions about return and its accompanying processes, the article offers a historical overview of the European colonial domination of Ceylon (as it was then called). It then analyses Sri Lanka's legal title to the cannon, highlighting the discrepancy between the international and mostly Euro-centric legal regime on the one hand, and Sri Lanka's own legal framework on the other. The authors also examine the provenance research practices of the Rijksmuseum, and close with suggestions for greater balance and equality in such efforts.

The last two articles of this set have been placed in the section "Debuts". A standard rubric of this journal, "Debuts" presents new early career voices in the field. In the present issue, both the featured scholars investigate the possibilities that contemporary legal frameworks offer for the return of particular cultural objects. Ruida Chen tells the story of the monumental colonial plunder of Chinese cul-

tural objects in the 19th and early 20th centuries, and examines whether international treaties provide a legally-binding obligation for their return, concluding that unfortunately this is not the case. He also draws out the difficulties that claimant countries of origin face in establishing the history and trajectory of ownership of the taken objects. Next, Andreas Giorgallis discusses the possibilities for US courts to play a constructive role in adjudicating restitution claims with respect to colonial cultural objects under the provisions of the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (2016). He zeroes in on a largely unexplored clause which, being applicable to “takings of a systematic nature against members of a targeted and vulnerable group which have taken place after 1900”, might provide legal recourse for at least one subset of colonial takings – those “which have occurred after the dawn of the 20th century”.

We now come to the second set of contributions, which take the form of country reports, presented in alphabetical order. In the first, on Austria, legal scholar and historian Sebastian Spitra examines a new expert committee established by the Austrian government in January 2022 to study the colonial collections held by its museums – which constitutes a large inventory despite the general view that Austria did not have an extensive colonial past. The committee is also tasked with drafting guidelines for restitution and addressing the broader question of how post-colonial museology may be implemented in Austrian museums. Following an assessment of its role and potential, Spitra also tracks the broader restitution debate in Austria. He discusses the legal mechanisms that museums and the government might employ and suggests that Austria offers “an interesting example for other countries with public holdings of cultural objects from colonial contexts but without a history of direct colonialism”.

Next, in a report on Belgium, legal scholars Marie-Sophie de Clippele and Bert Demarsin discuss the enactment of a new “Restitution Bill”, which was formally adopted in July 2022 and entered into force in October. This new law, which enables the return of cultural objects linked to Belgium’s colonial past, is on the one hand a milestone: it is the first law “of its kind to be adopted by a former colonial power”, and an important landing point in the country’s efforts “to come to terms with its colonial past”. On the other hand, as the authors discuss, the Bill is “not all roses”, as it has definite limits: its scope is narrow, including only cultural objects from former Belgian colonies, and not archives or human remains; it also excludes the involvement of local communities from the states of origin; and its processual rules lack clarity and give the government a great deal of leeway in negotiating bilateral restitution agreements. The authors offer a thorough analysis of the law and its passage as well as its implications for future restitution projects.

As is now well understood, the British Empire’s vast reach expresses itself also in the enormous scale of its colonial cultural holdings. British museums – not to mention British castles, stately homes, and private collections – hold vast quantities of cultural objects taken in a colonial context. We thus have two contributions

on the United Kingdom, focusing respectively on England and Scotland. Writing on England, legal scholar and practitioner Lauren Burseley examines the range of legal obstacles that impede the deaccession from public collections and restitution of colonial loot. She also traces the failure of the United Kingdom to create a comprehensive policy of repatriation; analyses the role of national, regional, and university museums; and reports on the current debates and developments surrounding the return of such objects, finding several points of interest in a guidance issued by the Arts Council England in August 2022. Alongside her analysis, in their country report on Scotland the heads of museums in Aberdeen and Glasgow, Neil G.W. Curtis and Steph C. Scholten, sketch a more optimistic picture of museum practices in this part of the United Kingdom. After providing an overview of restitutions of colonial takings from Scottish museums – including the well-known return (already in 1999) of a Ghost Dance Shirt to the Lakota Sioux by Glasgow Museums – they analyse the legal and policy framework that enabled these returns. They discuss the differences in this regard between Scotland and the rest of the United Kingdom, speaking to “Scotland’s own complex relationship with colonialism as well as the political debate about the identity and future of the nation”.

From the United Kingdom to its former imperial rival, France. In his country report, legal historian Xavier Perrot traces the rapid developments in French law and policy following President Emmanuel Macron’s now famous speech of November 2017 in Ouagadougou, Burkina Faso. Announcing his support for the return of African cultural heritage to Africa, Macron also commissioned the now equally famous Savoy-Sarr Report (November 2018) on this matter. Since then, the French Parliament adopted new legislation in 2020. Perrot examines this law, its necessity (in France, as in several other European states, special laws are needed to “lift” the inalienability of public collections) and its passage; and points out its limits. In particular, the law is not a general law as in Belgium, but one focused exclusively on 27 cultural objects for return to Benin and Senegal. Perrot then discusses the prospects for a general law in the form of a “Generic Statute”.

The next country report is on Germany and is authored by Robert Peters, a government official in the Ministry of State for Culture and Media. Noting that President Macron’s speech also had an impact on other states, including Germany, as well as on the international museum community, Peters explains that it played a role in amplifying political voices in Germany that sought to remind the country that it too had a colonial past, and one manifested, *inter alia*, in vast colonial collections. Peters traces the developments thereafter “towards new political and ethical schemes on how to deal with collections from colonial contexts and, in a broader sense, how to come to terms with the colonial past”. In terms of particular holdings, this has included “the return of cultural objects and human remains to Namibia as well as the transfer of ownership of all Benin Bronzes held by German institutions to Nigeria”. But although significant, these returns, as Peters points out, are only aspects of a much-needed broader confrontation with questions concerning Germa-

ny's colonial history and the possibilities of structurally new relationships between Germany and states in Africa and elsewhere in the Global South.

The next report, on Indonesia, represents a collaboration between criminologist Emiline Smith, cultural geographer Rucitarahma Ristiawan, and archaeologist Tular Sudarmadi. These scholars provide a “broad overview of Indonesia’s current post-independence legislation and practice with respect to cultural heritage protection and repatriation”. Their layered analysis brings out several challenges which include, for the state, difficulties arising from the repatriation processes of foreign held objects; and for sub-statal communities difficulties arising from the very state-centric character of the discourse and policies that impede “locally-led activism related to cultural heritage, particularly in relation to value production and sense of ownership”. They note that against the backdrop of the violent colonial looting of Indonesian cultural heritage, restorative justice demands these objects should be returned to their communities of origin, or where this is not possible to the Indonesian government; and that the communities of origin should also benefit from these objects’ “digital and physical lives, i.e. the knowledge and expertise created based on these objects”.

With thematic appropriateness, the next report is on the Netherlands, with author Jos van Beurden making his second appearance in the volume. Here he explores Dutch law and practice, particularly in the context of restitutions to and claims from Indonesia, but also with an eye to the Netherlands’ other former colonial territories. He offers a fine-grained analysis of the provisions of, and possible frictions between, the Dutch Heritage Act adopted in 2016, and a 2021 Policy Vision on Collections from a Colonial Context. He also places Dutch practices relating to colonial cultural loot in two comparative contexts: the treatment of restitution claims concerning Nazi-looted art; and the approach that Belgium has taken towards its colonial cultural takings.

Skipping over Scotland, which has been discussed above, the next country report is from another state connected with Dutch imperialism: Suriname. Authored by legal scholar Nadia Rostam, this report is, to our knowledge, the first scholarly treatment of Surinamese cultural heritage law. Rostam explores how cultural objects are dealt with both within national and traditional customary law frameworks in Suriname, and also how these frameworks might interact and generate a legal context for claims for the return of cultural objects from the Netherlands. She points out the shortcomings of the existing Surinamese national law and upcoming legal reforms in addressing some key questions, including of rights to the cultural objects that were taken in a colonial context, and of appropriate sites and processes for their repatriation. The article ends with a call for more work on these issues, noting that there is “little to no academic research focused on the legal and traditional framework of the right of ownership of cultural objects of Suriname. Future studies should offer a more in-depth analysis of this issue, taking into account the laws and customs of the different tribes and communities in Suriname”.



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Rounding out the contributions, the final country report, on Switzerland, is authored by scholar and legal practitioner Karolina Kuprecht. She notes that although Switzerland did not officially hold any colonial territories, it was “substantially involved in colonization all over the world through its diplomats, foreign legionnaires, missionaries, scientists, traders, artists, and travellers in private missions or on assignment; even Swiss cities and cantons participated in the colonial European expansion”. The country thus has extensive public and private collections of colonial cultural objects, and currently “the decolonization of ethnological and historical museums and collections is in progress”. Kuprecht analyses these developments, noting their promise but also pointing out the still-widespread reluctance towards restitution, and the low level of understanding of provenance research and its goals. She calls for the development of regulations and guidelines that would realize the international human rights of Indigenous peoples to control their cultural heritage or have it returned to them.

Collectively the articles included in this volume offer a wide range of engagements with multiple jurisdictions, perspectives, and political and social contexts. They present different views on the facts, goals, and processes of restitution, and explore various models and notions of ownership across international, national, and customary legal systems. We were delighted that our hope of a geographically diverse set of analyses was also complemented by a vast disciplinary and professional diversity: the collection includes voices from law, history, anthropology, archaeology, geography, and heritage and conservation studies, as well as from academia, legal practice, museums, public foundations, and government. This adds up to a rich and multi-layered examination of the ongoing Western European efforts to reckon with their histories of empire in this particular area, as well as the questions that the restitution of cultural objects pose within the postcolonial states to which they will return. At the same time, we present this volume not in a conclusory spirit, but rather one of invitation. We echo Nadia Rostam’s call for further research, both into other jurisdictions and into the thorny questions that the various contributions here have raised, and we hope that all this work will inspire further informed and inclusive decision-making, initiatives, and perhaps even a rights-based international model for the restitution of colonial takings. Last but not least, we hope the clear links drawn here between colonial histories and cultural objects, and between material objects and the matrix of intangible values within which they acquire their past and contemporary meanings, will serve as signposts for future scholarship.

Speaking to the spirit of collaboration that has animated this entire special volume, we would like to thank the journal editors Andrzej Jakubowski and Alicja Jagielska-Burduk for a year of close, supportive, and fruitful cooperation. All four of us are also enormously grateful to the over fifty colleagues who have served as peer reviewers for these essays, giving generously of their time and expertise. And to you, dear readers, we thank you for engaging with this volume and wish you enjoyable, contemplative, and fruitful reading.