Contested cultural objects: property or heritage?

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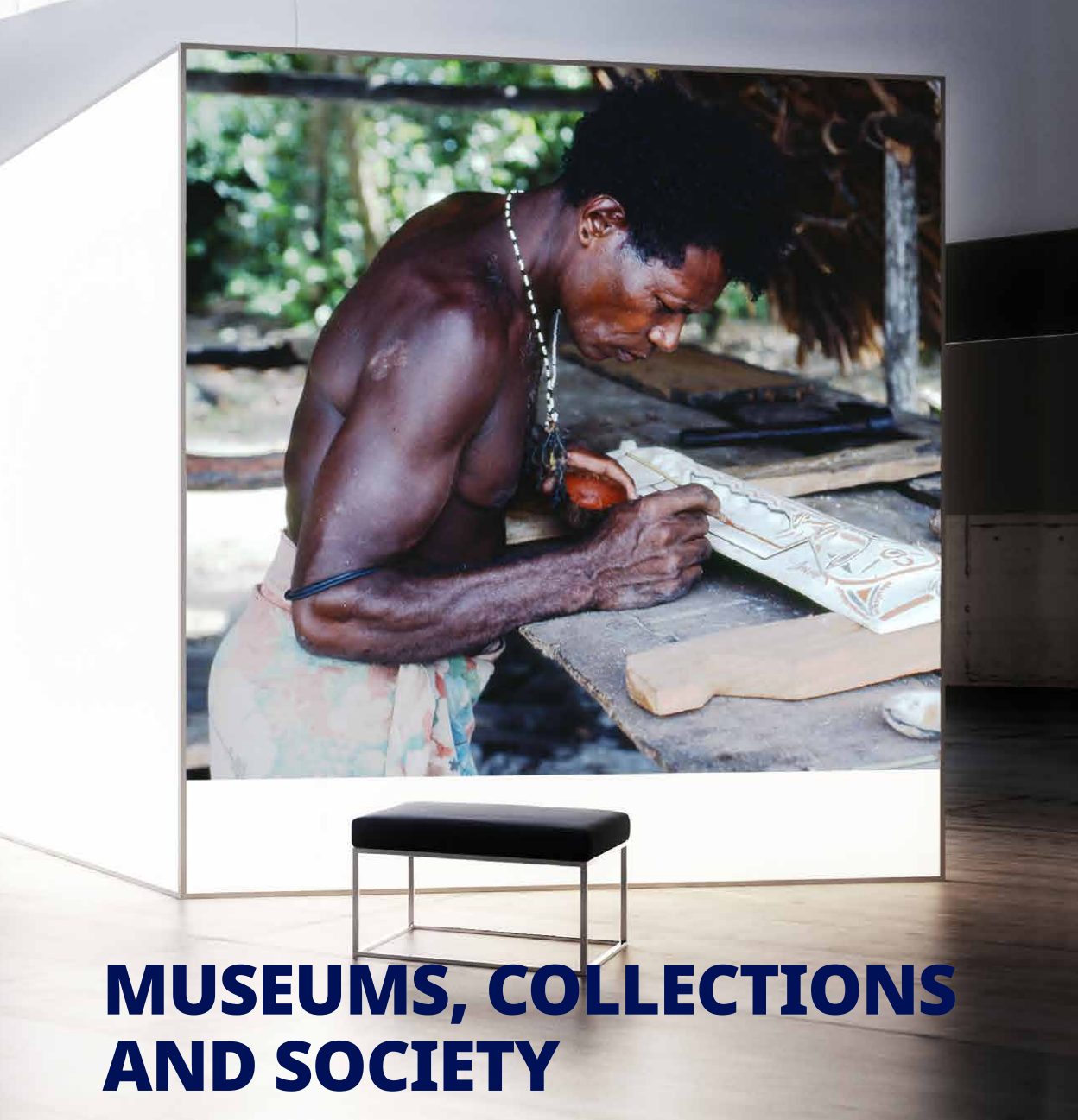

MUSEUMS, COLLECTIONS AND SOCIETY

YEARBOOK 2020

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Photograph cover: Kataka, one of the woodcarvers of Mandok Island (Siassi, Papua New Guinea), is working on a ceremonial dance shield for the museum in Leiden (November 1983). The objects of series RV 5307 of the National Museum of World Cultures, including this shield, were collected in 1983/84 on the Siassi-Islands (Photograph: Pieter ter Keurs).

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Contested cultural objects: property or heritage?

Evelien Campfens

'It is no longer acceptable that most of Africa's cultural heritage is in Europe'.[1] With these words by French President Emmanuel Macron, Europe seems to have entered a new phase in the discussion on colonial collections in Western museum collections.[2] Whilst in France a return policy was announced for African objects held in French museums, in Germany the idea was launched to draft rules for colonial takings similar to the "Washington Principles" for Nazi-looted art.[3] Interestingly, this proposal was voiced by the German director of one of the main 'universal' museums and signatories to the *Declaration on the Value and Importance of Universal Museums*.[4] In 2002, in reaction to claims by source communities to colonial takings, the main Western encyclopaedic museums had argued in this Declaration that treasures from around the world – no matter their provenance – are shown to their best advantage and can be best kept in the care of 'universal' museums. This follows the school of thought that argues that preservation and wide public access are *the* public interests at stake.

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1 Emmanuel Macron discusses the restitution of African art in French collections [video], YouTube, November 2017: https://www.youtube.com/watch?v=8I3exI4f9BY&feature=youtu.be, accessed 15 Jan. 2021.

2 The term 'looting' is used for pillage in times of conflict, for takings the unlawful export of cultural objects or losses as a result of racist policies, e.g. during the Nazi-era.

3 E.g. Oped by Herrmann Parzinger, President of the *Stiftung Preussischer Kulturbesitz* in: *Frankfurter Allgemeine Zeitung*, 25 January 2018.

4 Undersigned by 18 major Western museums. See 'Declaration on the Importance and Value of Universal Museum', *The State Hermitage Museum*, https://www.hermitagemuseum.org/wps/portal/hermitage/news/news-item/news/1999_2013/hm11_1_93/?lng, accessed 10 Jan. 2021.

In the meantime, however, the door had been opened to claims to Nazi-looted art. After settlement of such claims, artefacts may also disappear from public view – as happened, for example, with Gustav Klimt's *Portrait of Adele Bloch-Bauer II,* after its restitution to the heirs of the pre-war Jewish owner.[5] This, notwithstanding its status as Austrian national patrimony. Also requests for the repatriation of human remains by so-called 'settler states' were honoured – such claims by the New Zealand government for Mokomokai on behalf of its indigenous peoples.[6]

In other words, a new vision of cultural objects gains traction whereby the intangible 'heritage' value of cultural objects to individuals or communities, is key. This shift in thinking was voiced by president Macron when he argued that no justification exists for a situation where Africans have to travel to Europe to get an impression of their own cultural heritage. In a similar way, the 2019 German government policy for colonial takings in German museums, provides as rationale that 'all people should have the possibility to access their rich material culture [...] to connect with it and to pass it on to future generations'.[7]

Both Nazi and colonial looting are beyond the scope of present-day treaties that arrange for the return of looted cultural objects. Moreover, such claims often are 'stale' under national ownership laws. For both categories, however, "soft law" instruments (non-binding declarations or ethical guidelines) have been adopted that support claims. In the case of Nazi-looted art the so-called 1998 Washington Principles proposes in that regard 'fair and just' solutions for claims by victims of looting or their heirs. [8] Also in the field of colonial takings such soft law is in place: since the 1970s the United Nations General Assembly adopted, for example, more than twenty declarations on the importance of return of looted cultural objects to source communities. Similarly, the Council of Museums (ICOM) ethical code supports claims by source communities since 1986. [9] Although the political will to follow-up on these calls in Western Europe did exist in the field of Nazi looted art, this was generally lacking for colonial takings. That *status quo* seems to be changing since 2017.

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5 As result of its sale (see image 3.2). For an overview, e.g. Renold C, Chechi A, Bandle AL, Renold MA (2012) Case six Klimt paintings – Maria Altmann and Austria. Platform ArThemis, Art-Law Centre, University of Geneva, https://plone.unige.ch/art-adr/cases -afaires/6-klimt-paintings-2013-maria-altmann-and-austria, accessed 10 Jan. 2020.

6 See: 'The repatriation of Maori and Moriori Remains', *Museum of New Zealand*, https://www.tepapa.govt.nz/about/repatriation/repatriation-maori-and-moriori-remains, accessed 10 Jan. 2021.

7 *'Erste Eckpunkte Zum Umgang Mit Sammlungsgut Aus Kolonialen Kontexten'*, Kultusminister Konferenz (2019) https://www.kmk.org/aktuelles/artikelansicht/eckpunkte-zum-umgang-mit-sammlungsgut-aus-kolonialen-kontexten.html, accessed 15 Jan. 2021.

8 'Washington Conference Principles on Nazi-Confiscated Art' (1998), On 3 December 1998 the 44 governments participating in the Washington Conference on Holocaust-Era Assets endorsed a set of 11 principles for dealing with Nazi-looted art. See https://www.lootedartcommission.com/Washington-principles. Acc. 15 Jan 2021.

9 Adopted by the 15th General Assembly of the International Council of Museums (4 November 1986, renamed and revised in 2001 and 2004).

Figure 3.1: The Banjarmasin Diamond in the Rijksmuseum. It was war booty and once owned by Panembahan Adam, the sultan of Banjarmasin (Kalimantan). After his death, the Netherlands intervened in the battle of succession. In 1859 Dutch troops violently seized control of Banjarmasin and abolished the sultanate. The rough diamond was sent to the Netherlands, where it was cut into a rectangle of 36 carats. (text and image: courtesy Rijksmuseum)

In this debate some crucial matters remain unclear. First, what is decisive for return requests, the unlawfulness of the loss at the time or the significance of an object to people today? In the second place, who are the beneficiaries of return? Consider the case of the diamond of Banjarmasin now in the Amsterdam Rijksmuseum and seized in 1859 by the Dutch Army from the sultanate of Banjarmasin, presently part of the Indonesian state. Which party should be entitled to restitution: the heirs of the sultan (*i.e.* private families as is the case with Nazi-looted art), the people of Banjarmasin (following the example of the United Nations Declaration on the Rights of Indigenous Peoples)[10], or the Indonesian State (in accordance with the interstate model of UNESCO)? And, as a necessary third point: what organisation could monitor the implementation of non-binding rules? In this regard, lessons can be drawn from experiences in the field of Nazi-looted art: clear standards and neutral, transparent, claims procedures are needed for justice to have its way.[11] This paper proposes that a human rights law approach to the issue of contested culural objects could help develop this field further.

1. Stolen possession or lost heritage?

Cultural objects have a dual nature. They can be seen as possessions, and as such they can be owned and traded and are subject to property law regimes. Yet, it is their intangible (cultural or heritage) value that sets them apart from other goods. That intangible value is an all but static notion: an artefact may be valued by the general

10 Zie, Advies over the omgang met koloniale collecties, *Raad voor Cultuur*, 7 Oct. 2020, p. 10.

11 E. Campfens, 'Restitution of Looted Art: What About Access to Justice?', *Santander Art Cult Law Rev,* 2/4 (2019), 185-220.

public because of its scientific or aesthetic value, but at the same time be of spiritual importance to a community, it may be symbolic of the cultural identity of a people, or it may be a special family heirloom. Whereas, in broad terms, national private law addresses cultural object as possessions, international public law addresses the intangible cultural and heritage interests at stake.

Cultural objects as possessions

Private law is the field that traditionally arranges legal claims over lost cultural objects. Laws on ownership and property, however, differ widely per country, with many variations on the theme of how title over a (stolen) good can be transferred to a new possessor. Common law jurisdictions (*e.g.* the US and the UK) accord relatively strong rights to the dispossessed former owner on the basis of the principle that a thief cannot convey good title, whereas in civil law countries (most European countries) the position of the new possessor is stronger. Here, title over stolen goods may pass to a new possessor after an acquisiton in good faith or just after the passage of time.

Depending on the adoption by a specific country of international treaties that arrange for the restitution of looted cultural objects, this domestic private law will have been adapted to international standards. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, in that regard introduced a system that relies on the following pillars:[12] (i) national states are 'right holders' of the cultural property on their territory; (ii) the unauthorized export of such objects is unlawful; and (iii) such objects should be returned. Since its adoption, these principles have gained universal recognition. Nevertheless, these rules only apply directly to claims based on a loss after both states adopted the convention, and only in as far the country where the object is located implemented these standards in national law. This obviously does not cover historical cases such as Nazi looted art or colonial takings. Beyond these, however, many more such 'grey categories' of unlawfully looted but lawfully possessed cultural objects exist. This is why Alternative Dispute Resolution (ADR) generally is the preferred – and often the only – way to solve claims in this field.

Cultural objects as heritage

From a heritage point of view, cultural objects are valued because of their intangible value to people. Throughout history and in most cultures, objects that are symbolic of an identity enjoy protection under the law. Illustrative in this respect is a 1925 Indian court ruling holding that a contested Hindu family idol "could not be

12 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (signed 14 November 1970), 823 UNTS 231 (1970 UNESCO Convention).

Figure 3.2: *Portrait of Adele Bloch-Bauer II* by Gustav Klimt (1912). After restitution it was auctioned and, in 2016, reportedly resold for 150 million dollars. (See <https://news.artnet.com/market/oprah-sells-famed-gustav-klimt-portrait-150-million-851537>). (image: Wikimedia)

seen as a mere chattel which was owned".[13] The intangible heritage value of cultural objects, being symbolic of a spiritual, historical or ethnic identity, or of family life, arguably has been the rationale underlying the protected status of cultural objects in international law since its foundation.[14] In that sense Hugo Grotius, one of the founders of international law, in 1625 already highlights the protected status of cultural objects – in his turn referring to the writings of Polybius and Cicero – where he argues these are exempt from the righ to pillage in times of war:[15]

"There are some things of that nature, [...] which even common reason will have spared during war. [...] Such are temples, porticos, statues, and the like. Cicero much commends Marcellus, because he took such a particular care to preserve all the buildings of Syracuse both public and private, sacred and prohpane, as he had been

13 *Mullick v Mullick* (1925) LR LII Indian Appeals 245, cited in LV. Prott, PV. O'Keefe, 'Cultural Heritage or Cultural Property?' *International Journal of Cultural Property*, 1 (1992), 307. However, when it comes to the protection of *foreign* heritage interests such special treatment is not a given.

14 On the historical development, see: E. Campfens, 'The Bangwa Queen: Artifact or Heritage?' *International Journal of Cultural Property*, 26 (2019), 75-110.

15 Hugo Grotius, *De Jure Belli Ac Pacis (On the Law of War and Peace)* (1625) bk III ch 12.:V. For this translation see https://oll.libertyfund.org/page/grotius-war-peace#lf1032-03_label_1362.

sent with an army, rather to defend than take the city. [..]. Our ancestors used to leave to the conquered, what things were grateful to them, but to us of no great importance."

With regard to wartime looting, the legal obligation to return cultural objects is well established in international law. The peace treaties after the Napoleonic Wars at the outset of the 19th century are generally considered the turning point in the development of the law in this respect: restitution of dispersed heritage on the basis of territoriality (instead of 'winners takers') was at the time considered a principle of justice 'amongst civilised nations'.[16] Eventually, the legal obligation to return cultural objects looted in times of war was codified in 1954, in the First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict Hague Convention.[17] Beyond situations of armed conflict, as mentioned above, today the 1970 UNESCO Convention provides for the rule that unlawfully exported cultural objects should be returned. In spite of the fact that rules with regard to the return of

Figure 3.3: The Horses of San Marco (Quadriga) in Venice. The Quadriga probably originates from the island of Chios and was taken by the Venetions from Constantinople in 1204 during the sack of the capital of the Byzantine Empire as part of the Fourth Crusade. Napoleon took it to Paris, to be returned to Venice after his defeat. (image: Wikimedia)

16 Problematic is that international law for long was biased in this respect. A discussion in Campfens (2019a).

17 The 1954 Hague Convention, adopted 14 May 1954. 249 UNTS 358.

war booty are very old, former imperial powers generally did not acknowledge any legal obligations to return cultural objects taken from their colonies.

Leaving a discussion on the lawfulness of looting practices at the time for what they are, what about other approaches?

2. Human Rights Law notions

While the UNESCO Conventions approach cultural objects as national 'property', more recent regulations take another approach. They tend to focus on the social significance of cultural objects and their identity value for communities and this brings with it the relevance of international human rights law. Disputes relating to contested cultural objects, from that perspective, also do not necessarily have to be approached as issues of property or ownership (as stolen possessions), but may also be approached as cases that, in their essence, are about identity values (lost *heritage).*

The 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (the Faro Convention), for example, very well illustrates that shift in approach. It defines cultural heritage as "a group of resources inherited from the past which people identify, *independently of ownership*, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions".[18] Although the Faro Convention does not aim to create rights but rather voices policy aims for governments, it opened the door to a new understanding of cultural objects: away from a focus on property and state sovereignty, and towards the recognition of heritage interests of individuals and communities.

Heritage community

The Faro Convention introduced the concept of 'heritage communities': "A heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations".[19] This idea of heritage communites as "right holders" underscores that, apart from owners, more parties may have legitimate interests in the same heritage. In relation to contested cultural objects these may be creators, former and present owners, but also the general public – which reflects the importance of wide public access to "universal heritage". Such an approach contrasts with the "all-or-nothing" outcome in an ownership approach: under applicaton of ownership law only one party would be seen as the legitimate 'right holder', namely the owner. The notion of heritage communities allowes for more flexibility. It also better suits a reality where spiritually important objects or archaeological finds, in their original setting, were inalienable and could not be privately owned. Nevertheless, after such

18 Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005), CETS No. 199 (Faro Convention) (emphasis added), Art. 6.

19 Faro Convention, Art. 2(b).

objects entered another jurisdiction they may well be owned and traded, and seen as any other commodity. This clahs of national laws underlines a need for universally applicable rules in this field.

Equitable solutions to competing claims

In as far as it concerns competing claims, the Faro Convention provides for the rule that states should 'encourage reflection on the ethics and methods of presentation of the cultural heritage, as well as respect for diversity of interpretations'; and 'establish processes for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities'.[20]

This preference for cooperative solutions reflects soft law and (best) practice in the field of contested cultural objects. The 2015 Operational Guidelines to the 1970 UNESCO Convention, for example, suggest in the event of competing claims to national cultural property, 'to realize […] interests in a compatible way through, inter alia, loans, temporary exchange of objects […], temporary exhibitions, joint activities of research and restoration'.[21] Such creative solutions are not uncommon in practice as it is. For example, when France in 2011 returned looted scriptures to (South) Korea on a renewable long-term loan – to circumvent laws prohibiting French museums to deaccession public collections –, it separated ownership rights from rights to access, use and control.[22] A solution mirrored by the Korean example is the transfer of title of (presumably looted) Nok and Sokoto statuettes by France to Nigeria, whereas they physically remained in France under the terms of a 25-year loan.[23]

In the Korean example physical possession, whereas in the Nigerian example rehabilitation and a formal recognition, may have been key. Also in the field of Nazi looted art, the 1998 Washington Principles prescribe 'fair and just solutions, depending on the circumstances of the case', not an absolute right to full ownership. Solutions in that field often involve a financial settlement, where recognition by addressing the ownership history (*e.g.* in a plaque in a museum) also features as (part of) solutions found.

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20 Faro Convention, Article 7 (b).

21 Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted at the UNESCO Meeting of States Parties, 18-20 May 2015 (C70/15/3.MSP/11), para. 19.

22 *Décret No.2011-527 Portant publication de l'accord entre le Gouvernement de la République Française et le Gouvernement de la République de Corée relatif aux manuscrits royaux de la Dynastie Joseon (ensemble une annexe)* (adopted 7 February 2011) <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000024022738?r=g7YcXLuG3d>

23 M. Cornu, MA. Renold, New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution, *International Journal of Cultural Property*, 17/ 1-31 (2010), 20-21.

Figure 3.4: The Bull by Paulus Potter (1647), Mauritshuis, The Hague. The painting returned from Paris to the Netherlands after Napoleon's final defeat. (image courtesy Mauritshuis)

A human right to access to (one's) culture

As mentioned, the Faro Convention does not create binding rights. Nevertheless, binding international human rights instruments provide for a number of rights that may be relevant in this field. Of key importance in that respect is the evolution of the right of 'access to culture', as it developed from the right to culture in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[24] According to the 2009 General Comment on the right to culture this has come to include "access to cultural goods", and this implicates that states should adopt "specific measures aimed at achieving respect for the right of everyone … to have access to their own cultural… heritage and to that of others."[25] The 2011 Report of the independent expert in the field of cultural rights, Farida Shaheed, is instructive where she concludes that:

24 Article 15(1)(a) of International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966), 993 UNTS 3 (ICESCR). See also Art. 27 of the UDHR.

25 Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009), UN Doc E/C.12/GC/21.

> The right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage.[26]

Shaheed also observes that 'varying degrees of access and enjoyment may be recognized, taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages'. As mentioned in the introduction, this right of access to one's cultural heritage resonates in recent declarations and soft law instruments.[27]

Similar to the Faro Convention, according to Shaheed distinctions should be made between:

a. originators or 'source communities', communities which consider themselves as the custodians/owners of a specific cultural heritage, people who are keeping cultural heritage alive and/or have taken responsibility for it;
b. individuals and communities, including local communities, who consider the cultural heritage in question an integral part of the life of the community, but may not be actively involved in its maintenance;
c. scientists and artists; and
d. general public accessing the cultural heritage of others.[28]

Although this list is of a general nature and not per se aimed at lost cultural objects, it underscores that the specific social function of cultural objects defines entitlement. Moreover, it signals a trend away from national interests and towards community interests.

UNDRIP

While the right of 'access to culture' in the binding ICESCR may seem vague and unspecified, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is clear and specific in its obligations. The UNDRIP entitles indigenous peoples to rights with regard to their cultural heritage, including their lost cultural property.[29] In Article 11(2), this is defined as a right of 'redress through

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26 Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights (Farida Shaheed)' submitted pursuant to resolution 10/23 of the Human Rights Council, 22 March 2010 [Doc A/HRC/14/36

27 Supra, n. 7.

28 Ibid., (62) under 'Right Holders', p. 16

29 See also International Labour Organization (ILO) Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989) 28 ILM 1382. It requests States to take special measures to 'safeguard' the cultures of indigenous peoples (Art. 4). UNDRIP is more specific.

effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs'.[30] Article 12 deals with rights to objects of special importance – providing for a right to 'use and control' where lost ceremonial objects are concerned and a straightforward right to repatriation for objects containing human remains.[31]

Since these provisions are acknowledged as part of the (binding) right of access to culture insofar as the cultural heritage of indigenous peoples is concerned, this is an important instrument in the field of colonial takings.[32] That it is more than 'just' a declaration is illustrated by the fact that the UNDRIP was adopted after 20 years of negotiations and by now is supported almost universally.[33] States, in other words, are under the obligation to assist indigenous peoples in providing 'redress through effective mechanisms' and to 'enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned'.[34]

As to the question of what exactly constitutes an indigenous people, the UNDRIP deliberately abstained from a definition to allow for the flexible evolution of the concept.[35] In general terms the link between people, their land and culture, and self-identification as a distinct community, are decisive factors.[36]

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30 UNDRIP, Art. 11(2).

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

32 According to General Comment No. 21 the right of 'access to culture' includes the rights as listed in the UNDRIP.

33 It was adopted by a majority of 144 States in favour, 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa and Ukraine) and four votes against. These objectors all reversed their vote: on 3 April 2009, Australia's government endorsed it; on 19 April 2010, New Zealand's support became official; on 16 December 2010, the United States declared it would 'lend its support', and in 2016, Canada officially adopted the declaration.

34 UNDRIP, Art. 12(2).

35 Following the advice of Special Rapporteur Daes, Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 'Discrimination against Indigenous Peoples: Protection of the Heritage of Indigenous People', Final Report (1995), Doc. E/Cn.4/Sub.2/1995/26.

36 See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on Behalf of Endorois Welfare Council) v. Kenya* (2010) ACHPR, Communication No. 276/2003, discussed in Vrdoljak AF (2016) Standing and collective cultural rights. In: Jakubowski A (ed) Cultural rights as collective rights, an international law perspective. Brill, Leiden, pp 272-287, p. 281.

3. Heritage title

The approach taken in the UNDRIP is useful in a more general sense because it relies on rights implicated by a continuing situation. Remaining separated from cultural objects that are particularly meaningful to specific people could add up to a violation of human rights. This, as opposed to a focus on the illegality of the acquisition in the past in a property approach. A shift in focus, in other words, from events in the *past* towards the interests of people *today*.

A second point is that this approach enables the classification of objects, depending on their social function and identity value for the people involved. UNDRIP differentiates for example between ceremonial objects, objects containing human remains and a general category of cultural objects 'taken without free, prior and informed consent'.[37] In that sense, differences in entitlement follow from the type of object and identity values concerned.

A third element is that the rights involved are defined in terms of access, return or equitable solutions, not in terms of (the restitution of) exclusive ownership rights. Rights, in other words, tailored to the interests involved, enabling remedies that also take account of the interests of other right holders, such as new possessors who gained ownership title under a specific national regime.

As mentioned above, this reflects soft law that promotes creative and more flexible solutions. On the level of human rights law the jurisprudence of the Inter-American Court of Human Rights is noteworthy in this regard. In the 2015 *Kaliña and Lokono Peoples v. Suriname* case the Court acknowledged, first of all, pre-existing rights of the indigenous peoples with respect to their ancestral lands. The court futhermore held that the right of access can be compatible with rights of other title holders.[38] It ruled that "the State must establish, by mutual agreement with the Kaliña and Lokono peoples and the third parties, rules for peaceful and harmonious coexistence in the lands in questions, which respect the uses and customs of these peoples and ensure their access to the Marowijne River".

The notion that thus emerges can be denoted as "heritage title".[39] Entitlement in this respect depends on a continuing cultural link between people and cultural objects, and the rights involved are defined in terms of access and control, not in terms of absolute and exclusive ownership. Although we are accustomed to defining

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37 UNDRIP articles 11 and 12, see n. 31.

38 The Court ruled with respect to ancestral land that was now owned by third parties that 'the State must establish, by mutual agreement with the Kaliña and Lokono peoples and the third parties, rules for peaceful and harmonious coexistence in the lands in questions, which respect the uses and customs of these peoples and ensure their access to the Marowijne River'. *Kaliña and Lokono Peoples v Suriname*, Merits, Reparations and Costs, Inter-Am. Ct HR, Series C, No. 309, 25 November 2015, para. 159.

39 See E. Campfens 'Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims', NILR 67, 257-295 (2020).

Figure 3.5: The mummified body of 11th century monk Zhanggong Zushi, encased in a Buddha statue that was looted in 1995. The Dutch court did not honour the ownership claim by the Chinese villages, illustrating the wider usefulness of a human rights approach. (image courtesy Elsevier Stokmans Fotografie)

relations between objects and people by way of exclusive ownership, this exclusivity does not always fit cultural *property*. The reason for that is that the intangible heritage values – especially those of earlier foreign owners – are not sufficiently covered by regular ownership laws. Dependant on the type of object and the values it represents, heritage title gives rise to equitable. The specific circumstances and interests involved should determine what is 'equitable'.

Obviously, the intangible heritage value of an object is not the sole point of reference in disputes regarding contested cultural objects. It is important, however, to acknowledge this as a legitimate interest. The UNESCO Conventional framework appoints national states as right holder to heritage title with regard to their "national cultural property". Nevertheless, that model does not provide an answer for earlier losses and has other blind spots, meaning that additional legal tools seem needed.

Figure 3.6: One of the 122 pieces of the Quimbaya collection in Madrid (image courtesy Museo de America)

Access to justice

A last question that needs to be addressed is how to make heritage title operational. Alternative dispute resolution and cultural diplomacy on the interstate level are often promoted as being best equipped to solve disputes in this field.[40] However valid this may be in specific cases, access to justice eventually is key, not only in the recognition of unequal power relations, but also for the development of norms in a field that is hindered by legal insecurity. The question of whether norms can be made operational obviously depends on their binding force. Here, hurdles still exist as

40 E.g. the International Law Association's Principles for Co-operation in the Mutual Protection and Transfer of Cultural Material: 'If the [… parties, EC] are unable to reach a mutually satisfactory settlement […] both parties shall submit the dispute to good offices, consultation, mediation, conciliation, ad hoc arbitration or institutional arbitration'. International Law Association, Report of the Seventy-second Conference (2006), Principle 9. Annex to Nafziger JAR (2007) The principles for cooperation in the mutual protection and transfer of cultural material. Chic J Int Law 8:147-167.

Figure 3.7: The Quimbaya Treasure as shown in Madrid in the beginning of the 20th century (image courtesy Museo de America)

the law is evolving. Nevertheless, heritage title may operate as a 'narrative norm'.[41] Heritage title should thus instruct judges on the interpretation of open norms that exist in all jurisdictions, for example concepts such as 'morality', 'general principles of (international) law' or 'reasonableness and fairness'.[42]

In terms of a straightforward human rights claim, the question is whether a forum could evaluate a claim based on the argument that the continued deprivation of a specific cultural object is an infringement of the right to 'access to culture'. The Optional Protocol to the ICESCR offers a complaints procedure. This procedure, however, is limited to nationals or groups in the State responsible for the alleged violation, whereas claimants are not usually nationals of a holding State, and is

41 E. Jayme, 'Narrative Norms in Private International Law, The Example of Art law', in *The Hague Academy of International Law, Recueil des cours, Collected Courses*, 375 (2015), 41: 'These norms speak, but they are flexible and not very precise. They describe certain policies without giving answers in a single case'. As an example, he refers to the 1998 Washington Principles that judges should take into account.

42 In fact, courts in various countries already prevent unjust outcomes to cultural property disputes in a strict private law approach in that way, see E. Campfens 'Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims', *Netherlands International Law Review*, 67 (2020), 257-295, section 3.

subject to ratification of the Protocol by that State.[43] Within the European human rights system, while a stumbling block is that the European Convention on Human Rights does not include a right to culture, claims may be addressed through the human right to property and a number of other rights.[44]

An interesting roadmap on how to proceed is given by the Colombian Constitutional Court in a 2017 case concerning the 'Quimbaya Treasure'.[45] In its ruling, the Court ordered the Colombian government to pursue – on behalf of the indigenous Quimbaya people – the return from Spain of a treasure of 122 golden objects lost at the close of the nineteenth century. The Court argued that under today's standards of international law – referring to human rights law but interestingly also to the 1970 UNESCO Convention -, indigenous peoples are entitled to their lost cultural objects. *How* such a claim is pursued is left to the discretion of the government, but according to the Court *the fact that* governments should work towards this goal is clear.[46] In a first reaction to the subsequent request by the Colombian authorities for the return of the Quimbaya Treasure, the Spanish authorities, however, declined on the grounds that today the Quimbaya Treasure has become Spanish patrimony.

This, of course, has long been a common European reaction to restitution requests by former colonized people. It is also reminiscent of the (initial) position that the Austrian government took in the *Altmann* case mentioned in the introduction: due to national patrimony laws the Klimt paintings that were lost during the Nazi era were inalienable Austrian national cultural heritage. In that case, however, after US Supreme Court established a violation of international law, the Austrian government accepted to abide by an arbitral award and the rights of Altmann prevailed.[47] It illustrates the difficulties in this field, but also highlights the potential of the human rights framework as a universal language to further develop this field.

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43 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/RES/63/117, Art. 2: 'Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant *by that State Party*'. Emphasis added.

44 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR). In the case law, rights that may fall under the notion of 'cultural rights' have been recognized. See Jakubowski A (2016) Cultural heritage and the collective dimension of cultural rights in the jurisprudence of the European Court of Human Rights. In: A. Jakubowski (ed) *Cultural rights as Collective Rights, an International Law Perspective* (The Hague, Brill, 2016), 155-179, 158 and 178-179.

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

46 For a discussion, see D. Mejia-Lemos, 'The 'Quimbaya Treasure' Judgment SU-649/17', *American Journal of International Law*, 113 (2019), 122-130.

47 Above n. 5.

Conclusion

Although the rationale underlying the protected status of cultural objects in international law is their intangible 'heritage' value, the legal framework for contested cultural objects takes an ownership approach. By doing that, it fails to address the intangible heritage interests of people who identify with specific objects, adequately. Soft law instruments increasingly *do* acknowledge the interests of former owners in "their" lost cultural objects. An ethical approach and alternative dispute resolution for settling these types of cases that follows from such a soft law approach, may at times be the best way forward. From a legal perspective however this raises a fundamental question. If we believe this is a matter of (delayed) justice, the role of law is to provide for a framework where similar cases can be dealt with similarly.

This paper suggests that a human rights law approach could help structure this field. Human rights law is particularly equipped to address heritage and identity values; human rights are of a universal nature, and penetrate and shape how private law is being interpreted and adjudicated. The right of 'access to culture' as developed in the realm of the right to culture in Article 15 (1) ICESCR can be a point of reference in such an approach. Besides, other human rights could be invoked. More specifically such an approach may offer tools to address: (i) the recognition of the immaterial value of cultural objects for certain people, as opposed to a sole focus on ownership and legality of events in the past in the traditional approach of restitution issues; (ii) the interests of non-state parties like individuals, communities or indigenous people; and (iii) prioritization and conciliation of competing interests parties may have in the same cultural object by aiming at creative and participatory solutions.