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The Return of Fossils Removed Under Colonial Rule

Abstract: Debates on the restitution of colonial loot usually focus on art, antiquities, religious artefacts, and similar objects. Many fossils of considerable scientific and cultural value were also removed under colonial rule, yet they rarely feature in these discussions despite being classified as cultural objects. This article seeks to shed light on the colonial removal of fossils and explore potential avenues for their return under public international law. Instead of focusing on the (il-)legality of colonial takings, we argue that the right to access culture has developed from the right to participate in cultural life in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides, if not a solid legal basis, a valuable set of arguments for former colonies requesting the return of fossils looted from their countries/territories of origin. The case study of the negotiations on the return of the Broken Hill skull 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 (ICPRCP) highlights the potential of this mechanism of dispute resolution with respect to fossils.

Keywords: cultural property, colonialism, repatriation, human rights, fossils, palaeontology

Introduction

Debates surrounding the restitution of cultural objects looted during colonial times have received increasing attention in recent years. Prominent artefacts like the Benin Bronzes are being repatriated to Nigeria,¹ and major host countries like France² are revising their policies on colonial loot. Restitution has typically been framed in ethical terms, since taking a legal avenue is challenging and often unsuccessful.

¹ F. Lister-Fell, *More Museums Take Steps to Return Benin Bronzes to Nigeria*, 13 April 2021, <https://www.museumsassociation.org/museums-journal/news/2021/04/more-museums-take-steps-to-return-benin-bronzes-to-nigeria/> [accessed: 13.05.2022].

² F. Sarr, B. Savoy, *The Restitution of African Cultural Heritage: Toward a New Relational Ethics*, 2018, http://restitutionreport2018.com/sarr_savoy_en.pdf [accessed: 13.05.2022].

cessful.³ This article sets out to contribute to the endeavour of exploring potential forms of legal redress, with an emphasis on an area of cultural property law that is most often overlooked: palaeontological objects in the form of fossils, i.e., remains or traces of prehistoric plants and animals (including early hominins) embedded in rock and preserved in petrified form. Fossils are covered by cultural property definitions in both international law and domestic legislation alike,⁴ and numerous cases of fossils being removed from their country of origin are documented from the colonial period.⁵

This study proceeds by first detailing accounts of fossils removed during colonial times, then turning to the legal classification of fossils under international law: Fossils are cultural objects, and have been considered as such since the colonial era. After a brief consideration of the parallels in the restitution debates concerning “conventional” cultural objects and fossils, we examine whether the right to take part in cultural life under Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶ is a promising avenue to achieve the return of removed fossils. As an alternative avenue, we explore the potential role of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) in facilitating negotiations for the return of fossils.

History of Fossils Removed Under Colonial Rule

Fossils are fundamental to the study and appreciation of the history of life. Consequently, they are highly sought after, and have been for centuries – not only by scientists for research purposes, but also for use in art, construction, and for decorative and recreation purposes.⁷ Fossils have had cultural importance since Palaeolithic times⁸ in the form of tools, offerings, jewellery, and currency.⁹ Fossils also seem to have inspired some animals that appear in the legends and tales of Native American tribes.¹⁰ Today, fossils are highly prized items among the rich and privileged,

³ A. Herman, *Restitution: The Return of Cultural Artefacts*, Lund Humphries, London 2021.

⁴ P.P. Stewens, *Two Ways of Thinking About Fossils: Palaeontological Objects Between Fossil Nationalism and Fossil Internationalism*, “Völkerrechtsblog”, 31 March 2022, <https://voelkerrechtsblog.org/two-ways-of-thinking-about-fossils/> [accessed: 05.05.2022].

⁵ See below.

⁶ 16 December 1966, 993 UNTS 3.

⁷ R. Sookias, *Sustainable Fossils: Past Life for the Present and Future*, MA thesis, Uppsala Universitet, 2011, <https://www.diva-portal.org/smash/get/diva2:451040/FULLTEXT01.pdf> [accessed: 22.08.2022].

⁸ M.H. Henriques, R. Pena dos Reis, *Framing the Palaeontological Heritage Within the Geological Heritage: An Integrative Vision*, “Geoheritage” 2015, Vol. 7.

⁹ F. Demnard, D. Néraudeau, *L'utilisation des oursins fossiles de la Préhistoire à l'époque gallo-romaine*, “Bulletin de la Société préhistorique française” 2001, Vol. 98.

¹⁰ A. Mayor, *Fossil Legends of the First Americans*, Princeton University Press, Princeton 2005.

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who spend a considerable amount of money in order to own them.¹¹ Palaeontology is a thriving scientific discipline, with many new fossil species being discovered and studied each year. Natural history museums are very popular cultural attractions the world over among both the public and tourist visitors. For example, the Natural History Museum (NHM) in London attracts over 5 million visitors annually. Fossils therefore possess a high cultural as well as material value, both for their countries of origin and the countries where they are housed.

Palaeontology, and the natural sciences more broadly, were developed around an extractive process facilitated by European colonialism in the 19th century. Numerous expeditions were organized with the specific goal of uncovering fossils, which often were by-products of the newly established mining industry in colonial States. Once uncovered, many of them were shipped back to natural history museums in imperial metropolises, which were rapidly expanding to accommodate the influx of scientific specimens.¹²

The NHM London is home to many fossils of colonial provenance. For example, as part of activities designed to serve British imperial interests in India, officers of the East India Company's army in the 1900s were involved in the collection of fossils, such as from the Siwalik Hills in northern India during the construction of the Doab Canal.¹³ The same is true of many other prominent natural history museums in Europe; dinosaur fossils collected by the French from Morocco,¹⁴ Algeria,¹⁵ and Madagascar¹⁶ are now housed in the Muséum national d'Histoire naturelle (MNHN) in Paris. Even European powers without colonies, like Austria, benefited from these practices through trade agreements on colonial objects, as the large collection of scientific items of colonial provenance at the Naturhistorisches Museum in Vienna demonstrates.¹⁷

The Broken Hill skull is one of the best-preserved skulls of a fossil hominin (ancient human), and at the time of its discovery was the first important hominin

¹¹ M.G. Muller, *Leonardo DiCaprio Is Making Collecting Dinosaur Bones a Hot Trend for Rich People*, 21 February 2019, <https://www.wmagazine.com/story/leonardo-dicaprio-collecting-dinosaur-bones-trend> [accessed: 22.08.2022].

¹² C. Manias, *Building Baluchitherium and Indricotherium: Imperial and International Networks in Early-Twentieth Century Paleontology*, "Journal of the History of Biology" 2015, Vol. 48.

¹³ S.P. Nair, "Eyes and No Eyes": *Siwalik Fossil Collecting and the Crafting of Indian Palaeontology (1830-1847)*, "Science in Context" 2005, Vol. 18(3).

¹⁴ R. Lavocat, *Sur les dinosauriens du Continental Intercalaire des Kem-Kem de la Daoura*, in: *Congrès géologique international: comptes rendus de la dix-neuvième session, Alger 1952*, Alger 1954.

¹⁵ A.F. de Lapparent, *Les dinosauriens du "Continental Intercalaire" du Sahara Central*, Société géologique de France, Paris 1960.

¹⁶ C. Depéret, *Note sur les dinosauriens sauropodes et théropodes du Crétacé supérieur de Madagascar*, "Bulletin de la Société géologique de France" 1896, Vol. 24.

¹⁷ C. Hickley, *Austria Sets Up Expert Panel to Develop Guidelines for Repatriating Colonial Loot*, 21 January 2022, <https://www.theartnewspaper.com/2022/01/21/austrian-expert-committee-to-develop-guidelines-for-repatriating-colonial-loot> [accessed: 12.05.2022].

fossil found in Africa.¹⁸ The skull was recovered at Broken Hill, near Kabwe in Zambia (then Northern Rhodesia) during open cast mining undertaken by the British South Africa Company in 1921. The skull was taken to London and still resides at the NHM today. In 1972, the Kabwe Town Council made a request to the Zambian government demanding the return of the skull; a request which was denied by the British Foreign and Commonwealth Office.¹⁹ The Zambian Parliament has also, on several occasions, requested the return of the skull.²⁰ A later section of this work will discuss the potential of the ICPRCP for the restitution of the Broken Hill skull through the facilitation of negotiations between Zambia and the UK.

The Tendaguru dinosaurs are another prominent example of fossils removed during colonial rule. Several tonnes of fossils from scientific expeditions, led separately by German and British palaeontologists, were transported from the Tendaguru Hills in modern-day Tanzania to Europe, particularly to the Museum für Naturkunde (MfN) in Berlin and the NHM in London.²¹ The German-led expeditions (1907-1913) were undertaken as a “matter of national honour” as the young nation of Germany was redefining itself. At the time, the fossil-rich sites in the United States (US) were already world-renowned, and Germany sought to compete.²² Bones uncovered in the Tendaguru Hills (then German East Africa) – which are now known to have been used for cultural and religious purposes by local communities²³ – were presented to a German mining engineer, sparking extensive and generously funded excavations. These fossils, including the MfN’s centrepiece fossil, the giant dinosaur *Giraffatitan*, are now exhibited in the public galleries; unrecognized by visitors as a testament to the country’s colonial past.

Following almost five decades of negotiations, the Tanzanian government has abandoned the request for the restitution of these fossils in favour of enlisting the help of the MfN to promote palaeontological research in Tanzania.²⁴ The *Giraffatitan* is now considered to be part of Germany’s cultural assets and has been includ-

¹⁸ R. Grün et al., *Dating the Skull from Broken Hill, Zambia, and Its Position in Human Evolution*, “Nature” 2020, Vol. 580.

¹⁹ A.H. Mulongo, *The Broken Hill Skull: A Zambian Case*, “Museum” 1992, Vol. 44.

²⁰ *Zambia’s Quest for the Return of Broken Hill Man Skull: A Presentation to the 20th Session of the Inter-governmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*, September 2016, <https://documents.in/document/zambias-quest-for-the-return-of-broken-hill-man-zambias-quest-for-the.html> [accessed: 14.05.2022].

²¹ G. Maier, *African Dinosaurs Unearthed: The Tendaguru Expeditions*, Indiana University Press, Bloomington 2003.

²² Ibidem.

²³ M. Søndergaard, *Tendaguru fossilerne: global identitetsforhandling om national identitet*, MA thesis, Aarhus University, 2018.

²⁴ E. Qorro, *Germany to Help Tanzania Promote Tendaguru Dinosaur*, 14 March 2018, <https://www.ippmedia.com/en/news/germany-help-tanzania-promote-tendaguru-dinosaur> [accessed: 11.10.2021].

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ed in the German register of cultural property of national significance,²⁵ meaning its export would be illegal (Cultural Property Protection Act, Section 22(1)). After the First World War, German East Africa was divided, with the territory containing Tendaguru administered by the British. Another series of expeditions (1924-1931) followed, this time organized by the NHM.²⁶

Another important hominin fossil, the Java Man, was collected in the 1890s on the island of Java, then part of the Dutch East Indies, during a fossil-hunting expedition led by Dutch physician Eugène Dubois, a medic in the Dutch Indies army who advocated for the exploitation of the Indies' resources, including their fossils, for Dutch national prestige.²⁷ In the 1930s, the Geological Survey of the Netherlands Indies excavated other important hominin fossils from Java, namely the Ngandong skulls and the Mojokerto child which, alongside the Java Man, are all still housed at Naturalis Biodiversity Center in the Netherlands.²⁸ The Java Man fossil is currently part of a permanent exhibition where the Dutch public and visitors can learn about human evolution and Dubois' discoveries in Java.

This brief overview reveals the prevalence of fossil removal under colonial rule by virtually all major European colonial powers. While this dimension does not feature prominently in debates on colonial restitution (not least because natural history museums have been reluctant to engage in conversations about the provenance of their collections²⁹), it is part of the involvement of science and scientists in extractive colonial practices and has culminated in a highly inequitable geographical distribution of the former colonies' palaeontological heritage.

Fossils as Cultural Objects

An argument frequently invoked against the repatriation of fossils is that "unlike archaeological artefacts, fossils are not related to any geopolitical boundaries, history or culture of a specific people, region or country".³⁰ This section briefly outlines why fossils are indeed cultural objects – not only under the contemporary legal regime, but also at the time of the takings of colonial fossils.

²⁵ *Kulturgutschutzgesetz* [Cultural Property Protection Act], 31 July 2016, *Bundesgesetzblatt* 2016 Part I p. 1914, Section 7; the entire skeleton was entered into the register on 19 May 2011 under the registration number 03901.

²⁶ G. Maier, *op. cit.*

²⁷ C. Drieënhuizen, F. Sysling, *Java Man and the Politics of Natural History: An Object Biography*, "Journal of the Humanities and Social Sciences of Southeast Asia" 2021, Vol. 177.

²⁸ J.C.A. Joordens et al., *Homo Erectus at Trinil on Java Used Shells for Tool Production and Engraving*, "Nature" 2015, Vol. 518.

²⁹ J. Ashby, R. Machin, *Legacies of Colonial Violence in Natural History Collections*, "Journal of Natural Science Collections" 2021, Vol. 8; S. Das, M. Lowe, *Nature Read in Black and White: Decolonial Approaches to Interpreting Natural History Collections*, "Journal of Natural Science Collections" 2018, Vol. 6.

³⁰ J.C. Cisneros et al., *Digging Deeper into Colonial Palaeontological Practices in Modern Day Mexico and Brazil*, "Royal Society Open Science" 2022, Vol. 9(3).

Classification *de lege lata*

Although they receive comparatively little attention, palaeontological objects feature in cultural property definitions across jurisdictions and in international agreements. Article 1(a) of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the 1970 UNESCO Convention”)³¹ extends its scope to “objects of palaeontological interest”, an approach also adopted by the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Property Objects³² and the European Union Regulation 2019/880.³³ Also, European Union Regulation 116/2009 applies to “Collections of historical, palaeontological, ethnographic or numismatic interest” by virtue of Article 1 in conjunction with no. 13(b) of its annex.³⁴

In response to these instruments, and in some cases even prior to them, many States have passed domestic legislation that defines fossils as cultural objects and affords them legal protection.³⁵ Higher income countries that perform a large proportion of their research on foreign-collected fossils³⁶ often classify fossils as cultural objects, as for example in Germany³⁷ and France.³⁸ Also many fossil-rich source nations like Tanzania³⁹ or Madagascar,⁴⁰ which have experienced a fossil drain since colonial times (that continues to this day) also include fossils in their national heritage laws.⁴¹ Their widespread inclusion in the definitions of interna-

³¹ 14 November 1970, 823 UNTS 231.

³² 24 June 1995, 2421 UNTS 457, Annex.

³³ Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, OJ L 151, 7.06.2019, p. 1.

³⁴ Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Codified version), OJ L 39, 10.02.2009, p. 1.

³⁵ K.V. Browne, T. Dashdorj, *Mongolia's Fossilised Heritage*, “Inner Asia” 2022, Vol. 24; J.C. Cisneros et al., op. cit.

³⁶ N.B. Raja et al., *Colonial History and Global Economics Distort Our Understanding of Deep-Time Biodiversity*, “Nature Ecology & Evolution” 2022, Vol. 6.

³⁷ Cultural Property Protection Act, Section 2(1) no. 10.

³⁸ *Code du patrimoine* [Heritage Code], Annex 1, No. 13(b), https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074236 [accessed: 30.08.2022].

³⁹ Antiquities Act, 1 August 1964, R.L. Cap. 550, <https://www.tanzanialaws.com/principal-legislation/antiquities-act> [accessed: 30.08.2022]. The definition under Tanzanian law is particularly detailed and entails “any human or other vertebrate faunal or botanical fossil remains or impressions” (Section 2(1)).

⁴⁰ *Ordonnance n° 82-029 du 6 novembre 1982 relative à la protection, la sauvegarde et la conservation du patrimoine national* [Ordinance No. 82-029 of 6 November 1982 on the Safeguarding, Protection and Conservation of the National Heritage], *Journal officiel de la République démocratique de Madagascar* 1524, 6 November 1982, p. 2513. This piece of legislation interestingly even lists “le produit des fouilles et des découvertes archéologiques ou paléontologiques” (the proceeds of archaeological or palaeontological excavations and finds) in Article 1(B)(a), which declares the heritage status of “Toute création artistique et littéraire” (Any artistic and literary creation).

⁴¹ N.B. Raja et al., op. cit.

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tional instruments and national laws leaves little doubt that under the law fossils are cultural objects.⁴²

An intertemporal classification

At the international level, the *lex lata* according to which fossils are cultural objects began emerging in 1970, after the formal end of colonial rule in many countries. According to the intertemporal rule in international law, “a juridical fact must be appreciated in the light of the law contemporary with it”.⁴³ Consequently, the classification of fossils as cultural objects as of 1970 is insufficient to infer that palaeontological objects unearthed earlier already hold this status.

The inclusion of fossils in the 1970 UNESCO Convention was in line with previous tendencies in cultural property law. A 1962 report on previous regulatory efforts pointed to two instruments referring to fossils.⁴⁴ The report noted the contribution to defining cultural property made by the 1950 Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs, which listed pal[a]eontological objects as customs category 99.05 within the chapter on artworks.⁴⁵ The predecessor of the International Council of Museums submitted a draft convention on the repatriation of cultural objects⁴⁶ to the League of Nations in 1933, which was extended to include palaeontological objects when it was re-circulated among member states in 1936 after consideration in the Committee on Intellectual Co-operation.⁴⁷

This appears to be the first reference to palaeontological objects in a (draft) multilateral treaty. However, the recognition that objects of art *and* science are related in their need for protection dates back to the early 19th century. Early international humanitarian law instruments like the 1907 Hague Regulations⁴⁸ refer to

⁴² P.P. Stewens, op. cit.

⁴³ *Island of Palmas Case (Netherlands v. United States of America)*, 4 April 1928, 2 RIAA 829, p. 845; see generally M. Kotzur, *Intertemporal Law*, in: *Max Planck Encyclopedia of Public International Law*, 2008.

⁴⁴ UNESCO, *Technical and Legal Aspects of the Preparation of International Regulations to Prevent the Illicit Export, Import and Sale of Cultural Property*, 14 April 1962, UNESCO Doc. CUA/115.

⁴⁵ *Gesetz zu dem Berichtigungsprotokoll vom 1. Juli 1955 zu dem Abkommen über das Zolltarifschema für die Einreihung der Waren in die Zolltarife* [Law relating to the Protocol of Amendment of 1 July 1955 to the Convention on Nomenclature for the Classification of Goods in Customs Tariffs], *Bundesgesetzblatt* 1960 Part II p. 470.

⁴⁶ Draft International Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest which have been Lost or Stolen or Unlawfully Alienated or Exported, 1933, LN Doc. CL.205.1933.XII, Annex.

⁴⁷ Draft International Convention for the Protection of National Historic or Artistic Treasures, 1936, LN Doc. C.L.34.1936.XII, Annex, Art. 1(1).

⁴⁸ Convention (IV) respecting the Laws and Customs of War on Land, and Its Annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, 2 AJIL 90, Arts. 27 and 56.

this conceptual pair,⁴⁹ and European powers widely agreed during the Congress of Vienna that the French takings of art works, manuscripts, and scientific specimens were incompatible with then-contemporary international law.⁵⁰ This reveals that long prior to the 1970 UNESCO Convention, scientific objects have been considered worthy of the same protection as works of art. The assertion that fossils are “not cultural enough” to be considered cultural objects is not only wrong with respect to the law as it stands: it does not hold up by the standards of the 19th and early 20th centuries either.

Remedies for Colonial Fossil Removal

A human rights-based approach: the right to access culture

Approaching the issue of artefacts removed under colonialism with a focus on the legality of the taking is a challenging task. Although colonial looting was most likely inconsistent with an established rule of customary law, this rule was applied asymmetrically; that is, only in a European context.⁵¹ Thus assessing the legal and factual circumstances during colonial times is very difficult and requires navigating through attached questions of ownership, title, standing, and timeliness.⁵² An approach that relies on contemporary international law may fare better. The ICPRCP has expressed its support for this shift in perspective by acknowledging that legislation (or lack thereof) at the time of removal should not be the only consideration concerning restitution.⁵³

There is an ongoing trend towards the “humanization of cultural property law”,⁵⁴ i.e., a stronger consideration of arguments based on international human

⁴⁹ A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006, pp. 67-71.

⁵⁰ *Ibidem*, pp. 24-26. This emerging customary rule against the removal of cultural objects was applied asymmetrically, i.e., exclusively to European powers, leaving the return of non-European artefacts out of consideration. Removed colonial objects were collected for metropolitan museums and kept and exhibited there: first discriminatorily as objects of (ethnographic/anthropological) science, later as works of art: *ibidem*, p. 2.

⁵¹ E. Campfens, *The Bangwa Queen: Artifact or Heritage?*, “International Journal of Cultural Property” 2019, Vol. 26(1), pp. 86-87.

⁵² S. Kiwara-Wilson, *Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories*, “DePaul Journal of Art, Technology and Intellectual Property Law” 2013, Vol. 23; C. Gates, *Who Owns African Art? Envisioning a Legal Framework for the Restitution of African Cultural Heritage*, “International Comparative, Policy & Ethics Law Review” 2019, Vol. 3(3).

⁵³ ICPRCP, *Decisions of the 21st Session*, May 2018, UNESCO Doc. ICPRCP/18/21.COM/Decisions, Recommendation 21.COM 8, para. 4. This view was reiterated in ICPRCP, *Decisions of the 22nd Session*, September 2021, UNESCO Doc. ICPRCP/21/22.COM/Decisions, Recommendation 22.COM 7, para. 2.

⁵⁴ E. Campfens, *op. cit.*, p. 100.

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rights law.⁵⁵ Part of the tendency to recognize the value of cultural heritage for communities⁵⁶ has included approaching the issue of the return of cultural artefacts removed under colonial rule from a human rights angle. This approach derives a right to access cultural objects from the right to take part in cultural life in Article 15(1)(a) ICESCR and tries to establish the physical absence of a community's cultural objects as an ongoing human rights violation.⁵⁷

In this context, other human rights have been discussed in a 2011 Report on the right to access and enjoyment of cultural heritage (“the 2011 Report”).⁵⁸ Although compelling arguments have been made concerning the right of Indigenous peoples to the repatriation of sacred artefacts,⁵⁹ this study limits itself to Article 15(1)(a) of ICESCR as it is difficult to establish a connection between most fossils removed in colonial times and certain minority or even Indigenous groups. Similarly, the nexus between fossils and other discussed human rights like those to property or to freedom of thought is too loose to provide a plausible starting point for a human rights-based approach.

Scope and content

The Committee on Economic, Social and Cultural Rights (CESCR) considers the right to take part in cultural life as a freedom whose three main dimensions are participation, access, and contribution to cultural life.⁶⁰ The right to access is key to cultural property repatriation, since the CESCR requires the availability of cultural goods and services as a necessary condition for the enjoyment of the right.⁶¹ Fossils are cultural objects,⁶² but Article 15(1)(a) refers to *cultural life*, not *cultural property*. While cultural property protection and human rights law are distinct regimes whose terminology should not be conflated, the former provides an instructive background for the interpretation of the term “cultural life” in Article 15(1)(a)

⁵⁵ A.F. Vrdoljak, *Human Rights and Illicit Trade in Cultural Objects*, in: S. Borelli, F. Lenzerini (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, Nijhoff, Leiden 2012; S. Mackenzie, D. Yates, *Trafficking Cultural Objects and Human Rights*, in: *The Routledge International Handbook of Criminology and Human Rights*, Routledge, Abingdon 2017, pp. 221-223; E. Campfens, op. cit., p. 98.

⁵⁶ As evidenced, for instance, by the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS 199.

⁵⁷ E. Campfens, op. cit., pp. 99-100.

⁵⁸ Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, 21 March 2011, UN Doc. A/HRC/17/38, paras 37-48; for further potentially relevant human rights, see A.F. Vrdoljak, *Human Rights...*, p. 127.

⁵⁹ V.M. Tümsmeyer, *Repatriation of Sacred Indigenous Cultural Heritage and the Law: Lessons from the United States and Canada*, Springer, Cham 2022.

⁶⁰ CESCR, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, UN Doc. E/C.12/GC/21, paras. 6, 15.

⁶¹ *Ibidem*, para. 16(a).

⁶² See above.

ICESCR in light of its context.⁶³ The CESCR, favouring a “broad, inclusive concept”, later added a non-exhaustive list according to which the cultural objects and services that must be available to everyone include “the flora and fauna found there, which give nations their character and biodiversity”.⁶⁴

Just as extant animals and plants characterize and identify regions across the globe, fossils are the physical representation of the millions (or even billions) of years of biodiversity that existed in these places before the present day. Fossils, especially dinosaur fossils, are often considered a “gateway” topic through which young people become interested in the sciences more broadly.⁶⁵ Many nations have designated native animals and/or plants as national symbols based on their cultural significance.⁶⁶ Many US states have “state fossils” to highlight their importance and heritage.⁶⁷ In Australia, states are encouraged to adopt fossil emblems to promote the protection of fossil sites.⁶⁸ Fossils have also inspired place names, such as in the case of Asthipura (literally, “town of bones”), in the region of the Siwalik Hills, where the fossils uncovered there were said to be from beasts who perished in the mythic battle of the *Mahābhārata*.⁶⁹ The importance of fossils to society has even been advanced as a ground for their restitution (albeit in a European context). When the city of Maastricht requested the return of a *Mosasaurus* fossil taken by Napoleonic troops in 1794, it stated that the fossil was intrinsic to its heritage, while the French considered it culturally important by virtue of having been central to the research of George Cuvier, the “founding father” of palaeontology.⁷⁰

Fossils clearly contribute to the character of a nation and are covered by the right of access to culture as cultural goods. The view that “fossils have no national identity”⁷¹ is therefore mistaken. However, not every fossil is equally important

⁶³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(2).

⁶⁴ CESCR, *General Comment No. 21*..., paras. 11, 16(a).

⁶⁵ T. Clements et al., *The Perception of Palaeontology in Commercial Off-the-Shelf Video Games and an Assessment of Their Potential as Educational Tools*, “EGUsphere” 2022, <https://gc.copernicus.org/articles/5/289/2022/> [accessed: 19.12.2022].

⁶⁶ J. Zhu, *The Modern Totem: An Overview of the National Animal and Its Role in Forming National Identity*, “Pi Sigma Alpha Undergraduate Journal of Politics” 2021, Vol. 21.

⁶⁷ Official State Mineral, Fossil, and Quartz Designated, House Resolution No. 517-1385 of 18 March 1976; Official Code of Georgia Annotated, § 50-3-56.

⁶⁸ J. Long, *Australia Needs More State Fossil Emblems, but Let the Public Decide*, 7 September 2015, <http://theconversation.com/australia-needs-more-state-fossil-emblems-but-let-the-public-decide-46930> [accessed: 13.05.2022]; I.G. Percival, *Protection and Preservation of Australia’s Palaeontological Heritage*, “Geoheritage” 2014, Vol. 6.

⁶⁹ A. van der Geer, M. Dermitzakis, J. de Vos, *Fossil Folklore from India: The Siwalik Hills and the Mahābhārata*, “Folklore” 2008, Vol. 119(1); A. Mayor, *Place Names Describing Fossils in Oral Traditions*, in: L. Piccardi, W.B. Masse (eds.), *Myth and Geology*, Geological Society of London, London 2007.

⁷⁰ M. Simons, *Maastricht Journal; Dutch Want Back the Fossil Napoleon Took Away*, “The New York Times”, 7 June 1996.

⁷¹ J. Martin, *Dodgy Fossils: International Legislation and the Meaning of “Cultural Property”*, “The Geological Curator” 2018, Vol. 10(10), p. 615.

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to the nation; most scientific and public attention is paid to rare and “charismatic” fossils, such as dinosaurs and hominins (as evidenced by the cases above), instead of smaller, more abundant fossils such as trilobites and molluscs.

Regarding the content of the right to access culture, contracting States must under any circumstances fulfil their core obligation, which includes eliminating any barriers to access someone’s “own culture or to other cultures”.⁷² States must respect this right by adopting policies aimed at realizing the “right to seek, receive and impart information and ideas of all kinds [...], regardless of frontiers of any kind”, which in turn implies the right to have access to cultural goods.⁷³

A general or a concrete right?

The CESCR’s assertion that the right to access extends to both their “own culture and that of others”⁷⁴ seemingly implies a general right to access culture, rather than a concrete object-specific right based on cultural ownership. However, the CESCR has moved beyond the drafters’ focus on democratizing high culture⁷⁵ by finding a right to access for individuals and communities to “cultural heritages that are meaningful to them”.⁷⁶ That individuals must have access to both their own culture and that of others thus raises the question of competing interests. To address this, the 2011 HRC Report suggests recognizing “varying degrees of access” by considering the interests and relationships of individuals or groups to an object, listing different parties by their cultural proximity to the object in descending order.⁷⁷ This list has convincingly been argued to be hierarchical,⁷⁸ with source communities being entitled to access and enjoyment to the greatest degree.⁷⁹

Taking into account the example of the Broken Hill skull, the interest of the British public would carry less weight than that of the people of Zambia, inasmuch as fossils – when placed in the context of their area of origin, particularly with respect to local landmarks, industry, and social history – are considered to provide

⁷² CESCR, *General Comment No. 21*..., para. 35(d).

⁷³ *Ibidem*, para. 49(b).

⁷⁴ *Ibidem*, para. 15; see similarly paras. 49(b) and 52(d); see also: Human Rights Council, *Report*..., UN Doc. A/HRC/17/38, paras. 2, 10, 34, 46, 59, 61, 80(j).

⁷⁵ B. Saul, D. Kinley, J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, Oxford University Press, Oxford 2014, p. 1181.

⁷⁶ Human Rights Council, *Report*..., UN Doc. A/HRC/17/38, para. 34.

⁷⁷ *Ibidem*, para. 62.

⁷⁸ L. Belder, *The Right of Access to and Enjoyment of Cultural Heritage – Report 2011 (A/HRC/17/38)*, in: L. Belder, H. Porsdam (eds.), *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations*, Edward Elgar Publishing, Cheltenham 2017, p. 68.

⁷⁹ E. Campfens, *op. cit.*, p. 99; Vanessa Tümsmeyer also subscribes to a balancing of interests, but underscores the difficulties attached to this approach, where the “outcome is dependent on an underlying value frame which, consciously or not, ranks respective interests according to their perceived ‘worth’”: V.M. Tümsmeyer, *op. cit.*, pp. 90-92.

important educational opportunities allowing for a greater appreciation of local natural history.⁸⁰ A similar reasoning underlies the 1970 UNESCO Convention.⁸¹ This added value provides further support for ascribing greater weight to the interests of source-nation nationals.

Forms of access

This in turn raises the question of how the different degrees of access could be realized. Accessibility is another necessary fulfilment condition⁸² and must be granted without discrimination.⁸³ There are four access categories: physical, economic, information, and participatory procedures. Physical access is key for the repatriation of items removed in colonial times, and while the CESCO has considered the issue of access particularly with regard to the elderly and persons with disabilities,⁸⁴ the presence of a cultural object in its source country is not only a plausible component of the physical dimension: it is a precondition for all other forms of access mentioned above.

There are, of course, different forms of granting access. Proposed models include mutually beneficial repatriation agreements (MBRAs, which typically combine repatriation with cyclical or long-term loans to the host country); digital repatriation; touring exhibitions in the source country; as well as unconditional legal and physical return.⁸⁵ It has also been suggested that major European museums could establish branches in Africa to which African cultural objects would then be transferred.⁸⁶

Both the *status quo* (i.e. with the object remaining in Europe) and an unconditional repatriation represent “extreme” positions where exclusive access is granted to either the host or the source country. The other approaches to access listed above attempt to strike a balance between the “varying interests” of different parties in accordance with their cultural proximity to an object. In this continuum, digital access and/or purely legal restitution⁸⁷ is too close to the *status quo* to satisfy

⁸⁰ Numerous museums adopt such an approach, e.g., the University of Birmingham, *About the Lapworth Museum of Geology*, <https://www.birmingham.ac.uk/facilities/lapworth-museum/about/index.aspx> [accessed: 13.05.2022].

⁸¹ The third recital of its preamble determines that the “true value” of cultural objects “can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting”.

⁸² CESCO, *General Comment No. 21*..., para. 16.

⁸³ Human Rights Council, *Report...*, UN Doc. A/HRC/17/38, para. 60.

⁸⁴ B. Saul, D. Kinley, J. Mowbray, op. cit., p. 1209.

⁸⁵ J. Snowball, A. Collins, E. Nwauche, *Examining Restitution and Repatriation Options for Cultural Artefacts: An Empirical Enquiry in South Africa*, “International Journal of Cultural Policy” 2021, Vol. 28(5), pp. 2-5.

⁸⁶ C. Gates, op. cit., p. 1160.

⁸⁷ For a critical evaluation of the immaterial restitution approach, see G. Lwanzo Kasongo, *Is Immaterial Restitution Enough?*, “Völkerrechtsblog”, 3 November 2021, <https://voelkerrechtsblog.org/a-belgian-approach-to-the-human-right-of-access-to-cultural-heritage/> [accessed: 10.05.2022].

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the requirements for physical access, which may be only complemented by digital technologies.⁸⁸ Solutions like touring exhibitions or MBRA can generally be expected to roughly cover the middle ground between the parties. The establishment of a local museum branch in a former colony is arguably a compromise, one that is most heavily skewed towards the interests of the source country population (short of unconditional repatriation). The repatriation of an object to its source country in conjunction with digital access for other parties might also satisfactorily balance the interests of different groups.

Extraterritoriality

States generally owe their human rights obligations to individuals on their territory, but the increasing international connectedness and the growing role of state conduct with international implications have given rise to the notion of extraterritorial human rights obligations.⁸⁹ This includes the diagonal dimension of the human right to access cultural objects located abroad. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (the “Maastricht Principles”)⁹⁰ constitute a core soft law document, and consider States to be bound in situations where acts or omissions of the State foreseeably affect cultural rights, regardless of territorial boundaries (Principle 9 b). States limit the right of access to culture of the individuals in source countries when they refuse to return cultural objects to those source countries. The due diligence requirement inherent in this formulation is met especially in cases where a return of a disputed object has been requested.

Host nations’ obligations can take different forms⁹¹ and depend on whether the object in question is located in an institution whose conduct can be attributed to the host State. Maastricht Principle 12 provides for the attribution of conduct by non-state entities exercising “elements of governmental authority”, which includes many museums holding fossils removed during colonial times to the respective State. The MfN, for instance, is a public law foundation⁹² and as such fulfils certain

⁸⁸ Human Rights Council, *Report...*, UN Doc. A/HRC/17/38, para. 60.

⁸⁹ F. Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, “Human Rights Law Review” 2011, Vol. 11(1).

⁹⁰ *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ETO Consortium, Heidelberg 2013, https://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf [accessed: 26.04.2022].

⁹¹ W. Kälin, J. Künzli, *The Law of International Human Rights Protection*, 2nd ed., Oxford University Press, Oxford 2019, pp. 87-89.

⁹² *Gesetz über die Stiftung Museum für Naturkunde – Leibniz-Institut für Evolutions- und Biodiversitätsforschung an der Humboldt-Universität zu Berlin* [Law on the Foundation Museum für Naturkunde – Leibniz Institute for Evolution and Biodiversity Science at the Humboldt University of Berlin], 29 October 2008, Bayerisches Gesetz- und Verordnungsblatt 2008, 315, § 1(1).

governmental functions.⁹³ It can therefore be characterized as an entity exercising governmental authority. The case of the NHM is somewhat similar: It has the legal status of a non-departmental public body (NDPB),⁹⁴ meaning it operates under some degree of autonomy from the government but fulfils governmental functions.⁹⁵ The MNHN is explicitly characterized as a public institution.⁹⁶ Whenever the denial of access to a cultural object can be attributed to the State, one might go so far as to consider keeping a fossil on the other side of the world a violation of the duty to respect the right to access culture.⁹⁷

Host States must cooperate with source nations to progressively achieve the full realization of Covenant rights (Article 2(1) ICESCR), a duty that also follows from Articles 55 and 56 of the UN Charter⁹⁸ and is explicitly mentioned in provisions across the Covenant, including Article 15(4). The CESCR has addressed this obligation in *General Comment No. 3*⁹⁹ and reiterated it with regard to Article 15(1)(a).¹⁰⁰ These well-established principles of international law are also contained in the Maastricht Principles, which provide that States must consider a request to assist or cooperate in good faith and respond in accordance with their obligations (Principle 35).

The obligation to cooperate is triggered irrespective of which entity holds the fossil; is rooted in sound principles of international law; and as an obligation of conduct allows for a certain flexibility in finding a solution to access that respects the human rights of all parties involved. It would therefore seem advisable for governments requesting the return of fossils to explicitly state that this is a human rights issue which the host State is obligated to cooperate on. Requests for the return of fossils of colonial provenance are essentially calls for international cooperation

⁹³ R. Hüttemann, P. Rawert, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 1: Allgemeiner Teil: §§ 80-89 (Stiftungsrecht)*, Sellier-de Gruyter, Berlin 2017, para. 407.

⁹⁴ The Natural History Museum, *Governance Principles and Procedures*, p. 3, <https://www.nhm.ac.uk/content/dam/nhmwww/about-us/governance/policies-and-procedures/governance-principles-2021.pdf> [accessed: 12.05.2022].

⁹⁵ H. Davis, *Public Authorities as “Victims” Under the Human Rights Act*, “The Cambridge Law Journal” 2005, Vol. 64(2), pp. 322-323.

⁹⁶ *Décret n°2001-916 du 3 octobre 2001 relatif au Muséum national d’histoire naturelle* [Decree No. 2001-916 of 3 October 2001 on the National Natural History Museum], *Journal officiel de la République française* 233, 7 October 2001, Art. 1.

⁹⁷ It is important to note, however, that classifying this as a human rights violation does not necessarily imply a duty to repatriate. While the *status quo* is incompatible with the population of the source nation’s right to access fossils, this access can be realized in different ways including, but not limited to, repatriation; see above.

⁹⁸ Charter of the United Nations, 26 June 1945, 1 UNTS XVI.

⁹⁹ CESCR, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, UN Doc. E/1991/23, paras. 13-14.

¹⁰⁰ CESCR, *General Comment No. 21*..., para. 57.

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in ensuring the right to access culture – and it seems highly doubtful whether past responses by Western governments meet the good faith requirement.

Right-holders and legal standing

The right to participate in cultural life is held by both individuals and groups.¹⁰¹ Entities that can have standing vis-à-vis cultural rights¹⁰² include individuals, groups as a collective right-holding entity, and representative actions on behalf of a group e.g. by NGOs or States.¹⁰³ The assumption that there is a concrete right to access specific cultural objects of one's own culture raises the question of who can claim an object. In this article we have considered fossils to represent the flora and fauna that give a nation its character, making the only sensible conclusion that claims to fossils need to be tied to the source nation. The notion of a national culture has been present in the ICESCR *travaux* already¹⁰⁴ and is often referenced in the context of minority rights, where it must not be imposed on such groups.¹⁰⁵ That national groups can hold rights under the Covenant is evident through the right to self-determination in Article 1(1). Also, the notion of national patrimony was present at the very beginning of cultural property law, when States during the Congress of Vienna argued for the restitution of cultural objects removed under French occupation by virtue of them belonging to the nation.¹⁰⁶

Consequently, only States would automatically have standing concerning the right to access fossils. Governments could claim the right to access a fossil of its population in an inter-state complaint procedure like that under Article 10 of the ICESCR's Optional Protocol¹⁰⁷ (OP-ICESCR), as States are encouraged (Maastricht Principle 39)¹⁰⁸ and indeed required to consider the "distinctive identity of the national culture as a whole".¹⁰⁹ Moreover, source countries must also seek assistance

¹⁰¹ Ibidem, para. 9.

¹⁰² This presupposes the justiciability of cultural rights. While this remains contested, there is considerable evidence for not dismissing this possibility in principle: E. Riedel, *Committee on Economic, Social and Cultural Rights (CESCR)*, in: *Max Planck Encyclopedia of Public International Law*, 2010, para. 51; G. Staberock, *Human Rights, Domestic Implementation*, in: *Max Planck Encyclopedia of Public International Law*, 2011, para. 35.

¹⁰³ A.F. Vrdoljak, *Standing and Collective Cultural Rights*, in: A. Jakubowski (ed.), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill Nijhoff, Leiden 2016.

¹⁰⁴ Indeed, most delegations favoured the national community as a reference entity: A.F. Vrdoljak, *Human Rights...*, p. 134.

¹⁰⁵ Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed: Addendum, Mission to Brazil*, 21 March 2011, UN Doc. A/HRC/17/38/Add.1, para. 11.

¹⁰⁶ A.F. Vrdoljak, *International Law...*, pp. 22-33.

¹⁰⁷ United Nations General Assembly, *Resolution 63/117: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, UN Doc. A/RES/63/117.

¹⁰⁸ See also E. Askin, *Economic and Social Rights, Extraterritorial Application*, in: *Max Planck Encyclopedia of Public International Law*, 2019, para. 42.

¹⁰⁹ R. O'Keefe, *Cultural Life, Right to Participate in, International Protection*, in: *Max Planck Encyclopedia of Public International Law*, 2020, para. 15.

in ensuring the enjoyment of cultural rights (Maastricht Principle 34), which emanates from the duty to cooperate in Article 2(1) ICESCR. On the other hand, the notion of a distinct legal standing for a national group collapses into the standing of the State. The African Commission on Human and Peoples' Rights found that the Endorois people were free to determine who could represent them in accordance with their own laws and customs.¹¹⁰ This finding originates from the context of Indigenous rights, where the need for self-determination and respect for traditional norms applies with particular force. Nevertheless, this rationale might be instructive for collective cultural rights more broadly. Cultural goods are considered to be "vectors of identity, values and meaning",¹¹¹ and the identity dimension particularly justifies awarding a certain degree of autonomy to a group to express their own cultural interests. The legal standing of the national group to whom the fossil allegedly belongs is thus redundant, as the institutions of government arguably are the representation internally determined by the national group. This overlap leaves standing entirely up to the source State; individuals as a third potential complainant do not figure in the consideration in terms of standing in a proceeding to claim a fossil that belongs to a certain nation.¹¹²

This enforcement procedure is scarcely used by States, and they can be expected to be hesitant to act on behalf of a group whose rights were violated by another State.¹¹³ Moreover, the OP-ICESCR was only scarcely ratified and, binds, e.g., neither Germany nor the UK. So, while States typically have both an obligation and the most solid legal standing to launch an inter-state complaint that claims the right of its nationals to access fossils, the chances for this to materialize seem rather low.

Interim conclusions and evaluation

The right to access culture clearly covers access to fossils, since they characterize different nations. This right is collectively held by source country nationals, but also entitles the public in host nations to access to the fossil. Therefore, these interests must be balanced by granting varying degrees of access to the different parties based on cultural proximity. The baseline requirement for this remains the physical presence of the fossil in the source country. Cooperation obligations are also at-

¹¹⁰ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group on Behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, 4 February 2010, para. 162.

¹¹¹ CESCR, *General Comment No. 21*..., para. 49(b).

¹¹² Concerning the right to self-determination that is held by national groups as well, the Human Rights Committee has clarified that individuals cannot bring complaints as this right is purely collective: Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 3.1. Article 15(1)(a) has both an individual and a collective dimension, but being tied to the nation and its character clearly places them in the collective realm where it would seem unreasonable to award standing to individuals.

¹¹³ A.F. Vrdoljak, *Standing*..., p. 284.

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tached to the right, which requires the source nation to request that removed fossils be made accessible – only source nation governments have standing to invoke the right that is held by the group consisting of their nationals – and the host nation must respond to such requests in good faith.

The case for the right to access fossils is weaker than that for objects of significance to Indigenous and minority groups, where distinct obligations for host States and rights for individuals and communities can be established.¹¹⁴ Nevertheless, human rights law can constructively inform disputes relating to fossils taken under colonial rule, particularly on the inter-state level. Framing them with reference to Article 15(1)(a) ICESCR would not only increase the legal weight of the claim but also highlight the great cultural significance of palaeontological objects.

UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

Overview

Following the adoption of the 1970 Convention, the ICPRCP was established as a permanent body in 1978.¹¹⁵ Independent of the 1970 Convention, it is open to all UNESCO Member States, including those who have not ratified the treaty. Its mandate includes promoting bilateral negotiations, mediation, and conciliation.¹¹⁶ The Committee has successfully facilitated the return of several objects, e.g. the Boğazköy Sphinx, taken by German researchers from Turkey in the 1910s and only returned in 2011 after 25 years of negotiations.¹¹⁷ Not all cases submitted to the ICPRCP lead to repatriation: negotiations regarding the Parthenon Marbles between Greece and the UK have been overseen by the Committee since the 1980s¹¹⁸ without any substantial progress yet towards their return.¹¹⁹

¹¹⁴ V.M. Tünsmeier, *op. cit.*

¹¹⁵ UNESCO, *Records of the General Conference, 20th session, Paris, 24 October to 28 November 1978*, vol. 1: *Resolutions*, UNESCO Doc. 20 C/Resolutions, Resolution 4/7.6/5.

¹¹⁶ A.F. Vrdoljak, *Human Rights...*, p. 121.

¹¹⁷ A. Chechi, A.L. Bandle, M.-A. Renold, *Case Boğazköy Sphinx – Turkey and Germany*, “Platform ArThemis”, October 2011, <https://plone.unige.ch/art-adr/cases-affaires/bogazkoy-sphinx-2013-turkey-and-germany> [accessed: 10.05.2022].

¹¹⁸ ICPRCP, *Final Report of the 21st Session*, May 2018, UNESCO Doc. ICPRCP/18/21.COM/Report, para. 21.

¹¹⁹ H. Smith, *Time Has Come for UK to Return Parthenon Marbles, Says Greek PM*, “The Guardian”, 10 January 2022, <https://www.theguardian.com/artanddesign/2022/jan/10/time-has-come-for-uk-to-return-parthenon-marbles-says-greek-pm> [accessed: 10.05.2022].

Case study: the Broken Hill skull before the Committee

Following unsuccessful bilateral negotiations, in 1991 Zambia attempted to refer the case of the Broken Hill skull to the ICPRCP. The UK was not a UNESCO member at the time, so the mediation and conciliation services of the Committee were unavailable.¹²⁰ The case resurfaced on the ICPRCP's agenda in 2016 when Zambia presented their case and the UK confirmed the receipt of the request.¹²¹ After some preliminary correspondence on the matter between UNESCO and the UK, the case was discussed in 2018,¹²² when the UK invoked the 1963 British Museum Act (BMA) as an obstacle to the de-accession of objects from the NHM. The absence of any official legal objection was presented as evidence that the removal of the skull did not violate any colonial legislation, but the UK emphasized its openness to further negotiations with Zambia.¹²³

Many States have expressed their support for Zambia's claim and the repatriation of taken colonial objects more broadly, while none sided with the UK's position. Its persistent referral to the BMA as the core obstacle to repatriation has been widely criticized. Italy, with support from India, Pakistan, and Turkey, urged that exceptions could be made, for instance through changes in domestic legislation.¹²⁴ However, the UK once again pointed to the BMA and stated that the position of the NHM and the British Government were the same.¹²⁵ The ICPRCP further passed a resolution that invited the UNESCO Director-General to assist negotiations between the UK and Zambia.¹²⁶ Two bilateral meetings followed in 2019 and 2021, but the discussion of the Broken Hill skull at the 23rd session of the ICPRCP in May 2022 revealed that only sparse written communication between the countries had taken place in the meantime, with Zambia expressing the feeling of not having made any headway.

Evaluation

While it may be a long time before the return of the Broken Hill skull is settled, the ICPRCP's involvement as an independent third party has led to increased nego-

¹²⁰ UNESCO, *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*, October 2005, UNESCO Doc. CLT/CH/INS-2005/21, Art. 1.

¹²¹ UNESCO, *Report on the Activities of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (2016-2017)*, 8 August 2017, UNESCO Doc. 39 C/REP/20, para. 16.

¹²² ICPRCP, *Report of the Secretariat on the Follow-Up to the Recommendations and Decisions Adopted during the 20th Session*, April 2018, UNESCO Doc. ICPRCP/18/21.COM/5/REV, para. 21.

¹²³ ICPRCP, *Final Report...*, paras. 26-27.

¹²⁴ *Ibidem*, para. 29.

¹²⁵ *Ibidem*, para. 30.

¹²⁶ ICPRCP, *Decisions of the 21st Session*, Recommendation 21.COM 8, para. 8.

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tiation discipline by ensuring that talks between the parties take place, and with growing frequency. Repatriation requests are also no longer an entirely bilateral affair: other States in the Committee can comment on the dispute, which in the case of the Broken Hill skull will likely place pressure on the UK, given the broad support for Zambia's position. While this had little influence on, e.g., the return of the Parthenon Marbles, disputes relating to fossils removed by other colonial powers might be more successful. Moreover, the statements of different delegations might be indicative of an *opinio iuris* supporting an emerging customary rule requiring the return of objects removed under colonialism.

In short, while it is not able to guarantee success, the ICPRCP holds potential, not only for the return of removed objects but also for the development of cultural property law more broadly. Given the UK's history of unsuccessful claims (e.g., the Parthenon Marbles), it is uncertain if the claim in the case of the Broken Hill skull will be successful, but the advantages of the ICPRCP procedure makes it a fruitful tool for other States seeking the repatriation of fossils appropriated in contravention of local laws.

Conclusions

Fossils, despite having been removed extensively under colonial rule, represent a neglected category of cultural objects, both under contemporary international law and in the legal standards of the 19th and 20th centuries. Consequently, a significant number of scientifically and culturally important fossil specimens are now located in European museums, often despite return requests by source countries.

International human rights law might provide an alternative fruitful angle compared to intertemporal legal remedies. The right to participate in cultural life has been developed to include a right to access culture and cultural goods, including fossils, which define the character of the source country. This access is to be granted to varying degrees, and based on their cultural proximity source country nationals should be given priority over host countries. Moreover, the ICPRCP represents a dispute resolution mechanism whose potential for fossil return requests has not yet been fully realized. The Broken Hill skull is so far the only fossil case brought before the Committee, but other fossil disputes might also benefit from this procedure.

Therefore, source countries seeking the return of important fossils should consider framing their requests as a concern for its nationals' human right to access culture, compelling host States to cooperate. Submitting the case to the ICPRCP also grants an independent facilitator for negotiations, and permits other States to express their views on a given dispute. Still, public international law does not yet establish a clear-cut legal obligation for host States to repatriate fossils removed under colonialism, ultimately making their repatriation dependent to a large degree on the benevolence of the hitherto defensive former colonial powers. However,

it is a moral imperative to right the wrongfulness and violence of colonialism, thus the drive to correct past injustices, and in particular the return of removed fossils, should be led by host States.

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