

WHO OWNS AFRICAN ART? ENVISIONING A LEGAL FRAMEWORK
FOR THE RESTITUTION OF AFRICAN CULTURAL HERITAGE

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I. INTRODUCTION

In the early moments of a scene in the breakout Marvel film, *Black Panther*, the character played by Michael B. Jordan is seen peering at the African art exhibit of a European museum.¹ The displays are full of African masks, tribal tools and intricate artifacts. While distracting a museum curator who is unaware of the supernatural value of an artifact that he is about to steal, Jordan asks the curator whether she believes that a fair price was paid for the exhibited artifacts.² The curator hesitates in her answer, taken aback by such a bold assertion of historical and institutional reckoning. This scene represents the unsettling truth that many western museums are battlegrounds for the tension and complexities associated with African cultural heritage that are located within its collections and the traumatic history surrounding

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¹ BLACK PANTHER, 15:24-19:10 (Marvel Studios 2018).

² *Id.*

their capture.³ Western museums and cultural institutions are also the sites of the largest collections of African cultural heritage surpassing the amount attributed to African national collections. These repositories of cultural heritage construct “access to knowledge” and represent the inheritance of “an asymmetrical history” as “the benefactors of an excess of privilege and mobility.”⁴

For centuries, European colonial powers have been involved in mass looting of African civilization and cultural heritage.⁵ Much of this looting happened illegally as part of military expeditions or civil wars that divided groups against each other. Some scholars have referred to this colonial expedition as a sort of “cultural hemorrhaging.”⁶ Examples of the ways in which cultural objects were taken were: (i) through the imposition of foreign religions (such as Christianity and Islam) Africans simply destroyed or left to decay what were once important objects of veneration or, if not destroyed, were removed to museums and private collections of the missionaries or colonial administrators; (ii) objects were given away as gifts either as a sign of hospitality or in exchange for something of value; (iii) sheer plunder (i.e. military expeditions); or (iv) by research workers who removed pieces claiming that they were meant for study collections or would help to publicize the art of Africa around the world.⁷ One infamous occurrence happened in Benin during an 1897 British military expedition looting thousands of bronze statues from the Kingdom of Dahomey.⁸ These looted artworks were sold to collectors and

³ Sarah Cascone, *The Museum Heist Scene in “Black Panther” Adds Fuel to the Debate About African Art Restitution*, ARTNET NEWS (Mar. 5, 2018), <https://news.artnet.com/art-world/black-panther-museum-heist-restitution-1233278>.

⁴ Felwine Sarr & Bénédicte Savoy, *Rapport sur la restitution du patrimoine culturel africain. Vers une nouvelle éthique relationnelle «The Savoy-Sarr Report»*, n° 2018-26 (Nov. 2018), <http://restitutionreport2018.com/> [hereinafter *Savoy-Sarr report*].

⁵ See Dr. Kwame Opoku, *Musée du Quai Branly as Ally in Quest for Restitution of African Artefacts?*, MODERN GHANA (Jan. 15, 2018), <https://www.modernghana.com/news/828549/musee-du-quai-branly-as-ally-in-quest-for-restitution-of-afr.html>; see also Vincent Noce, *Quai Branly-Jacques Chirac Museum in Paris is Ready to Return African Art*, THE ART NEWSPAPER (Jan. 4, 2018, 9:39 GMT), <https://www.theartnewspaper.com/news/ethnographic-museum-ready-to-return-african-art>.

⁶ FOLARIN SHYLLON, CULTURAL HERITAGE LAW AND MANAGEMENT IN AFRICA 368 (Lagos: CBAAC 2013).

⁷ *Id.*

⁸ Sarah Cascone, *Benin Bronzes Looted by the British Returned to Nigeria*, ARTNET NEWS (June 23, 2014), <https://news.artnet.com/art-world/benin-bronzes-looted-by-the-british-returned-to-nigeria-46550>; see also Alyssa Buffenstein, *Benin*

museums in Britain which helped finance many of the expeditions executed during the colonial era.⁹ Additionally, the amassment of African cultural heritage provided the foundation for the collections of many major art museums, galleries and cultural spaces throughout the United States and Europe. Some scholars posit that perhaps, if museums had been established in Africa during the colonial era, it may have “prevented or reduced the wholesaler removal of cultural objects from the colonies to the Western European metropolis.”¹⁰ Conversely, European museums as an institution were formalized well before the scramble for Africa, so they served as the so-called perfect repositories for these newfound cultural treasures.¹¹

Although there are many individual situations of repatriation or restitution, a legal framework or system to protect this process has yet to be developed within the context of looted African art.¹² In November 2017, President Emmanuel Macron of France pledged to repatriate cultural heritage found in French museums back to the source countries in Africa.¹³ The Élysée Palace shattered the historical apathy toward restitution by declaring that “African cultural heritage can no longer remain a prisoner of European Museums.”¹⁴ This

Urges France to Return Precious Objects Taken During Colonial Era, ARTNET NEWS (Mar. 28, 2017), <https://news.artnet.com/art-world/benin-stolen-objects-repatriation-france-904217>; Ben Panko, *European Summit to Discuss the Return of Looted West African Art*, SMITHSONIANMAG.COM (Aug. 31, 2017), <https://www.smithsonianmag.com/smart-news/european-museums-discuss-returning-looted-african-art-180964555/>.

⁹ *Id.*

¹⁰ SHYLLON, *supra* note 6, at 366.

¹¹ *Id.*

¹² See Dilip Ratha & Patrick Kabanda, *African Art Needs to Come Home—and This is Why*, THE GUARDIAN (Oct. 21, 2015), <https://www.theguardian.com/global-development-professionals-network/2015/oct/21/african-art-needs-to-come-home-and-this-is-why>; see also Cascone, *supra* note 3.

¹³ See Naomi Rea, *France’s President has Promised to Return Africa’s Heritage—Now Macron’s Pledge is Being Put to the Test*, ARTNET NEWS (Mar. 8, 2018), <https://news.artnet.com/art-world/macron-repatriate-african-heritage-1238219>; see also Iliaria Maria Sala, *France is Preparing to Return African Artifacts Looted in its Colonial Era*, QUARTZ AFRICA (July 2, 2018), <https://qz.com/africa/1317376/france-to-return-african-artifacts-from-senegal-benin-dahomey-mali-others/>; Anna Codrea-Rado, *Emmanuel Macron Says Return of African Artifacts is a Top Priority*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/arts/emmanuel-macron-africa.html>; *Restitution d’oeuvres d’art Africaines*, YOUTUBE (Apr. 4, 2018), <https://www.youtube.com/watch?v=fk7Cr2loAkc>.

¹⁴ *Id.*; see SHYLLON, *supra* note 6, at 373 (discussing the “refusal to return such cultural objects is tantamount to keeping a people’s history and heritage in captivity.”).

acknowledgement by the French president comes as an immense step towards colonial reckoning as “the historical, psychological, and political responsibility of this past ... remains one of Europe’s greatest challenges for the 21st century.”¹⁵ President Macron created a commission under which he appointed a professor from France and a professor from Senegal to help develop a concrete solution for repatriation.¹⁶ In November 2018, the commission drafted a report which demands the “swift” return of cultural heritage and have proposed a set of restitutive procedures.¹⁷ The report highlights the positive impact of restitution for future generations on a continent where a majority of the population is under the age of 20, declaring that:

[G]reat importance is for young people to have access to their own culture, creativity, and spirituality from other eras that certainly have evolved since, but whose knowledge and recognition can no longer merely be reserved for those residing in Western countries or for those who count themselves among the African diaspora living in Europe. The youth of Africa, as much as the youth in France or Europe in general, have a right ‘to their artistic and cultural heritage’ ... cultural and artistic resources inherited from Africa’s past itself, held and stored in museums and countries completely out of reach from the African youth who often are unaware of not only the richness and creativity of this legacy, but often are not even aware of its existence.¹⁸

The report is stringent about the ties between colonial administration and the creation of African art collections within public museums.¹⁹ However, the report does not fully address the practicality of restitution as there is yet to be developed a concretized legal framework dedicated to the complex task of the restitution of African cultural heritage looted during the colonial era.²⁰ This topic is of great

¹⁵ *Savoy-Sarr report*, *supra* note 4, at 2.

¹⁶ Rea, *supra* note 13.

¹⁷ *Savoy-Sarr report*, *supra* note 4, at 61; Sala, *supra* note 13; *see also* Pierre Lepidi, *Restitution du Patrimoine Africain : « Nous sommes face à un défi historique »*, LE MONDE AFRIQUE (Mar. 22, 2018), https://www.lemonde.fr/afrique/article/2018/03/22/restitution-du-patrimoine-africain-nous-sommes-face-a-un-defi-historique_5274971_3212.html.

¹⁸ *Savoy-Sarr report*, *supra* note 4, at 4.

¹⁹ *Id.* at 5.

²⁰ *Id.*; *see* John Eligon, *The Big Hole in Germany’s Nazi Reckoning? Its Colonial History*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/world/europe/germany-colonial-history-africa-nazi.html>; *cf.* Hugh Eakin, *The Great Giveback*, N.Y. TIMES (Jan. 26, 2013), <https://www.nytimes.com/2013/01/27/sunday-review/the-great-giveback.html>.

scholarly debate given the immense complexities involving ownership, national sovereignty and jurisdictional issues, and existing legal frameworks that can be used as a baseline for developing a restitutive system in the African context.²¹

Part I of this Note presents the scope of important terms that will be used throughout the paper and an overview of the existing legal framework protecting cultural heritage and looted art. Part II discusses a theory for ownership rights regarding who owns the cultural property taken from Africa given the complex nature of statehood and group interests at stake on the continent. This complexity will be analyzed against the legal hurdles posed by European cultural heritage laws. Additionally, this part will address perspectives on the consequences of restitution, including cosmopolitanism views of cultural heritage as belonging to the collective humankind and perspectives that highlight the importance of attributing ownership to a specific source community. Part III illustrates successful examples of restitution and repatriation in contexts such as the United States,²² Nigeria,²³ Ethiopia,²⁴ and Cameroon.²⁵ It will conclude by presenting a proposed legal process for addressing the return of African cultural heritage property as opposed to the piecemeal legal systems that currently exist to provide relief.

II. DEFINITIONAL LIMITATIONS AND SCOPE

A. Definitional Limitations

In the exploration of provenance disputes and solutions for repatriation or restitution of African cultural heritage properties, it is important to situate which aspect of the topic will be interrogated. The African continent is such a vast region and encapsulates a diversity of

²¹ See Mary Rhoads Martin, *Legal Issues in African Art* (May 2010) (unpublished Ph.D. thesis, University of Iowa available at Iowa Research Online).

²² Annalisa Quinn, *French Court Orders Return of Pissarro Looted by Vichy Government*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>; see Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, November 7, 2017, N. 17/58735, obs. D. Forton (Fr.).

²³ Cascone, *supra* note 8.

²⁴ Codrea-Rado, *supra* note 13.

²⁵ Thomas A. Johnson, *Afo-A-Kom Joyously Greeted on Its Return Home*, N.Y. TIMES (Dec. 14, 1973), <https://www.nytimes.com/1973/12/14/archives/afoakom-joyously-greeted-on-its-return-home-afoakom-is-joyously.html>; see also *Sacred African Statue on Its Way Back Home*, JET (Dec. 13, 1973), at 63.

cultural traditions, legal regimes and histories. Given this insurmountable diversity, it would be hard to examine the issues that arise in the more than fifty African nations. For the purposes of this note, the geographic focus will be on West African countries and, in particular, a comparative survey of Nigeria, Ghana, Mali, Benin and Cameroon to analyze the current legal protections that exists within these countries in addition to their experiences with colonial looting of cultural heritage properties and artifacts. This particular selection of countries was chosen as samples of West African legal systems and the varying colonial backgrounds that each country endured. Nigeria and Ghana represent the British influence, whereas Benin and Mali represent French influence. Cameroon has a complex history involving a multitude of different colonial powers including French, British and German influence. These colonial powers also represent the location of the largest collections of African cultural heritage property, with France and Britain containing the most significant portions.

Cultural heritage properties that are most likely to be implicated in this debate are typically considered traditional or classical African art. This traditional art was often made for cultural rites of passage or utilitarian purposes within the source community. Traditional or classical African art typically refers to indigenous art traditions made before the colonial era in the late 19th century.²⁶ The concept of African art has evolved over the centuries.²⁷ Starting with Europeans' first contact with the continent in the early 15th century, explorers regarded African artifacts as "curious" treasures that they brought back with them to start their private collections and, subsequently, early museum collections.²⁸ This initial fascination with traditional African artifacts turned into an ethnographic exploration of the cultural property as data samples for racist pseudo-science during the colonial period.²⁹ African cultural heritage property evolved from being considered exotic treasures in the early 15th century to ethnographic artifacts in the late 19th century, and was meant to be representative of the dark continent to

²⁶ Dr. Peri Klemm, *African Art and the Effects of European Contact and Colonization*, KHAN ACADEMY, <https://www.khanacademy.org/humanities/art-africa/african-art-intro/a/african-art-effects-of-european-colonization> (last visited, Sept. 28, 2018).

²⁷ JEAN LAUDE, *THE ARTS OF BLACK AFRICA*, 1-23 (Jean Decock trans., University of California Press, 1st Ed., 1971); see also SUZANNE BLIER, *Africa, Art, and History: An Introduction*, in *A HISTORY OF ART IN AFRICA* (Harry N. Abrams ed., 2001) (discussing the evolution of African art and what is considered in the African context).

²⁸ LAUDE, *supra* note 27, at 1.

²⁹ *Id.*; see also BLIER, *supra* note 27.

peoples in Europe and was largely discussed within the framework of tribalism or “tribal art.”³⁰

The African art scholar, Suzanne P. Blier, has argued that the label of African art as “tribal art” explains why far fewer dates and artist attributions are available than is the case for comparable art surveys.³¹ It was not until the early 20th century that African artifacts started to be regarded as art—in the traditional sense of the word—due to the emergence of modern painters, and sculptors such as Pablo Picasso and Henri Matisse who regarded them as a source of inspiration for their work.³² Previously, the work was not attributed to an individual and European surveyors at the time were uninterested in which ethnic group may have produced the item. Essentially, this definition is a more westernized conception of African art tradition. It is important to note that “art” as a concept has a different meaning among a variety of ethnic groups throughout the continent.³³ For instance, the Fon of Benin designates art as “something by hand” (*alonuzo*), whereas for the Bamana of Mali, the word for sculpture is translated as “things to look at.”³⁴ In addition to the great philosophical debates around the definition of art, there is also a great legal debate around what constitutes a work of art. The Supreme Court of the United States was tasked with asking the question “what defines a work of art” in determining whether a lamp base qualified for a valid copyright.³⁵ The Court interpreted the phrase “works of art” as a “tangible expression” of an author’s ideas.³⁶ This note will primarily focus on “art”—in all its different iterations—made before the colonial occupation of European powers in Africa and that was ultimately looted during the colonial period.

The question of what is “art” becomes more complex when it is part of a broader category of cultural property, sometimes called tangible cultural heritage.³⁷ The concept of cultural heritage takes into consideration the fact that objects not considered to be art in the past—

³⁰ BLIER, *supra* note 27, at 21.

³¹ *Id.* at 22.

³² LAUDE, *supra* note 27, at 1; see Carol Kino, *When Artifact ‘Became’ Art*, N.Y. TIMES (Oct. 26, 2012), <https://www.nytimes.com/2012/10/28/arts/artsspecial/how-african-artifacts-became-art-inspiring-modernists.html>.

³³ BLIER, *supra* note 27, at 22.

³⁴ *Id.*

³⁵ *Mazer v. Stein*, 347 U.S. 201 (1954).

³⁶ *Id.*

³⁷ See *Art and Cultural Heritage, in ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS* 15 (Carolina Academic Press 2d ed. 2008).

or when they were first produced—are considered to be art in contemporary terms.³⁸ The term cultural heritage defines “the legacy of physical artifacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations.”³⁹ This includes tangible cultural heritage made up of movable (paintings, sculptures, coins, manuscripts, etc.), immovable (monuments, archaeological sites, etc.) and underwater (shipwrecks, ruins, and cities) cultural heritage, in addition to intangible cultural heritage (i.e. oral tradition, performing arts, rituals).⁴⁰ The focus here will primarily be on tangible cultural heritage, but the note will also highlight important debates surrounding the tension between the concepts of cultural heritage and cultural property.⁴¹ Scholars highlight the tension of the term “cultural property” as the combination of conflicting elements: culture embodying group-orientated notions of heritage, and property focusing on individualized notions of ownership.⁴² However, questions remain as to whether traditional property law can remedy the harms associated with the history of colonization and theft of cultural objects suffered by indigenous peoples.⁴³ The notion of who owns cultural heritage and which framework of property rights applies is addressed in Part 3.

Alongside the discussion of art and cultural heritage, it is paramount to explain the distinction between the concepts of restitution and repatriation. These two terms are often used interchangeably, yet they offer vastly different forms of relief. In legal terms, restitution “refers both to disgorging something which has been taken, and to

³⁸ *Id.*

³⁹ *What is Meant by “Cultural Heritage”?*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/>; see *Tangible Cultural Property*, UNESCO, available at <http://www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/> [hereinafter *What is Meant by “Cultural Heritage”*]; see also Lyndel V. Prott & Patrick J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT. J. CULT. PROP. 307 (1992) (discussing the significant linguistic distinction between using the term cultural heritage versus cultural property in understanding the development of policy behind cultural heritage law).

⁴⁰ See *What is Meant by “Cultural Heritage”*, *supra* note 39.

⁴¹ See Prott & O’Keefe, *supra* note 39.

⁴² Kristen A. Carpenter, et al., *In Defense of Property*, 118 YALE L. J. 1022, 1033 (2009) (analysis of alternative conceptions of property law as a means of protecting indigenous cultural heritage).

⁴³ See *id.*

compensation for loss or injury done.”⁴⁴ In the arena cultural heritage and cultural property, restitution is the process by which cultural objects are returned to an individual or a community.⁴⁵ Typically, this involves returning privately held works to the source community. In the common parlance of the term, repatriation means to “send back to one’s own country.”⁴⁶ In the arena of cultural heritage and cultural property, repatriation is the process by which cultural objects are returned to a nation or state at the request of a government.⁴⁷ This commonly involves returning publicly held or state-owned cultural objects to the source community. Either of these options could be beneficial in the context of looted African art depending on the ultimate objectives of the parties involved.

Another important point of departure is the concept of the term “indigenous.” There is much scholarly debate surrounding indigeneity.⁴⁸ Currently, there is no international consensus around what constitutes indigenous populations or peoples.⁴⁹ The U.N. has adopted a working definition that defines indigenous people as:

[T]hose which, having a historical community with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant [sic] sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the

⁴⁴ *Restitution*, LEGAL INFORMATION INSTITUTION CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/restitution> (last visited Feb. 2, 2019).

⁴⁵ *Restitution and Repatriation*, Collections Trust, <https://collection-trust.org.uk/cultural-property-advice/restitution-and-repatriation/> (last visited Sept. 28, 2018).

⁴⁶ *Repatriation*, DICTIONARY.COM, <https://www.dictionary.com/browse/repatriation> (last visited Feb. 2, 2019).

⁴⁷ *Restitution and Repatriation*, *supra* note 45.

⁴⁸ See Erica-Irene A. Daes, *An overview of the history of indigenous peoples: self-determination and the United Nations*, 21 CAMBRIDGE REV. OF INT’L AFF., 7-13 (2008) (discussing working definition of “indigenous peoples” within the context of the U.N. system); see also Will Kymlicka, *The internationalization of minority rights*, 6 ICON, 1-32 (2007) (details issues that arise in applying burgeoning international collective rights standards to indigenous peoples as opposed to either national minorities or immigrant groups); Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 VERMONT L. REV., 565-94 (2006) (discussing issues associate with created a uniform international law when there are different conceptions of indigenous peoples depending on the region of the world that is implicated); Carpenter, et. al., *supra* note 42.

⁴⁹ *Id.*

basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁵⁰

Some legal scholars argue that indigenous peoples in international law are essentially “those peoples with their own identities and organized societies, distinct from other sectors of the societies in which they live...who are descendants of those who originally inhabited a land at the time when settlers came from elsewhere to occupy or conquer such land.”⁵¹ Others clarify this definition arguing that indigenous peoples are “defined in terms of their distinctiveness as well as their descent from the inhabitants of their territory at the time of conquest, colonization or establishment of present state boundaries.”⁵² Using the International Labor Organization (“ILO”) Convention No. 169, which in Article 1 defines tribal people as those “whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations,” emphasizes the distinction between the often-mingled definitions of “indigenous” and “tribal.”⁵³

Alternatively, there are some scholars who argue that in regions such as Africa, the application of the term indigenous is complicated because these regions contain native people that are by all means indigenous since they are descendants of the original population that inhabited the land before colonial influences, yet do not necessarily fit into the working definition of indigenous groups specified by the U.N.’s charter.⁵⁴ More accurately stated, “during the era of colonial rule, all homeland groups, majority and minority alike, were designated as ‘natives’ or ‘indigenous’ in relation to colonial rulers.”⁵⁵ Scholars rationalize the U.N.’s protection of such groups under the category of indigenous peoples by arguing “we should not focus on whether homeland minorities are dominated by settlers from a distant colonial power or by neighboring peoples [but rather] the fact of their

⁵⁰ Carpenter, *supra* note 42 (quoting Daes at 9); see *Indigenous Peoples at the UN*, UNDESA Division for Inclusive Social Development Indigenous Peoples, available at <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.

⁵¹ Fodella, *supra* note 48, at 565.

⁵² Daes, *supra* note 48, at 10.

⁵³ *Id.* at 10; Indigenous and Tribal Peoples in Independent Countries, International Labour Organization Convention No. 169, art. 1(a) (June 27, 1989), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A1.

⁵⁴ Kymlicka, *supra* note 48, at 12-14.

⁵⁵ *Id.*

domination by others and their vulnerability.”⁵⁶ This debate deserves attention in relation to analyzing legal frameworks for restituting and/or repatriating looted West African art due to its impact on who the identified beneficiary should be whether that is the source community (“tribal”) or the source country (“indigenous”).⁵⁷ In the West African context in particular, there are groups of people that are both the “tribal” community and the “indigenous” community. This means that the people living on the continent before the colonial powers arrived were inherently indigenous to the land. However, in a post-colonial society, many tribal communities were stripped of their traditional and customary laws, losing their power over the control of the society. When the colonial rule replaced the tribal system, some parts of the community assimilated into the colonial culture thereby differentiating themselves from the original tribal communities. Today, there are competing interests between those who retain historical ties to the tribal communities and those that represent the new identity of the nation-state (i.e. Nigerian versus Igbo). This creates difficulties in applying the terms indigenous and tribal communities because, in the African context, they may in fact be one and the same. For purposes of this note, the term indigenous will be used to describe the source communities in West Africa.

B. Current Legal Framework Protecting Cultural Heritage and Looted Art

The greatest obstacle to the restitution of West African cultural heritage is the “inalienability of public collections,” especially in France and the U.K.⁵⁸ France and the U.K. are two main sources for a significant majority of African cultural heritage objects.⁵⁹ Therefore, the domestic laws of these countries are paramount to the dynamics of

⁵⁶ *Id.*

⁵⁷ *Id.*; Ratha & Kabanda, *supra* note 12; Rea, *supra* note 13.

⁵⁸ See Vincent Noce, *The Repatriation Debate Intensifies as Calls for Post-Colonial Restitution Grow—but is it Legal?*, THE ART NEWSPAPER (Dec. 27, 2018, 6:52 GMT), <https://www.theartnewspaper.com/analysis/calls-for-post-colonial-restitution-grow-but-is-it-legal>; see also Alexander Herman, *Legal Challenges Remain for Restituting African Artefacts from French Museums*, THE ART NEWSPAPER (Nov. 28, 2018, 10:45 GMT), <https://www.theartnewspaper.com/comment/french-report-calls-for-massive-restitution-of-african-artefacts-while-macron-promises-return-of-26-items-to-benin>; CODE DU PATRIMOINE [C. PAT.] [HERITAGE CODE] art. L451-5 (Fr.); British Museum Act 1963, c. 24 (Eng.); <https://www.britishmuseum.org/PDF/BM1963Act.pdf>.

⁵⁹ *Id.*

restitution and the practicality of transferring objects.⁶⁰ The existence of these type of laws, referred to as codes in the civil system, creates a major barrier to transferring cultural heritage out of public collections back to their origins. In France, the *Code du Patrimoine*—in English, the Heritage Code—contains a provision which dictates that objects contained in French national collections—*les propriétés publiques*—is inalienable and, therefore, cannot be taken or transferred out of public collections.⁶¹ While this is a steadfast rule prohibiting the removal of objects from public collections, restitutions have been made primarily through approval by parliament.⁶² For example, exceptions to the removal of objects from national collections have been made for human remains, out of respect for human dignity, and cultural spoils that were obtained as a result of Nazism.⁶³ In fact, the Savoy-Sarr report endorses creating an exception for African cultural heritage objects “to avoid applying texts regarding public property to the object in question, through its status of non-belonging to the collection.”⁶⁴ Essentially, the report argues for considering African cultural heritage objects as out of the scope of legal protection for French public collections.⁶⁵

The law in the U.K., on the other hand, is a little more complex when considering the restitution of cultural objects. The British Museum Act of 1963 is an act of parliament that creates a legal restriction from deaccessioning—or removing—works from its collection.⁶⁶ The act defines various aspects of the way in which the British Museum operates including rules on how the Museum can remove objects from its collection or how it cannot.⁶⁷ The only way that items can be removed or transferred from the British Museum’s collection is if:

⁶⁰ *Id.*

⁶¹ CODE DU PATRIMOINE [C. PAT.] [HERITAGE CODE] art. L451-5 (Fr.); *see also* CODE GÉNÉRAL DE LA PROPRIÉTÉ DES PERSONNES PUBLIQUES [C.CIV.][CODE OF PUBLIC OFFICIALS’ PROPERTY] art. L3111-1 (Fr.) available here http://codes.droit.org/CodV3/propriete_personnes_publiques.pdf (“Les biens constituant les collections des musées de France appartenant à une personne publique font partie de leur domaine public et sont, à ce titre, inaliénables”).

⁶² Noce, *supra* note 58.

⁶³ *Savoy-Sarr report*, *supra* note 4, at 74; Noce, *supra* note 58.

⁶⁴ *Savoy-Sarr report*, *supra* note 4, at 74.

⁶⁵ *Savoy-Sarr report*, *supra* note 4, at 74.

⁶⁶ British Museum Act 1963, *supra* note 58.

⁶⁷ *Id.*; *see also* *Moral Obligations of British Museum Could Overrule the British Museum Act*, ELGINISM (May 24, 2005), <http://www.elginism.com/similar-cases/moral-obligations-of-british-museum-could-over-rule-the-british-museum-act/20050524/110/>.

the object is a duplicate of another; the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography...is held by the Trustees; or in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students.⁶⁸

The act effectively forbids deaccessioning to retribute objects looted or that have a disputed provenance.⁶⁹ This is the reasoning that the British Museum regularly cites for its decision not to retribute African cultural heritage objects.⁷⁰ However, in the 1970s, through a declassified report by *The Art Newspaper*, it was uncovered that the Museum had sold more than 30 of the controversial Benin pieces despite the legal restriction by act of Parliament.⁷¹ This event undermines the whole argument against deaccessioning and highlights the loopholes the Museum is willing to create within the law.⁷² The act has been subsequently challenged by cases involving Nazi-era looted cultural objects.⁷³ The proliferation of cases involving Nazi-era claims inspired the passage of legislation in 2009 in the U.K. called the Holocaust (Return of Cultural Objects) Act.⁷⁴ The act “allows national museums that are forbidden from deaccessioning to retribute objects looted or subject to forced sales during the 1933-45 period.”⁷⁵ After the passage of this act, there have been several successful examples of restitution in Nazi-era looted art, including the return of a 900-year-old missal back to its owner at the cathedral of Benevento in southern

⁶⁸ British Museum Act 1963, *supra* note 58, at section 5(1) *Disposal of objects*.

⁶⁹ See Martin Bailey, *UK's restitution powers to be extended indefinitely for Nazi-era loot*, *THE ART NEWSPAPER* (Sept. 13, 2017, 11:02 GMT), <https://www.theartnewspaper.com/news/uks-spoliation-powers-to-be-extended-indefinitely-for-nazi-era-loot>; see also Hannah McGivern, *Then & Now: how The Art Newspaper shaped UK restitution law*, *THE ART NEWSPAPER* (Mar. 27, 2018, 5:00 GMT), <https://www.theartnewspaper.com/comment/then-and-now-the-art-newspaper-shapes-uk-restitution-law>.

⁷⁰ *Id.*

⁷¹ SHYLLON, *supra* note 6, at 376; see also Martin Bailey, *British Museum Sold Benin Bronzes*, *FORBES* (Apr. 3, 2002, 12:01 am), <https://www.forbes.com/2002/04/03/0403conn.html#3576a38a41aa>.

⁷² *Id.*

⁷³ McGivern, *supra* note 69.

⁷⁴ Holocaust (Return of Cultural Objects) Act 2009, c. 16 (Eng.), <https://www.legislation.gov.uk/ukpga/2009/16/contents>.

⁷⁵ Bailey, *supra* note 69.

Italy.⁷⁶ The successful revision of U.K. legislation through the passage of this act could provide a window into which a similar legislation can be introduced for looted African art.⁷⁷ The widespread effects of this act remain to be seen as it was set to expire on November 11, 2019.⁷⁸ However, an amendment was passed to “omit subsection (7) which provides for the act to expire after 10 years.”⁷⁹

Cultural heritage laws vary among European nations as seen in the case of France and the U.K. Countries like Germany, the Netherlands and Denmark, for example, do not have such laws forbidding deaccessioning or transfer of objects to retribute which is why they have been able to return certain objects without much legal restriction.⁸⁰

While there is a range of intellectual property and cultural heritage protection laws in the West, the scope of legal protections within West Africa are much less robust.⁸¹ Most of these countries are emerging from post-colonial legal systems in which some of the legal regimes employed during the colonial era were retained and eventually adapted to reflect the national priorities of the new states.⁸² The general conception is that most West African legal systems are just a strict assimilation of the laws of the former colonial state into the current domestic legal framework.⁸³ This view does not account for the agency of the newly formed West African nations to create their own iteration of the law. The principle of continuity did, however, influence the legal domain of the newly formed states in the realm of cultural heritage, whereby the former colonial laws made the foundation

⁷⁶ McGivern, *supra* note 69.

⁷⁷ Bailey and McGivern, *supra* note 69.

⁷⁸ Bailey and McGivern, *supra* note 69.

⁷⁹ Holocaust (Return of Cultural Objects)(Amendment) Act 2019, c. 20 (Eng.), <http://www.legislation.gov.uk/ukpga/2019/20/enacted>.

⁸⁰ Noce, *supra* note 58.

⁸¹ See CULTURAL HERITAGE AND THE LAW: PROTECTING IMMOVABLE HERITAGE IN ENGLISH-SPEAKING COUNTRIES OF SUB-SAHARAN AFRICA 1-121 (Ndoro, et al. eds., ICCROM 2008); see also BOATEMA BOATENG, THE COPYRIGHT THING DOESN'T WORK HERE 7-15 (Univ. of Minn. Press, 2011) (discussion of intellectual property laws and protection of Adinkra and Kente cloth in Ghana); see also Folarin Shyllon, *Cultural Heritage Legislation and Management in Nigeria*, 5 INT'L J. OF CULT. PROP. 235-68 (1996) (presenting cultural heritage legislation and management systems in Nigeria).

⁸² See *supra* note 81.

⁸³ Vincent Negri, *Introduction to heritage law in Africa*, CULTURAL HERITAGE AND THE LAW: PROTECTING IMMOVABLE HERITAGE IN ENGLISH-SPEAKING COUNTRIES OF SUB-SAHARAN AFRICA 7 (Ndoro, et al. eds., ICCROM 2008).

of the post-colonial systems of legal protections.⁸⁴ Many West African nations abandoned their traditional, customary laws that existed pre-colonization in favor of imitation of foreign models.⁸⁵ Perhaps a justification for this lies in the fact that this was a way for the newly created legislation to be accepted by former colonial powers and within the international community given that European countries were powerful financial partners to them and major players in the international arena.⁸⁶ If Mali were to adopt a piece of legislation regarding the protection of cultural heritage that France did not accept or want to abide by, this would create a host of legal issues in a dispute between the two nations over cultural heritage property.

The development of contemporary African legal systems has its roots in the legal tradition that was implemented by colonial powers during European occupation.⁸⁷ European states that use a Roman law tradition, namely French-, Spanish-, and Portuguese-speaking areas used a system of direct administration employing the legal tools and legislation of the home country within the colonies.⁸⁸ The goal was essentially to assimilate the colonial territories into the system administered within the mainland country. Alternatively, European states with a common law tradition, namely the British, enacted a more indirect control using the local traditions by reinforcing or weakening them depending on political needs.⁸⁹ In post-colonial West African states, “the transfer of power and responsibilities from communities to central colonial governments often led to the centralization of heritage management.”⁹⁰ An analysis of the historical roots of West African legal systems in connection to colonial legal traditions, reflects the current modes of protection enacted in the region today.⁹¹ One scholar argues that the “reconstruction of national identity and the promotion of a dominant national culture” create an opportunity for cultural heritage to be a “vehicle for transformation of the society.”⁹²

The case of Nigeria is an interesting one as it had its first cultural heritage legislation in the form of a 1924 ordinance which was passed in order to prohibit the export of ancient works of art without the

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 7-8.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 9.

⁹² *Id.*

government's permission.⁹³ Subsequently, a comprehensive act was created in 1953 in an effort to stifle the export of antiquities and demolition of historical buildings being replaced by modern ones.⁹⁴ The Antiquities Act of 1953 established an Antiquities Commission which was responsible for the preservation and management of antiquities and monuments.⁹⁵ This statute was seen as a straw man piece of legislation because it practically had no enforceable affect and was replaced in 1979 with the National Commission for Museums and Monuments Act.⁹⁶ This legislation "consolidated most of the provisions thereof and made fresh provisions in connection with the declaration of national monuments."⁹⁷ Article 60 establishes a regulation to "identify, collect, preserve or generally look after ancient and historical monuments and records and archaeological sites and remains declared by the National Assembly to be of national significance or national importance."⁹⁸

In Ghana, there is the Ghana Museums & Monuments Board ("GMMB"), which has the mission to "acquire, protect, conserve and document the Nation's movable and immovable material cultural heritage for posterity, for the purposes of research and education of the public."⁹⁹ GMMB derives its powers from the National Liberation Council Decree ("NLCD") 387 of 1969, also known as Act 387 of 1969, which was further strengthened by the Executive Instrument ("E.I.") 29 of 1973.¹⁰⁰ Act 387, referred to as the National Museum Act—1969, essentially prohibits the exportation of any antiquity except in accordance with an export permit issued by the Board.¹⁰¹ The act covers antiquities that were "made or fashioned before the year 1900" or "are of historical, artistic, or scientific interest, and is or has been

⁹³ SHYLLON, *supra* note 6, at 236.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 239.

⁹⁷ *Id.*

⁹⁸ *Constitution of May 29, 1999*, UNESCO DATABASE OF NATIONAL CULTURAL HERITAGE LAWS, https://fr.unesco.org/cult-natlaws/list?field_nl_year_value%5Bvalue%5D=&combine_op=%3D&combine=&&&&&field_nl_language_tid=&&&page=11&order=title_field&sort=desc&sort_bef_combine=field_nl_year_value%20ASC (last visited Feb. 4, 2019).

⁹⁹ GHANA MUSEUMS & MONUMENTS BOARD, <http://www.ghanamuseums.org/mission.php> (last visited Feb. 3, 2019).

¹⁰⁰ *Id.*

¹⁰¹ Section 1, *National Museum Act – 1969*, (NLCD 387), GHANA LEGAL, http://laws.ghanalegal.com/acts/id/245/section/1/Permit_To_Export.

used at any time in the performance, and for the purposes of, any traditional ceremony.”¹⁰² The E.I. 29 of 1973 details the process by which antiquities can be exported, providing that the “export permit...shall be surrendered to a customs officer at the customs port or airport” and the antiquity shall be detained if no export permit is surrendered.¹⁰³ Ghana ratified the World Heritage Convention in 1975.¹⁰⁴ Therefore, GMMB is guided by the operational guidelines for the implementation of the World Heritage Convention.¹⁰⁵ International guidelines, recommendations, and charters also guide the GMMB including the international cultural heritage conventions to which Ghana is a signatory.¹⁰⁶

In Mali, there are several laws maintaining and protecting movable cultural heritage.¹⁰⁷ Article 8 of the Constitution of February 27, 1992 provides that “the liberty of artistic and cultural creation is recognized and guaranteed. It is exercised under conditions fixed by the law.”¹⁰⁸ Article 70 further extends this principle to the “protection of cultural heritage and archaeology.”¹⁰⁹ In 1985, the Malian government passed Decree N.203 to institute the National Cultural Heritage Protection Commission.¹¹⁰ The creation of commissions was given more clarifying amendments in 1994 and 1996, respectively, to “set up and define operating procedures.”¹¹¹ Given that Mali has a particular

¹⁰² *Id.* at §30.

¹⁰³ *Export of Antique and Non-antique Objects: The Role of Ghana Museums and Monuments Board*, GHANA MUSEUMS & MONUMENTS BOARD, <http://tbt.at-agh.org/wp-content/uploads/2016/11/Export-of-Handicrafts.pdf> (last visited Feb. 3, 2019).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Mali: National Cultural Heritage Law*, UNESCO DATABASE OF NATIONAL CULTURAL HERITAGE LAWS, <https://whc.unesco.org/en/statesparties/ml/laws/> (last visited Feb. 4, 2019).

¹⁰⁸ See Article 8, Constitution of February 27, 1992 in *Normes constitutionnelles africaines relatives à la culture et à la sauvegarde du patrimoine : Mali*, UNESCO DATABASE OF NATIONAL CULTURAL HERITAGE LAWS, https://fr.unesco.org/cult-natlaws/list?field_nl_year_value%5Bvalue%5D=&combine_op=%3D&combine=&&&&field_nl_language_tid=&&page=11&order=title_field&sort=desc&sort_bef_combine=field_nl_year_value%20ASC (last visited Feb. 4, 2019).

¹⁰⁹ *Id.* at Art. 70. (“La loi détermine également els principes fondamentaux...de la protection du patrimoine culturel et archéologique....”).

¹¹⁰ Decree N.203, UNESCO, available at <https://whc.unesco.org/en/statesparties/ml/laws/>.

¹¹¹ Order No. 96-1591, UNESCO, available at https://ar.unesco.org/sites/default/files/mali_order961591_1996_engtof.pdf.

history involving the theft of objects from its cultural heritage monuments and sites, it has passed several pieces of legislation including an inter-ministerial order (N. 94-7968) to “regulate the profession of dealers in cultural property, prospecting, marketing and export of cultural property.”¹¹² On September 19, 2007, the United States signed a bilateral agreement with the Government of the Republic of Mali to prohibit to importation of archaeological material from the Niger River Valley region and the Tellem burial caves of Bandiagara.¹¹³

In the Republic of Benin, Article 10 of the Constitution of December 11, 1990 provides that “every person has a right to culture.”¹¹⁴ The constitutional provision designates to the State the task of “safeguarding and promoting the national values of civilization both material and spiritual as well as cultural traditions.”¹¹⁵ On February 25, 1991, the Beninese government passed a cultural charter “to assure the safeguarding, protection and promotion of the national cultural heritage.”¹¹⁶ Another followed this cultural charter in 2007, which outlined the characteristics of Beninese cultural heritage in addition to its geographic composition.¹¹⁷

¹¹² Inter-ministerial Order N. 94-7968, *supra* note 107. See also Decree N.299 regulating the prospecting, marketing and export of cultural properties, UNESCO, available at <https://whc.unesco.org/en/statesparties/ml/laws/>; See also Law N.86-61 on the profession of traders in cultural property, UNESCO, available at <https://whc.unesco.org/en/statesparties/ml/laws/>.

¹¹³ Agreement between the Government of the United States of America and the Government of the Republic of Mali to Extend and Amend the Agreement Between the Government of the USA and the Government of the Republic of Mali Concerning the Imposition of Import Restrictions on Archaeological Material from Mali from the Paleolithic Era to Approximately the Mid-Eighteenth Century, Sept. 19, 1997, BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS available at <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/mali>.

¹¹⁴ See Article 10, Constitution of December 11, 1990 in *Normes constitutionnelles africaines relatives à la culture et à la sauvegarde du patrimoine: Benin*, UNESCO DATABASE OF NATIONAL CULTURAL HERITAGE LAWS, https://fr.unesco.org/cultnatlaws/list?field_nl_year_value%5Bvalue%5D=&combine_op=%3D&combine=%26&field_nl_language_tid=%26&page=11&order=title_field&sort=desc&sort_bef_combine=field_nl_year_value%20ASC (last visited Feb. 4, 2019).

¹¹⁵ *Id.*

¹¹⁶ Article 6, Loi n.91-006 portant Charte Culturelle en République du Bénin (1991), Secrétariat Général du Gouvernement, available at <https://sgg.gouv.bj/doc/loi-91-006/>.

¹¹⁷ Loi portant protection du patrimoine culturel et du patrimoine naturel à caractère culturel en République du Bénin, Loi n.2007-20, Secrétariat Général du Gouvernement, available at <https://sgg.gouv.bj/doc/loi-2007-20/>.

In Cameroon, the earliest law protecting cultural heritage was the Federal Act N.63-22 of June 19, 1963 “arranging for the protection of monuments, objects and sites of historic or artistic interest.”¹¹⁸ The Act creates a “high commission for the conservation of monuments, objects and sites of historic or artistic interest...[which]...shall make a list of monuments and sites to be preserved for the national interest.”¹¹⁹ The existence of this Federal Act in 1963 may explain why the Constitution of June 2, 1972, revised on January 18, 1996, does not have an explicit provision about the protection of cultural heritage.¹²⁰ The constitution instead emphasizes the promotion of a democratic and social state that recognizes and protects traditional values in addition to working to protect and promote national languages.¹²¹ Recently in 2013, the Cameroonian government passed a law governing the cultural heritage of the nation consisting of both tangible and intangible cultural property.¹²² The law defines the cultural property as those “belonging either to the state and other public authorities or to individuals.”¹²³ The Ministry of Cultural Heritage manages the cultural properties and classifies them.¹²⁴ This law essentially mirrors that of the French laws relating to the management of cultural heritage.¹²⁵

While the issue remains of how domestically enforced these cultural heritage laws are, there have been attempts at collaboration between West African nations and other colonized nations such as the Declaration of African, Caribbean, and Pacific States (ACP) on the Return or the Restitution of Cultural Properties signed in Lomé on

¹¹⁸ Federal Act No. 63-22 of the 19th of June, 1962, J. OFFICIEL DE LA REPUBLIQUE FEDERALE DU CAMEROUN (1963), *available at* https://en.unesco.org/sites/default/files/cameroun_loi_fed_6322_1963_engorof.pdf (last visited Feb. 4, 2019).

¹¹⁹ *Id.* at Title 1 & 6.

¹²⁰ See Article 1, Constitution of June 2, 1972 in *Normes constitutionnelles africaines relatives à la culture et à la sauvegarde du patrimoine: Cameroun*, UNESCO DATABASE OF NATIONAL CULTURAL HERITAGE LAWS, https://fr.unesco.org/cult-natlaws/list?field_nl_year_value%5Bvalue%5D=&combine_op=%3D&combine=&&&&field_nl_language_tid=&&&page=11&order=title_field&sort=desc&sort_bef_combine=field_nl_year_value%20ASC (last visited Feb. 4, 2019).

¹²¹ *Id.*

¹²² Loi n.2013/003 du 18 Avril 2013 Régissant Le Patrimoine Culturel au Cameroun, CAMERLEX.COM, *available at* <https://www.camerlex.com/cameroun-loi-n-2013003-18-avril-2013-regissant-patrimoine-culturel-cameroun/> (last visited Feb. 4, 2019).

¹²³ Article 6, *supra* note 120.

¹²⁴ Article 10 & 11, *supra* note 120.

¹²⁵ See CODE DU PATRIMOINE, *supra* note 58.

December 15, 1989 (“The Lomé Convention”).¹²⁶ The Lomé Convention invites the UN community and its member states to “acknowledge the legitimate right of the ACP states to cultural identity, to promote the return or restitution of cultural property taken from ACP states and now found in member states.”¹²⁷ The convention also demanded for the establishment of an “inventory of cultural property from ACP states found in territory of community member states, in public and quasi-public institutes” and “to facilitate access for ACP states to archives” including providing “financial and technical assistance for the appropriate training activities carried out in the preservation and protection of cultural property.”¹²⁸ This convention is the most explicit attempt at a unilateral demand for the return of cultural heritage objects. It must be noted, however, that only Nigeria, Ghana, and Cameroon are signatories to this declaration out of the West African nations surveyed in this note.

Perhaps the most pressing legal obstacle in implementing cultural property or cultural heritage laws is that they are essentially national in nature.¹²⁹ Some legal scholars propose that cultural property law should become more uniform through “increased globalization of cultural property law.”¹³⁰ The argument is that increased globalization of cultural property laws will address the issue of asymmetry between countries that have strong protections (typically market nations) and those that have relatively weak protection in others (typically source nations).¹³¹ This argument is especially relevant in the context of European restitution of cultural heritage back to African countries which have relatively weak cultural heritage protections as compared to their European counterparts.

One of the original quasi-legal frameworks for the protection of cultural heritage is outlined in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹³² This

¹²⁶ The Lomé Convention, Annex XXIV, UNITED NATIONS TREATY SERIES 326 (1996), available at <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b1e2b> (last visited Feb. 4, 2019).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ SHYLLON, *supra* note 6, at 365.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, available at <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage-convention-and-protocols/1954-hague-convention/> (last visited Sept. 29, 2018)[hereinafter *1954 Hague Convention*]; see also Prott & O’Keefe *supra* note 39.

international treaty focuses exclusively on the protection of cultural heritage in the event of armed conflict covering immovable and movable cultural heritage and includes several measures that States who are signatories to the convention may take to protect cultural property.¹³³ It is important to note that while France ratified the convention in 1954, the U.K. has only ratified it recently.¹³⁴ The U.K. passed it into law in February 2017 through the Cultural Property (Armed Conflicts) Act after a long legislative process.¹³⁵ The strengths of this treaty is that its provisions have inspired similar provisions in domestic cultural heritage property laws in Europe and in Africa. The drawback is that this law does not have retroactive application to wars or armed conflicts prior to World War II.¹³⁶

The UNESCO 1970 Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is an international legal instrument developed to suppress the illegal transfer of, and trade in, cultural property across national boundaries.¹³⁷ The convention is meant to provide preventative measures for prohibiting the importation of cultural property by requiring the issue of export certificates.¹³⁸ It must be noted that Nigeria, Benin, Ghana, Mali and Cameroon are all signatories to the UNESCO 1970 Convention.¹³⁹ Weaknesses of the convention include the fact that it is not retroactive for objects stolen before the convention came into force, many of the major illicit importing nations have not ratified the convention and there is no requirement that ethnic

¹³³ *Id.*

¹³⁴ John Glen MP, *Government Ratifies Hague Convention on Protecting Cultural Property*, GOV.UK (Sept. 12, 2017), <https://www.gov.uk/government/news/government-ratifies-hague-convention-on-protecting-cultural-property>.

¹³⁵ *Id.*

¹³⁶ *1954 Hague Convention*, *supra* note 132.

¹³⁷ *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, available at <http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/1970-convention/> (last visited Sept. 28, 2018) [hereinafter *1970 Convention*]; see also Prott & O'Keefe, *supra* note 39; see also John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 THE AMERICAN J. OF INT'L LAW 831–53 (1986) (discussing the ways of thinking about cultural property and overview of existing protections for cultural property).

¹³⁸ *1970 Convention*, *supra* note 137.

¹³⁹ *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, State Parties, UNESCO, available at <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha> [hereinafter *1970 Convention, State Parties*].

origins be taken into account when making or considering restitution claims.¹⁴⁰ A later enactment seeking to protect art from the illicit trading market was enacted in the United Kingdom under the 2003 Cultural Objects (Offences) Act. The act received royal assent to provide punitive offense for “acquiring, disposing of, importing or exporting tainted cultural objects, or agreeing or arranging to do so; and for connected purposes.”¹⁴¹ The barriers that it creates for broad application is that it applies mostly to private dealers or individuals engaging in the illicit art trade.¹⁴² In the U.S., Congress passed the Convention on Cultural Property Implementation Act in 1983 in order to “reduce certain duties, to suspend temporarily certain duties, to extend certain existing suspensions of duties....”¹⁴³ The act essentially put into force the UNESCO Convention of 1970 within the U.S. jurisdiction.¹⁴⁴

After the ravages of World War II, several European countries signed the European Cultural Convention in 1954.¹⁴⁵ The treaty was enacted by European states for the purpose of “develop[ing] mutual understanding among the peoples of Europe and reciprocal appreciation of their cultural diversity.”¹⁴⁶ The issues that are presented in applying this treaty in the context of looted West African art is that the convention mainly applies to cultural activities of European interest meaning European cultural activities.¹⁴⁷ This point begs the question as to whether West African cultural heritage housed within European cultural institutions fall within the scope of “European interest.”¹⁴⁸ Subsequently, the Council of Europe developed its own treaty, the 1985 European Convention on Offences Relating to Cultural Property,

¹⁴⁰ DARRELL A. POSEY AND GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES*, 94 (International Development Research Centre, 1995).

¹⁴¹ *Dealing in Cultural Objects (Offences) Act of 2003*, Chapter 27, UNESCO available at http://www.unesco.org/culture/natlaws/media/pdf/gb/gb_dealingcultobjsoffences2003_engorof.pdf (last visited Sept. 29, 2018).

¹⁴² *Id.*

¹⁴³ Convention on Cultural Property Implementation Act, P.L. No. 97-446, 96 Stat. 2329 (1983), <https://eca.state.gov/files/bureau/97-446.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ European Cultural Convention, COUNCIL OF EUROPE, Dec. 19, 1954, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/018> (last visited Sept. 29, 2018).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

protecting cultural property from illicit trafficking and destruction.¹⁴⁹ Similar to the UNESCO convention on related offences, this treaty mostly deals with private individual instances of illicit trade and destruction, not addressing looting by a sovereign or government order.¹⁵⁰

Perhaps the most significant quasi-legal framework in the realm of looted artwork was the creation of the Washington Conference Principles on Nazi-Confiscated Art (“Washington Principles”).¹⁵¹ After the Washington Conference on Holocaust Era Assets, the conference promoted this series of non-binding principles to “assist in resolving issues relating to Nazi-confiscated art.”¹⁵² Some of the principles include identifying art that had been confiscated by the Nazis and not subsequently restituted, and providing accessible and open archives to “facilitate the identification of all art that had been confiscated.”¹⁵³ Recently, as a logical expansion of the principles established during the Washington Conference, the United States Congress passed the Holocaust Expropriated Art Recovery Act of 2016, commonly referred to as the HEAR Act.¹⁵⁴ It was enacted to “ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner,” essentially extending the statute of limitations to bring a claim for Nazi looted artworks.¹⁵⁵ This is an important development in the American context as it provides potential claimants six years within actual discovery of the identity and location of the art or cultural property and sufficient evidence of a viable claim preempting state statutes of limitations, which may present procedural hurdles (i.e.

¹⁴⁹ *Council of Europe Convention on Offences Relating to Cultural Property*, COUNCIL OF EUROPE (May 3, 2017), <https://www.coe.int/en/web/culture-and-heritage/convention-on-offences-relating-to-cultural-property>.

¹⁵⁰ *Id.*

¹⁵¹ *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEPT. OF STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>; see also NICHOLAS M. O’DONNELL, *A TRAGIC FATE* 29-58 (ABA Publishing, 1st ed.) (2017) (details the events surround the conference and the existing legal context).

¹⁵² *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 151.

¹⁵³ *Id.*

¹⁵⁴ Holocaust Expropriated Art Recovery Act of 2016, 114 P.L. 308; see also *A Proposed Uniform Statute of Limitations for Nazi-Plundered Art and Cultural Property*, HUGHES HUBBARD & REED ART LAW BLOG (Jul. 11, 2016), <https://www.hhrartlaw.com/2016/07/a-proposed-uniform-statute-of-limitations-for-nazi-plundered-art-and-cultural-property/>.

¹⁵⁵ Holocaust Expropriated Art Recovery Act of 2016, 114 P.L. 308, § 3(2).

laches or burden of proof standards).¹⁵⁶ The removal of procedural hurdles in the looted art context could perhaps open the door for repatriating other types of artwork.

III. A THEORY OF OWNERSHIP

A. *Ownership Rights: Who has Property Rights?*

Scholars often differentiate between cultural objects, property and heritage.¹⁵⁷ “Cultural object is defined by significance it has for states, individuals, non-state entities, and groups and may embody archaeological, ethnological or historical information about the creative process and about the identity of the group responsible for its production.”¹⁵⁸ Cultural property and cultural heritage create a strong tie between national identity and the people within that nation. One art and business law scholar argues that “what a community or group recognizes as part of its identity and as representative of its symbolic continuity beyond its contingent existence, helps to identify that group.”¹⁵⁹ This argument suggests a kind of link between cultural heritage and acknowledgement of property rights.¹⁶⁰ It also relates to the “personhood theory” of property law in which “objects are closely bound up with the personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.”¹⁶¹

The debate surrounding use of cultural property versus cultural heritage in defining the legal framework that covers tangible cultural

¹⁵⁶ *Id.*; see, e.g., *Reif v. Nagy*, 61 Misc. 3d 319 (N.Y.S. 2018) (ordering return of two pieces of allegedly Nazi-looted art to relatives of original Jewish owner). *But see* *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011) (declaring a purchaser to be the owner of a drawing, and counterclaims of prior owners' heirs were barred by laches); Webster D. McBride, *Surprise Decision in Reif v. Nagy Raises As Many Questions as it Answers*, HUGHES HUBBARD & REED ART LAW BLOG (Apr. 23, 2018), <https://www.hhrartlaw.com/2018/04/surprise-decision-in-reif-v-nagy-raises-as-many-questions-as-it-answers/> (for further discussion of the contradictory results in these two cases with similar facts).

¹⁵⁷ Christa Roodt, *Restitution of Art and Cultural Objects and Its Limits*, 46 THE COMP. & INT'L L. J. OF S. AFRICA 286, 287–91 (2013) (discussing complex nature and status of art and cultural objects in legal negotiations or disputes); see also Meryman, *supra* note 137; Prott & O'Keefe, *supra* note 39.

¹⁵⁸ Roodt, *supra* note 157, at 287.

¹⁵⁹ *Id.* at 291.

¹⁶⁰ *Id.* at 291.

¹⁶¹ Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

manifestations is a complex one.¹⁶² Tensions exist between the westernized system of legal ownership (Civil v. Common Law) and non-westernized systems of property rights.¹⁶³ First, there are important distinctions that are raised between Civil and Common law.¹⁶⁴ Civil law regimes typically apply different rules when the cultural property at issue is owned by the State or other public body versus when it is in private hands.¹⁶⁵ For instance, cultural objects held in French state-owned or local museums have the protection of inalienability and indefeasibility, whereas private owners are protected through the bona fide acquirer normal legal rule of property.¹⁶⁶ “The fundamental policy behind traditional property law is protection of the rights of the possessor whereas the fundamental policy behind cultural heritage law is protection of the heritage for the enjoyment of present and later generations.”¹⁶⁷ Cultural heritage represents the identity of a people. In order to continue the legacy of that identity, it must be protected and passed down. Without protection, cultural heritage is at risk of being “lost” or at a minimum, being taken advantage of.¹⁶⁸ The inherent goal of the law is important to understand as it determines how legislation should be developed in order to protect cultural objects.

Westernized notions of property law focus on commercial connotations including being able to alienate, exploit and exclude others from the thing in question.¹⁶⁹ There is a focus on an individual owner or possessor who acquires rights to the exclusion of others.¹⁷⁰ In Western property legal traditions, property connotes ownership and allows that single owner to do what they wish with that property.¹⁷¹ In fact, the laws of intellectual property developed as a way to “protect the pecuniary [monetary] value inherent in the products of artistic genius.”¹⁷² Deeming “works of art” as having “aesthetic value” puts a monetary notion on it as something that can be owned and thus subject

¹⁶² See Prott & O’Keefe, *supra* note 39, at 315.

¹⁶³ See Merryman, *supra* note 137, at 852.

¹⁶⁴ See Prott & O’Keefe, *supra* note 39, at 315.

¹⁶⁵ *Id.* at 315.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 309.

¹⁶⁸ *Id.* at 315.

¹⁶⁹ *Id.* at 310.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² GERSTENBLITH, *supra* note 37; see also Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J. L. AND JURIS. 249–85 (1993).

to traditional legal framework of property law.¹⁷³ Traditional property law does not account for this ambiguous area of art as property. There needs to be a “system of law which will take account of the peculiar nature and requirements of [property law applying to aspects of the cultural heritage] arising from the need to protect them.”¹⁷⁴ A logical gap is created, which makes it “difficult to achieve recognition of non-pecuniary values inherent in cultural objects, even though these [values] are respected by non-Western groups.”¹⁷⁵

The way these objects are viewed in a Western legal system presents a dichotomy with how they are perceived in non-Western systems. Indigenous societies often do not apply the Eurocentric concept of property as an individualized right to the exclusion of others. In some indigenous communities, indigenous property is “devised along the lines of a stewardship model of property that allows indigenous peoples to participate in dialogue about the representation of indigenous images without acquiring fixed property rights.”¹⁷⁶ The stewardship model of property “prioritizes service to the organization or group over self-interest” and is “pluralistic in nature, rather than individualistic.”¹⁷⁷

There is also an interesting dynamic that occurs when indigenous cultural property is construed as “art” within the Western conceptualization of the term. The conflict between the different legal systems is “exacerbated when ethnographic and archaeological objects, for example, become viewed as art when they are decontextualized and placed in museums and private collections in the West.”¹⁷⁸ Art in the West has a strong connection to property rights as it represents a tangible piece of creation.¹⁷⁹ Since most of the cultural heritage from West Africa, that is considered “art” in the Western world, was used for utilitarian purposes in the source communities, these objects did not carry the same connotation as property in the sense of protected artworks. The varying conceptions of what constitutes “art” and whether “art” should be protected as a matter of cultural property makes the determination of who ultimately has ownership rights in West African cultural heritage properties very complex. One scholar

¹⁷³ See GERSTENBLITH, *supra* note 37.

¹⁷⁴ Prott & O’Keefe, *supra* note 39, at 312.

¹⁷⁵ GERSTENBLITH, *supra* note 37, at 16.

¹⁷⁶ Carpenter, *supra* note 42, at 1111.

¹⁷⁷ *Id.* at 1072.

¹⁷⁸ GERSTENBLITH, *supra* note 37, at 16.

¹⁷⁹ *Id.*

has estimated that approximately 90% of Africa's cultural heritage exists outside the continent.¹⁸⁰ Thus, African countries only have a minority share of their material cultural legacy. Some scholars are critical of this estimation, voicing a concern that the calculation of this estimate stems from a Eurocentric perspective.¹⁸¹ This argument is premised on the idea that African communities do not see cultural heritage as cultural property or "art." However, this argument fails to address that leaders from various West African countries, especially Benin and Nigeria, have made demands for the return of their cultural heritage properties.¹⁸² This seems to suggest that there is an innately human interest at stake rather than a neocolonial political tactic.

These subsidiary debates emphasize that there are several competing interests at stake. On the one hand, there are the source communities who created the cultural heritage, often in pre-colonial times and for the purpose of cultural rites. Then, there is the nation-state, typically the government representing the national interest in these cultural properties. Finally, there are the European current possessors who may have obtained the property through military expeditions or "legally" through the legal systems that were implemented by the colonial powers at the time. At the point that the European possessor acquired the cultural heritage property, there may have been colonial laws in place which made possession of it legal. The contemporary issue of "looting" becomes one of detailed provenance research. Given that accessible record systems for heritage management are either grossly inadequate or non-existent in most countries of Africa, it makes it difficult to locate records on cultural heritage.¹⁸³

When source communities created the cultural heritage, the identity of the artist was typically not identified and was often considered communal property. This makes it difficult to trace back to one person

¹⁸⁰ Ruth Maclean, *France Urged to Change Heritage Law and Return Looted Art to Africa*, THE GUARDIAN (Nov. 21, 2018, 1:34 EST), <https://www.theguardian.com/world/2018/nov/21/france-urged-to-return-looted-african-art-treasures-macron>; see also Alain Godonou, *UNESCO forum on Memory and Universality*, in WITNESS TO HISTORY: A COMPENDIUM OF DOCUMENTS AND WRITINGS ON THE RETURN OF CULTURAL OBJECTS 61 (Lyndel V. Prott, Paris: UNESCO, 2009).

¹⁸¹ Z.S. Strother, *Eurocentrism Still Sets the Terms of Restitution of African Art*, THE ART NEWSPAPER (Jan. 8, 2019 10:12 GMT), <https://www.theartnewspaper.com/comment/eurocentrism-still-defines-african-art>.

¹⁸² See Buffenstein, *supra* note 8.

¹⁸³ Joseph Eboreime, *Challenges of heritage management in Africa*, in CULTURAL HERITAGE AND THE LAW: PROTECTING IMMOVABLE HERITAGE IN ENGLISH-SPEAKING COUNTRIES OF SUB-SAHARAN AFRICA 2 (Ndoro, et al. eds., ICCROM 2008).

and attribute ownership to them using the Western model of property rights. In the West, however, there are arrangements of joint ownership of property.¹⁸⁴ These arrangements include concurrent estates or joint tenancies.¹⁸⁵ Taking into consideration the source community's conception of ownership is important in determining which mechanisms to implement in repatriating West African cultural heritage. Specifically, with West African cultural property, the objects were often used in cultural ceremonies or rites of passage in particular ethnic communities. A tribal origin can be attributed to the work, though given the diversity and expanse of many ethnic groups across several modern-day nation states, there is a question as to who gains rights to that property. In the Kingdom of Dahomey, the *oba* maintained all the cultural objects within the palace. This ancient mechanism of maintaining and displaying cultural objects produced by the artisans in the community served as the original museums. The issue is that the Kingdom of Dahomey stretched across modern-day Benin and Nigeria.¹⁸⁶ Who claims rights in property that may technically belong to both Benin and Nigeria? Whose laws control?

Additionally, given the vast diversity of ethnic groups on the continent, there are cultural properties that belong to a group whose geographic existence is not limited to one country. For instance, the Senufo people exist in several countries in West Africa. Cote d'Ivoire, Mali, Burkina Faso, among others, could possibly claim ownership over cultural heritage that belongs to the Senufo community. These communities are vast and do not necessarily contain a chief or head of the entire community. It would be difficult to return objects to a community that is disconnected across several countries and would not be able to claim ownership as individuals. Therefore, the heads of African governments are positioned to have a strong claim for restituting cultural heritage objects to the state. there is, however, a complex web of issues related to the restitution of objects to African state officials given the history of corruption by politicians, possibility of a profit-motive to in turn sell these objects once received, and a general sense that the objects are not going back to their "true" owner.

¹⁸⁴ DUKEMINIER, ET AL., PROPERTY 387 (Wolters Kluwer, ed., 9th ed. 2018).

¹⁸⁵ *Id.*

¹⁸⁶ See *The Kingdom of Benin*, BBC BITESIZE, <https://www.bbc.co.uk/bitesize/topics/zpvckqt/articles/z3n7mp3> (last visited Mar. 28, 2020).

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B. Perspectives on Tension Between the Movement of Art and Cultural Objects and Their Original Contexts

There are various perspectives surrounding the ownership cultural heritage. Some take a cosmopolitan point of attribution arguing that art is the common heritage of mankind and thus does not “belong” to one single community, but instead it belongs to the world community. In other words, a cultural object may “acquire a universal value and is considered to be a part of the progressive development of human civilization.”¹⁸⁷ The idea of cultural internationalism “urges that objects of that kind be made available abroad by sale, exchange or loan [so that] the achievements of earlier cultures of the source nation could be exhibited to a wider audience.”¹⁸⁸ This viewpoint is made more multi-dimensional by the notion of “cosmopolitanism” which focuses on the fact that “cultures are made of continuities and changes...[that] societies without change aren’t authentic.”¹⁸⁹ Conversely, other perspectives, such as the one posited in the Savoy- report, emphasize cultural heritage as property that belongs to a specific community or country, which communicates their culture, worldview and is essentially of the community.¹⁹⁰ This idea of cultural nationalism is a direct contradiction of cultural internationalism, whereby cultural objects are retained by the source nations.¹⁹¹ This perspective contemplates the “plural anthropological sense, in which different cultures lay claim to different properties.”¹⁹²

IV. A LEGAL PROPOSAL FOR RESTITUTION

A. Proposed Frameworks

Based on a review of the above historical legal systems, a proposed legal framework must deal with the issue of ownership. To restitute cultural property is not only to symbolically “give it back,” but to create an understanding that the source community has ownership over that returned property.¹⁹³ As stated earlier, French inalienability

¹⁸⁷ Coombe, *supra* note 172, at 258–59.

¹⁸⁸ Merryman, *supra* note 137, at 847.

¹⁸⁹ KWAME ANTHONY APPIAH, *A case for contamination, in COSMOPOLITANISM* (Allen Lane 2006).

¹⁹⁰ *Savoy-Sarr report, supra* note 4.

¹⁹¹ Merryman, *supra* note 137, at 847.

¹⁹² Coombe, *supra* note 172, at 259–60.

¹⁹³ *Should Looted African Art be Returned?*, THE ART NEWSPAPER WEEKLY (Dec. 14, 2018) (downloaded using Apple Podcasts) (featuring discussion of the Savoy-

laws create a significant impediment to returning African cultural heritage.¹⁹⁴ Exceptions have been made for human remains and Nazi-looted art to jump through the hurdles of inalienability.¹⁹⁵ These exceptions should be extended to protect African cultural heritage that was looted as a result of colonialism. Similarly, to works that were captured as a result of Nazi occupation, African cultural heritage belonging to public collections in Europe should be included in the exception that the works were taken as a result of conflict or spoils of war. This process necessitates due diligence in provenance research of African cultural heritage. Those works that were obtained in the “colonial context” could be considered as *prima facie* spoils of armed conflict, military operations, civilizing missions or scientific expeditions. African cultural heritage can be restituted on the basis of this fact alone.

Perhaps, European countries, which have inalienability laws, especially France and Britain, can take a page from the American book with regards to Native American cultural heritage.¹⁹⁶ In the U.S., there are tribal museums which “evolved as a reaction to alien institutions imperialistically collecting and interpreting Native American culture and as a focal point of resurgence of tribal communities.”¹⁹⁷ These tribal museums are funded and operated by the sovereign Native American nations.¹⁹⁸ This could be a viable option in the context of West African/European relations.

Some argue that depriving African countries of their cultural property creates economic and identity crises.¹⁹⁹ Thus, foreign cultural investment can be offered as a mechanism to reconstitute African cultural heritage without a full transfer of ownership by placing the profit motive with a social impact objective. An example of such potential foreign cultural investment could be a major European museum building a branch in an African country and relocating African cultural heritage objects to that branch.²⁰⁰ There is even discussion about creating a

Sarr report with campaigner Vicky Ngari-Wilson, Nicholas Thomas, Director of the Museum of Archaeology and Anthropology, Cambridge, and Ugochukwu-Smooth Nzewi, Curator of African art at the Cleveland Museum of Art).

¹⁹⁴ CODE DU PATRIMOINE, *supra* note 58.

¹⁹⁵ *Savoy-Sarr Report*, *supra* note 4, at 74.

¹⁹⁶ Duane H. King, *Exhibiting Culture: American Indians and Museums*, 45 *TULSA L. REV.* 25, 30 (2009).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 29.

¹⁹⁹ Ratha & Kabanda, *supra* note 12.

²⁰⁰ *Id.*

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digital archive for African youths to be able to more readily access cultural heritage objects held abroad.²⁰¹ This is a feasible option that has been practiced through a system of long-term loans. The drawback is that it does not address the idea of full ownership. Even though an object may be transferred back to its source community on a permanent long-term loan, that object would still be under the ownership of the European institution it came from. Significantly, this means that African cultural heritage would still be owned by a foreign entity and undermines the symbolism of restitution. A way to counteract this would be to create councils or commissions represented by various ethnic groups whose cultural heritage is contained in European museums to serve as guardians of the loans. These representatives could determine the standards by which restitution would be handled. In other words, the representatives could act as trustees of the cultural heritage and provide for its management including promulgating standards of care, maintaining the terms of the loan, etc. The councils or commissions could also encapsulate the national government interests in asserting ownership over the cultural heritage. This also begs the question of what the geographic scope of the councils should include. The existence of unilateral agreements such as the Lomé Convention should be a model for proposing collaboration amongst the governments in terms of restitution. These councils or commissions will allow the source communities to have a voice in the decisions made about cultural heritage that was produced by them. From a socio-legal perspective, they should set the terms for how returned objects shall be treated.

Arguably, the most sweeping measure would be the passage of a new resolution by the United Nations, UNESCO or other international intergovernmental body for the restitution of looted cultural heritage around the world. The resolution could be modeled after the 1954 Hague Convention, the 1970 Convention and a combination of national cultural heritage management laws to create a model framework for restituting art that falls into the category of looted art. Like the Washington Principles established in the United States and the exceptions made in French inalienability laws, the legal exceptions should be extended to the context African cultural heritage. The international resolution should also provide for retroactive applicability and define “looting” within the context of colonial escapades. An

²⁰¹ See Clémentine Deliss, *Why Africa's Future Museums Should Forget Western Models*, THE ART NEWSPAPER (Jan. 13, 2020, 12:03 GMT), <https://www.theartnewspaper.com/comment/africa-museum-comment-future-western-models>.

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internationalized diplomatic resolution could preempt domestic laws creating an obligation to the international community to engage in a moral reckoning through restitution.