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## Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories

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## RESTITUTING COLONIAL PLUNDER: THE CASE FOR THE BENIN BRONZES AND IVORIES

Africa needs not only apology and forgiveness, but that these priceless African cultural treasures – artworks, icons, relics – be returned to their rightful owners. . . . [T]he African art that has found its way into the galleries of former European colonial powers and the homes of the rich in North America, Europe, and elsewhere has deep cultural significance. These works form an integral part of defining our identity and personality as family, as African family. We talk to them. They talk to us. We touch them at certain moments of our lives, from birth through life to death. It is through them that the living spirits of our people, of our history, of our culture interact and interface with us. They are not there, hence the void in our minds and in our hearts. We continue to cry for them to come back home, to complete that cultural, spiritual space.

—Theo-Ben Gurirab<sup>1</sup>

Ce qu'il ne pardonne pas à Hitler, ce n'est pas *le crime* en soi, *le crime contre l'homme*, ce n'est pas *l'humiliation de l'homme en soi*, c'est le crime contre l'homme blanc, c'est l'humiliation de l'homme blanc, et d'avoir appliqué à l'Europe des procédés colonialistes dont ne relevaient jusqu'ici que les Arabes d'Algérie, les coolies de l'Inde et les nègres d'Afrique.

—Aimé Césaire<sup>2</sup>

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1. CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 1 (Elazar Barkan et al. eds., 2003).

To tear treasure out of the bowels of the land was  
their desire, with no more moral purpose at the back  
of it than there is in burglars breaking into a safe.

—Joseph Conrad<sup>3</sup>

## INTRODUCTION

Britain's African empire in the nineteenth century was both extensive and ruthless. The empire was responsible not only for the colonies' loss of minerals and land, but also for the subjugation of the local people. In many cases, this included the looting and transfer of the colonized people's cultural property to Britain. Looting was an economic tool, but it was also a means for the colonial power to assert dominance over the colonized people through erasing cultural identity and instilling a sense of inferiority among the subjugated. In these ways, the colonial treatment of African people was similar to the Nazi treatment of Jewish people during the Holocaust. Because of these similarities, the principles that justify the restitution of Nazi-looted art may similarly justify the restitution of cultural property to former colonized states. This paper seeks to explore this thesis by focusing on the Benin bronzes, which can be traced back to the 1897 British punitive expedition and which are currently held in American collections. The first section of this paper outlines the historical background of the Benin Kingdom and its invasion by the British in 1897 following the Benin massacre. The second section explores the moral and ethical considerations of the restitution debate, and the historical stance on spoils of war under international law in the nineteenth century. The final section of this paper discusses what legal standing, if any, the descendants of the original Kingdom of Benin royal family would have in a judicial proceeding in the

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2. "What he cannot forgive Hitler for, is not *the crime* in itself, *the crime against man*, it is not *the humiliation of man himself*, it is the crime against the white man, the humiliation of the white man, and that he applied to Europe colonialist procedures which until then had been reserved for the Arabs of Algeria, the coolies of India, and the niggers of Africa." AIMÉ CÉSAIRE, DISCOURS SUR LE COLONIALISME 14 (1955). Translated by author.

3. JOSEPH CONRAD, HEART OF DARKNESS 32 (2008).

United States; this section also analyzes the legal rules that would be applicable in such a proceeding. The conclusion of this paper presents a suggestion for the resolution of the restitution debate that might be beneficial to all parties.

## I. HISTORICAL BACKGROUND

### *A. Kingdom of Benin*

The old Kingdom of Benin extended over the area that is now Edo state in modern day Nigeria.<sup>4</sup> According to Benin oral history, Benin City—the heart of the Kingdom of Benin—was founded in “mythological times” by the Ogiso rulers, the first royal dynasty of Benin.<sup>5</sup> The kingdom was led by an oba, or king, a holder of a hereditary title who was believed to be divine.<sup>6</sup> From the fifteenth century, the kingdom was ruled mainly by warrior kings who developed their power base through concrete control over a strong military machine.<sup>7</sup> However, towards the seventeenth century, civil strife began to seriously weaken the kingdom.<sup>8</sup> The weakening may be attributable to the change in the rules of royal succession in 1610, after the oba died without issue and without any brothers to replace him, allowing his indirect descendants to take the throne.<sup>9</sup> A power struggle for the kingship ensued, coupled with a belief that the oba was no longer divinely ordained, which undermined the people’s support of his leadership.<sup>10</sup>

Another important arm of the political structure in Benin was the office of the chief. Chiefs were appointed at the oba’s pleasure

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4. BENIN: KINGS AND RITUALS: COURT ARTS FROM NIGERIA 23 (Barbara Plakensteiner, ed., 2007).

5. *Id.*

6. PAULA GIRSCHICK BEN-AMOS, ART, INNOVATION, AND POLITICS IN EIGHTEENTH-CENTURY BENIN 30 (1999). In this paper, “oba” refers generally to the position of king, while “Oba” refers to the particular king who ruled in the year of the Benin Massacre.

7. *Id.*

8. *Id.* at 33.

9. *Id.* at 36-37.

10. *Id.* at 37.

and did not pass their title on to their children.<sup>11</sup> One particular chieftain position, that of the iyase, or war chief, held great power and influence.<sup>12</sup> As a result, there was often conflict between the obas and the iyase.<sup>13</sup> By the late seventeenth century, the iyase and other chiefs had grown very powerful; the selection procedure for the king now included a confirmation by the iyase.<sup>14</sup> As the oba grappled with the infighting of the seventeenth century power struggles, he became less engaged in military attacks, which allowed the position of the iyase to grow even stronger.<sup>15</sup> The extent of the chiefs' growing political power could be seen in the deliberations that led to the attack on the British vice counsel James Phillips' party. The Iyase played a pivotal role in the decision to attack the British party.<sup>16</sup>

Despite the internal strife, the kingdom was generally very prosperous, reaching a golden age in the fifteenth century.<sup>17</sup> As with other successful warrior states in Africa, the prosperity of the fifteenth and sixteenth century encouraged artistic exploration.<sup>18</sup> One of the hallmarks of the kingdom's art was the royally commissioned brass works, which have come to be known as the Benin bronzes. Generally, property ownership was reserved for some social classes, and only the oba could own brass objects.<sup>19</sup> These brass works served as a pictorial record of the history of the kingdom.<sup>20</sup> Many of the plaques produced therefore depict numerous themes, including war and trade with the Portuguese.<sup>21</sup>

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11. *Id.* at 31.

12. BEN-AMOS, *supra* note 6, at 33. In this paper, "iyase" refers to the general position of war chief, while "Iyase" refers to the particular war chief in the year of the Benin Massacre.

13. *Id.*

14. *Id.* at 38.

15. *Id.*

16. ROBERT HOME, CITY OF BLOOD REVISITED: A NEW LOOK AT THE BENIN EXPEDITION OF 1987 36 (1982).

17. BEN-AMOS, *supra* note 6, at 53.

18. *Id.* at 54.

19. HOME, *supra* note 16, at 28.

20. BEN-AMOS, *supra* note 6, at 54.

21. *Id.* at 54, 57.

First contact between Benin and Europe occurred in the sixteenth century, when Portuguese explorers, who described the city as being “as prosperous, civilized, and populous as towns and cities in Portugal,”<sup>22</sup> began to trade in West Africa. The Portuguese explorers developed a symbiotic trade relationship with the oba, moving the kingdom’s trade interests to the coast, thereby expanding prior inland-concentrated trade.<sup>23</sup> The Portuguese traded cloth, glass, and weapons for pepper, beads, and ivory, and offered military assistance to the oba against other kingdoms.<sup>24</sup>

Though these initial trade routes remained open for centuries after the initial contact, the Portuguese left West Africa and were replaced by different European trading companies.<sup>25</sup> By the late nineteenth century, the British dominated the Niger coast.<sup>26</sup> The British were reluctant to accept the trading conditions as dictated by the oba; they began to make plans to take control of the region, which would in turn allow them to control all trade.<sup>27</sup> The plans of the British were advanced by the Berlin Conference of 1884-85, which declared that the geographical area around the kingdom—the coast between Cameroon and the Lagos colony—was within the British “sphere of influence.”<sup>28</sup> The conference aimed to quell mounting animosity among European nations over territorial disputes in Africa, in what had come to be known as the “Scramble for Africa.” After the conference, the British set out to establish a protectorate over the region, a colonial cost-saving measure that placed “African territories under the protection of civilized nations.”<sup>29</sup>

Gradually, the British deposed the rulers of other kingdoms around Benin City until Benin remained among the last few strongholds.<sup>30</sup> The British were instrumental in the defeat of several leading chiefs and kings, including King Jaja of Opobo,

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22. HOME, *supra* note 16, at 1.

23. *Id.*

24. *Id.*

25. *Id.*

26. Plakensteiner, *supra* note 4, at 25.

27. *Id.*

28. *Id.*

29. HOME, *supra* note 16, at 3.

30. Plakensteiner, *supra* note 4, at 25.

and Nana of Itsekiri; like the Oba of Benin, both men were perceived as great obstacles to trade.<sup>31</sup> The Oba and his officials perhaps began to see the writing on the wall, and suspected that it was only a matter of time until the British came for them.<sup>32</sup>

The British first attempted to bring the kingdom under their control through treaty. The first British vice counsel stationed in the Benin area was Captain Henry Gallwey (later spelled Galway).<sup>33</sup> Galway's name would become synonymous with the treaty some commentators argue gave the British the right to take over the kingdom and the antiquities therein.<sup>34</sup> In 1892, Galway went to the Oba to negotiate the terms of the treaty.<sup>35</sup> Essentially, the terms of the treaty greatly reduced the Oba's sovereignty. As per the treaty, in return for the Queen of England's favor and protection, "the Oba agreed to entertain no foreign power without British approval, to give the consular officials full and exclusive jurisdiction over British subjects in Benin and the right to arbitrate in disputes, to act upon their advice, to allow free trade, and to receive missionaries."<sup>36</sup> However, the Oba may not have fully comprehended the implications of the treaty, perhaps in part because in all his previous dealings with European traders and representatives, none had attempted to usurp his power or authority in this way.<sup>37</sup>

### *B. The Punitive Expedition*

Despite Galway's treaty, trade did not improve because the Oba did not open up the trade routes as the treaty required.<sup>38</sup> By the late nineteenth century, Galway was replaced by Ralph Moor,

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31. Martins O. Akanbiemu, *The Dispersal of Benin Works of Art Vis-A-Vis the Return and Restitution of Cultural Property – An Exceptional Case*, 21 NEWSL. (MUSEUM ETHNOGRAPHERS GROUP) 95, 96 (Apr. 1987).

32. *Id.*

33. HOME, *supra* note 16, at 5.

34. Plakensteiner, *supra* note 4, at 25.

35. HOME, *supra* note 16, at 7.

36. *Id.* at 8. The treaty was signed by a chief on the Oba's behalf.

37. *Id.*

38. *Id.*

whose deputy was James Phillips.<sup>39</sup> As the trade situation deteriorated, Moor began to plan ways to overthrow the Oba in order to develop the protectorate.<sup>40</sup> To implement these plans, Moor enlisted the help of Phillips, who was eager to accomplish the goal, as evidenced in Phillips' dispatch to the Foreign Office in Britain, which read:

I therefore ask for His Lordship's permission to visit Benin City in February next, to depose and remove the King of Benin and to establish a native council in his place and to take such further steps for the opening up of the country as the occasion may require. . . . – but in order to obviate any danger [of attack] I wish to take up a sufficient armed Force, consisting of 250 troops, two seven-pounder guns, 1 Maxim, and 1 Rocket apparatus. . . . PS I would add that I have reason to hope that sufficient Ivory may be found in the King's house to pay the expenses in removing the King from his Stool.<sup>41</sup>

In response, the Foreign Office preached caution; therefore, Phillips, on his own accord, planned an unarmed expedition to Benin.<sup>42</sup> Phillips' plan was a no-win situation for the Oba:

[Phillips] was using the last tactic short of armed force . . . visiting the Oba with a large party of white men representing all British interests. . . . If the Oba refused to see them, the affront to British prestige would make it almost impossible for the Foreign Office not to sanction an armed solution. If he received them, he would be pressed to sign a new and stricter treaty than Gallwey's, which

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39. *Id.* at 30.

40. *Id.* at 32.

41. HOME, *supra* note 16, at 33-34 (quoting Phillips' letter to the dispatch office).

42. *Id.* at 35.



would open his country to British trade and political control.<sup>43</sup>

Phillips was able to gather a party of about eight British officials and about two hundred African porters from villages outside Benin City.<sup>44</sup> Phillips had hoped to attract a larger party, because he expected that a larger group of white men would be less likely to be attacked and would later help him justify the unsanctioned visit to the colonial administrators in Britain.<sup>45</sup>

In Benin, news of Phillips' expedition was met with suspicion and confusion.<sup>46</sup> The Oba was not sure if the visit was truly a peaceful one.<sup>47</sup> In addition, the proposed visit was to be in January, during the Ague festival.<sup>48</sup> The Ague festival was a sacred time in Benin, during which outside visitors were forbidden to visit the city.<sup>49</sup> Above all, the Oba was reluctant to fight the British, declaring that since his birth, no white man had been killed in Benin.<sup>50</sup> As a leader, the Oba tried to avoid open conflict in his political dealings, and was especially worried because of his weakened position.<sup>51</sup> The Iyase was the strongest advocate for war; at his insistence, the council of chiefs made the final decision to attack Phillips' party, whether or not it included soldiers.<sup>52</sup> The Oba rightly blamed the chiefs for encouraging the trouble, and tried to postpone the coming clash by sending messengers to meet Phillips' party and ask them not to come because of the festival.<sup>53</sup>

When Phillips encountered the messengers from the Oba, he ignored the Oba's message, and sent the messengers back.<sup>54</sup>

43. *Id.*

44. *Id.* at 40.

45. *Id.*

46. *Id.* at 35.

47. HOME, *supra* note 16, at 35.

48. *Id.* at 35-36.

49. *Id.* at 36. The Ague festival was a time of thanksgiving and fasting that was meant to help the people appreciate what they had. *Id.*

50. *Id.* at 35.

51. *Id.* at 36.

52. *Id.*

53. ALAN BOISRAGON, THE BENIN MASSACRE 59 (2007).

54. HOME, *supra* note 16, at 41.

Phillips then sent his own messengers to reiterate that he was still coming as promised.<sup>55</sup> Without waiting for a reply from the Oba, Phillips pushed forth towards Benin.<sup>56</sup> As the party approached the city, it was met by friendly chiefs from neighboring villages who also warned against going to Benin.<sup>57</sup> The party also encountered other warnings along the way, such as empty villages, cleared out in anticipation of the expected battle, and reports of Edo soldiers being spotted in the area.<sup>58</sup> Alan Boisragon, one of two surviving British officials from Phillips' party, later reported that he had a running wager with Phillips that the party would be stopped by a Benin party before it reached Benin City.<sup>59</sup> Boisragon added that, had the British party been stopped, the British foreign office would have perceived this as an insult, and would have responded by sending an armed expedition to fight any such opposition.<sup>60</sup>

The Edo ambush was well laid; all but two of the British officials in the party were killed.<sup>61</sup> The attack lasted about half an hour, and killed a large number of the African carriers; some escaping survivors were captured and later enslaved.<sup>62</sup> The fleeing carriers dropped the trunks they had been carrying, some of which contained the British party's weapons.<sup>63</sup>

Preparations for the retaliation were almost instantaneous. When he received word of the massacre, Galway sent word to the Oba demanding that he return prisoners and property immediately.<sup>64</sup> The Oba replied that all hostages were dead, and returned two rings.<sup>65</sup> The Oba also declared defiantly that he would not receive any more messages, and that he would instead

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 42.

59. BOISRAGON, *supra* note 53, at 63.

60. *Id.*

61. HOME, *supra* note 16, at 44.

62. *Id.* at 45.

63. *Id.* at 44.

64. *Id.* at 49.

65. *Id.*

await the inevitable retaliation, prepared to fight to the last man in his kingdom.<sup>66</sup>

When news of the attack reached Britain, it was readily apparent that the government was going to dispatch a punitive expedition for Benin.<sup>67</sup> The expedition was billed as just war, morally justifiable both to avenge the massacre and to stop the human sacrifices in the “city of blood.”<sup>68</sup> The British public was supposed to understand and support the moral necessity and duty to dethrone a tyrannical, bloodthirsty, primitive Oba. A month after the Phillips massacre, the British began a fierce attack on Benin City, partly to punish the city for the massacre and partly to gain control of trade in the area.<sup>69</sup> Despite British expectations of a weak resistance, they met a determined Edo defense armed with guns and cannons from their trading days with the Portuguese.<sup>70</sup> However, the British had superior weapons, and the Edo guns were “antiquated and unreliable,” and the cannons old and unused.<sup>71</sup> The British were unfamiliar with the warfare tactics of the Edo, and the Edo soldiers had an advantage in the bush.<sup>72</sup> However, the British countered this advantage by using maxims and rocket guns to clear the bush, burning houses in villages as they advanced on Benin.<sup>73</sup>

Eventually, Benin City fell, with the Oba and a few of his subjects escaping into the bush to avoid capture.<sup>74</sup> After the British took the city, they began to loot the palace for what they called “spoils of war.”<sup>75</sup> In the palace, the British found a cache of art treasures, largely comprised of brass castings and ivory

66. *Id.*

67. HOME, *supra* note 16, at 102-03.

68. *Id.* Benin City was often referred to as the “city of blood” because of various European visitors’ description of the extent of human sacrifice in the city. *Id.*

69. *Id.* at 68

70. *Id.*

71. *Id.*

72. *Id.* at 80

73. HOME, *supra* note 16, at 80.

74. *Id.* at 88.

75. *Id.*

carvings.<sup>76</sup> Most of the carvings were taken directly from altars, which were covered with the remnants of various sacrifices.<sup>77</sup> The palace shrines also contained various bronze memorial heads, cast after each Oba's death, and carved ivory tusks depicting each Oba's achievements.<sup>78</sup> The heads and tusks were taken away without recording their relative positions or which Oba they commemorated.<sup>79</sup> Bronze plaques were found both in the main palace and in a storage room "buried under the dust of generations."<sup>80</sup> All of the material objects were assembled in a courtyard where they were divided as official and unofficial booty, and then shipped to Britain.<sup>81</sup> The unofficial booty was divided among the British soldiers according to rank.<sup>82</sup> For years, the British thought that the treasures they had recovered were created by the Portuguese, because "their artistic quality and advanced technology were apparent to even the most prejudiced eye."<sup>83</sup>

About three days after the initial occupation of Benin City, a great fire burned down the palace and the main city.<sup>84</sup> Though there were conflicting accounts of the cause of the fire, the official British account was that it was started by two drunken carriers, who were the only casualties of the fire.<sup>85</sup> Six months after the palace's destruction, the Oba returned to Benin City and surrendered to the British forces at the new court house, in front of his former palace, where he was informed that he would have to stand trial for the Phillips massacre.<sup>86</sup> Several chiefs had already returned to the city; some faced trial and were executed, while others were incorporated into the newly formed Council of Chiefs.<sup>87</sup>

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76. *Id.*

77. Plakensteiner, *supra* note 4, at 32.

78. HOME, *supra* note 16, at 100.

79. *Id.*

80. Plakensteiner, *supra* note 4, at 32.

81. *Id.*

82. *Id.*

83. HOME, *supra* note 16, at 88.

84. *Id.* at 89.

85. *Id.*

86. *Id.* at 111.

87. *Id.*

After the Oba's trial, it was determined that he had not played a main role in the massacre; therefore, instead of receiving a death sentence, the Oba was exiled to Calabar, Nigeria.<sup>88</sup> In addition, the British wished to ensure that the Oba's traditional role as leader was extinguished. Moor made this clear in a speech in which he declared that "Overami is no longer the king of this country; the white man is the only man who is king in this country, and to him only service is due."<sup>89</sup> The Oba's exile marked the end of the monarchy in favor of rule by a council of chiefs.

The Oba died in captivity in 1914, and his eldest son pleaded with the British to let him succeed the throne and become the new Oba, replacing the Council of Chiefs as the native ruler of the Edo people.<sup>90</sup> The British agreed to his proposal, and he was crowned Oba Eweka II.<sup>91</sup> Though this reestablished the monarchy, the power and rule of the Oba was now subject to British authority. After Nigerian independence, the kingdom was subject to the authority of the Nigerian government.<sup>92</sup> Nevertheless, the monarchy continues to exist to this day. The Nigerian government and the Benin royal family have continuously requested the return of the cultural property looted by the British. These requests have largely fallen on deaf ears. To date, no major museums have restituted any Benin artifacts.

## II. ETHICAL CONSIDERATIONS

### *A. Nineteenth Century International Law and the Spoils of War*

British title to the Benin bronzes and ivories ostensibly rests on nineteenth century international law on the spoils of war, as was applied to non-European people. Another often-cited source of authority for title to the bronzes is the Galway treaty. However, the treaty between the Oba and Captain Galway did not concern or affect property rights, and therefore cannot be the basis for the

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88. *Id.* at 112.

89. HOME, *supra* note 16, at 112.

90. *Id.* at 122.

91. *Id.*

92. *Id.*

British claiming title.<sup>93</sup> An analysis of the validity of the title to the bronzes, therefore, must begin with an analysis of nineteenth century international law on wartime plunder and subsequent restitution.

Restitution as a legal concept in western jurisprudence has its roots in ancient Rome.<sup>94</sup> References to restitution at that time meant *restitution in integrum*, which generally referred to a restoration of the status quo existing before certain events, such as war, that were later found to be illegal.<sup>95</sup> As international law developed, this definition of restitution became shaped by the practice or customs of the day.<sup>96</sup> However, restitution was developed from an absolute rule of ignoring any vanquished state's property rights.<sup>97</sup> The enemy's property was considered *res nullis*, ownerless from the moment of the declaration of war, thereby allowing the conqueror to claim it once they possessed it.<sup>98</sup> This concept of war booty, or prize, was eventually undermined by the medieval concept of a "just war."<sup>99</sup> Under the "just war" concept, a belligerent army could only keep the property of a state they fought in war if the war itself was just and necessary.<sup>100</sup> Objects obtained in unjust wars had to be returned, because the sin of waging an unjust war could not be otherwise forgiven.<sup>101</sup> Purchasers of goods taken in this unjust manner could never acquire clear title in those goods.<sup>102</sup> As Hugo Grotius put it, "if the reason for the war is unjust, all activities resulting from this war are unjust because of their intrinsic injustice."<sup>103</sup> While the concept of war and restitution was based on religious principles,

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93. See generally Phillip A. Igbafe, *The Fall of Benin: A Reassessment*, 11 J. AFR. HIST. 385 (1970).

94. WOJCIECH W. KOWALSKI, *ART TREASURES AND WAR* 1 (1998).

95. *Id.* at 2-3.

96. *Id.* at 3.

97. *Id.* at 6.

98. *Id.*

99. *Id.*

100. KOWALSKI, *supra* note 94, at 6.

101. *Id.*

102. *Id.*

103. *Id.* at 7.

internationally, the practice of restituting war booty or prizes was based on restitution reciprocity between nations.<sup>104</sup>

By the seventeenth century, philosophers such as John Locke began to question the grounds for the right of the victor to take the spoils of war.<sup>105</sup> Locke recognized the right of the victor to take the enemy's life, without extending this right to take possession of the enemy's property.<sup>106</sup> Locke explained his position with an example;

For though I may kill a Thief that sets on me in the Highway, yet may I not (which seems less) take away his Money and let him go; this would be Robbery on my side. His force, and the state of war he put himself in, made him forfeit his Life, but gave me no Title to his Goods.<sup>107</sup>

Eighteenth century scholars further acknowledged that the private property of the king and his subjects was protected during war, and also subject to restitution.<sup>108</sup> But, it was not until the nineteenth century that the principles of restitution were fully developed. The development of these principles can be attributed in large part to the large-scale plunder inflicted by Napoleon and his armies in Europe and elsewhere during the Napoleonic wars. European nations accused Napoleon's government of pillaging contrary to "all principles of justice and customs of modern war."<sup>109</sup> After Napoleon's defeat, the allied powers required him to return looted artworks that he had taken from European nations.<sup>110</sup> However, Napoleon was not required to return any of the objects looted from Egypt.<sup>111</sup>

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104. *Id.*

105. *Id.*

106. KOWALSKI, *supra* note 94, at 7.

107. *Id.* at 8 (quoting JOHN LOCKE, TWO TREATISES ON GOVERNMENT 309-10 (1698)).

108. *Id.* at 21.

109. *Id.* at 23.

110. *Id.*

111. *Id.*

Ironically, one of the reasons the allies pushed for restitution of Napoleon's plunder was to further cement their own national identity,<sup>112</sup> a concept largely shunned by cultural property internationalists today. In the nineteenth century, there was a rising national consciousness among European states, recognizing that cultural goods belonging to the nation-state contributed to the definition of its identity.<sup>113</sup> Thus, the basis for restitution became the new principle of protecting the integrity of the national cultural heritage.<sup>114</sup> Additionally, there was recognition that cultural and artistic patrimony could not be separated from its nation of origin, because it was a permanent link to the nation's past and a key to its future creative expression.<sup>115</sup>

However, the restitution required of Napoleon was not a uniform principle of return. Time limits were ignored to allow for justice and an accurate consideration of national culture. For example, the Heidelberg manuscripts looted two hundred years earlier were returned to Germany.<sup>116</sup> The return of the Heidelberg manuscripts also illustrated the allied powers' recognition of a principle of a special territorial link between cultural objects and their country of origin. The manuscripts were returned to Heidelberg, not to the Vatican, from where Napoleon's armies had looted them.<sup>117</sup> As with other restitution principles, this territorial principle was not applied to African territories. After the First World War, for example, in the Treaty of Versailles, the British required Germany to transfer German East Africa to the British as its mandate

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112. KOWALSKI *supra* note 94, at 23.

113. *Id.*

114. *Id.*

115. Teresa McGuire, *African Antiquities Removed During Colonialism: Restoring A Stolen Cultural Legacy*, 1990 DET. C.L. REV. 31, 36 (1990).

116. KOWALSKI *supra* note 94, at 28. The Heidelberg manuscripts were a collection of manuscripts in Heidelberg, Germany in the 14<sup>th</sup> century. JEANNETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 210 (2007). The manuscripts were taken from Heidelberg during the Thirty Years War, and given to the Vatican in 1634. *Id.* Subsequently, Napoleon, through the imposed 1797 Treaty of Tolentino, transferred the manuscripts from the Vatican to Paris. *Id.*

117. KOWALSKI, *supra* note 94, at 28.



territory.<sup>118</sup> Additionally Germany was to transfer a cultural remain, the skull of Sultan Makaoua, to Britain, and not to the East African people from whom it had been taken.<sup>119</sup>

The restitution movement of the nineteenth century eventually culminated in the codification of the restitution principles in the Brussels Conference of 1874, the Hague Convention of 1899, and the Hague Convention of 1907. However, these conventions only codified or sanctioned the existing state of international law, and did not create any new obligations of restitution.

The recognition of the nineteenth century international law custom of ignoring legitimate sales and other such considerations to ensure justice is especially important in analyzing the case for the restitution of the Benin Bronzes today. This custom may also be seen in the Belgian reversal of sales of the Van Eyck panels from Germany after the First World War.<sup>120</sup> Belgium asked Germany to retribute the panels, even though the Germans had legally purchased some of them, arguing that the painting in its complete form constituted part of Belgium's cultural heritage and should not be separated.<sup>121</sup> In looking at the history of Benin artistic creation, the division or separation of the bronzes and ivories from Benin should be equally deplorable. As discussed below, the only reason restitution customs in international law did not apply to the Benin case was due to nineteenth century racism. Applying the custom of considering justice first, race should not be considered a factor in an analysis of the nineteenth century international law on spoils.

### *B. Historical Attitudes Towards Non-Western Societies*

The restitution exclusion for non-European states can be attributed to marked efforts in the nineteenth century to exclude colonized peoples from the protections afforded by international

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118. *Id.* at 31.

119. *Id.*

120. McGuire, *supra* note 115, at 37-38.

121. *Id.*

law.<sup>122</sup> International Law replaced the Law of Nations, under which some Europeans argued for the inclusion and protection of non-European people.<sup>123</sup> As such, there was a move from a separation of the world's population from "civilized" and "differently civilized" peoples to "civilized" and "uncivilized" peoples.<sup>124</sup> As these changes were incorporated into international law and the law became more favorable to European nations, indigenous people became "objects of international law," and could therefore not seek relief under it.<sup>125</sup> Therefore, in the nineteenth century, customary international law was not generally applicable to colonized peoples.

As expressed from a European point of view, "humanitarian measures only covered warfare between civilized nations."<sup>126</sup> Several contemporary writers have acknowledged these distinctions, and used them as the basis for a proposition that former empires rightly have title to looted cultural objects.<sup>127</sup> This adherence to custom in international law is important in a judicial forum interpreting past international law; as the Supreme Court of the United States in a 1900 case stated,

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122. ANA FILIPA VRDOLJAK, *INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS* 50 (2008).

123. *Id.* at 47. Spanish jurists Francisco de Vitoria and Bartolomé de las Casas advocated for the inclusion of indigenous peoples within the Law of Nations. *Id.* at 47-48. Though they did not necessarily consider these peoples equals, and referred to them as "exotic anomalies", the theorists nevertheless argued for their limited inclusion and protection. *Id.* at 47.

124. *Id.* at 50.

125. *Id.* at 51. With the incorporation of indigenous groups into larger states, indigenous people were only recognized as part of those states, and any applications of international law bent to State sovereignty. *Id.* Essentially, this meant that for a colonized people, the only rights they has were those given by the colonizer.

126. *Id.* at 65.

127. See, e.g., Josh Shuart, *Is All "Pharaoh" in Love and War? The British Museum's Title to the Rosetta Stone and the Sphinx's Beard*, 52 U. KAN. L. REV. 667, 695 (2004) (concluding that title to the Rosetta stone was rightfully acquired by the British because, "it is unequivocal that in 1799-1801 there was no rule of international law protecting the cultural property of non-European entities from the clutches of European imperialists.").

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.<sup>128</sup>

However, the customs should perhaps be studied in the context of other customs of the time, and should be applied together in the interest of justice.

Such relevant customs are illustrated, as discussed above, by the duty imposed on Napoleon at the end of the Napoleonic Wars. These customs continued even after the Benin punitive expedition when Germany was also required to return looted cultural property after World War I. While this latter example may not be seen as precedential to the Benin case, it is illustrative of how steeped these customs were in international law as applied to the Europeans. In addition, after World War II, this process was continued, and integrated into the various treaties that came at the end of the war.<sup>129</sup> However, these concessions may only have been allowed because the Jewish people were Europeans, and the western community was, therefore, quicker to respond to their pleas for justice. After all, after independence was granted to most African states, there were no European calls for the restitution of colonial plunder. Therefore, in the interest of justice and righting the wrong of excluding a group of people from the protection of the law on the basis of racism, we should apply the international law as it existed in the nineteenth century for Europeans to the restitution of the Benin Bronzes, as was the case after the Holocaust.

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128. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

129. VRDOLJAK, *supra* note 122, at 138-40.

*C. Transitional Justice*

The demand for restitution by African states, especially from former colonial masters, transcends a need for possession of priceless material artifacts. It is often an attempt to reclaim a cultural past erased by years of colonial domination and subjugation. The request in some ways also seeks to establish a stronger international presence for the former colonized state, a presence hindered by post-colonial struggles to establish national identity apart from colonial powers. Most importantly, restitution allows former colonial victims to take control of their cultural narrative.

A group's control of cultural patrimony is seen as evidence of equality, and has become "a privileged right in today's world."<sup>130</sup> In terms of transitional justice,<sup>131</sup> restitution is seen as a way for societies to undertake responsibility for past wrongs, resume a place in the international community, and sidestep collective guilt.<sup>132</sup> Ideally here, the societies or nations that would be resuming a place in the international community would be the former colonial powers. The Benin royal family may base their restitution claims on moral grounds. Although this does not have the force of law, it is a better approach to negotiated justice.

While there have been attempts to regain control of the cultural narrative through other ways, such as social commentary in art and post-colonial literature,<sup>133</sup> the exhibition of the Benin bronzes and ivories in western museums continues the imperial narrative by suggesting that the African is not capable of appreciating the value

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130. *Id.* at 17.

131. Transitional justice is the set of judicial and non-judicial measures implemented by different countries to redress the legacies of massive human rights abuses. See Int'l Ctr. for Transitional Justice, *What is Transitional Justice?*, <http://ictj.org/about/transitional-justice?gclid=CO6KmuDt2K8CFUrWKgodcxAsCg> (last visited Apr. 30, 2012). The measures sometimes include reparations or restitution. *Id.*

132. See generally Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT'L L. 50 (2011).

133. See generally Michael Bowles, *The King, The Brit, The Bronze, and The Cartoon*, 12 J. MUSEUM ETHNOGRAPHY 133 (2000).

of the objects or of properly caring for them. The imperial narrative interferes with the Benin cultural narrative and, on a macro level, with the development of Nigeria's post-independence narrative. This interference is best illustrated by the 1970 request for the return of the Queen Idia mask, one of five ivory masks looted as part of the 1897 punitive expedition. The organizers of the 1977 African festival FESTAC,<sup>134</sup> held in Nigeria, requested the Queen Idia mask from the British Museum so that it could be used as the symbol of the festival.<sup>135</sup> The British Museum refused the request, initially requiring a bond, and later arguing that the mask was too fragile to travel.<sup>136</sup> Eventually, the festival proceeded with a replica of the mask.<sup>137</sup> This interaction illustrates the frustrations experienced by the former victims. Despite independence and the notions of post-independence cooperation between colonizers and the colonized, the British still hold the power and the final verdict on whether the Nigerians and other Africans have access to their cultural past.

In Nazi-looted art cases, "restitution is a mechanism for survivors and heirs to reinstate [their social] status," by controlling their past through controlling the objects of their cultural past.<sup>138</sup> Above all, restitution for Nazi-looted art allows for the veneration of a culture "which tyranny sought to make disappear."<sup>139</sup> Restitution thus allows the victims to move from being history's

134. FESTAC is the acronym for the World Black and African Festival of Arts and Culture, held in Lagos, Nigeria, in 1977. The festival was aimed at promoting and celebrating African cultural traditions. Andrew Apter, *FESTAC for Black People: Oil Capitalism and the Spectacle of Culture in Nigeria*, 6 PASSAGES1 (1993).

135. Kwame Opoku, *Was the Decision to Cancel the Benin Mask Based on Moral Principles, or Merely a Tactical Withdrawal?*, ELGINISM, <http://www.elginism.com/20110127/3512/> (last visited Apr. 30, 2012).

136. Kwame Opoku, *They Are Selling Queen-Mother Idia Mask and We Are All Quiet*, Modern Ghana, <http://www.modernghana.com/news/309827/1/they-are-selling-queen-mother-idia-mask-and-we-are.html> (last visited Mar. 17, 2013).

137. *Id.*

138. Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or The Raft of The Medusa?*, 22 EUR. J. INT'L L. 49, 50 (2011).

139. *Id.* at 56.

objects to its subjects.<sup>140</sup> The re-characterization of the victims from objects to subjects is similarly needed for former colonial states such as Nigeria. In addition to having their cultural identities continuously vilified and diminished, colonized states may feel more powerless because they emerged from colonial rule with even their territorial borders pre-determined by the colonial masters, often splitting traditionally cohesive groups of people into different countries.<sup>141</sup> While colonialism cannot be blamed for all of Africa's current woes, it can be tied to loss of cultural identity.<sup>142</sup> Independence and self-governance also brought more cultural confusion, often with yearnings to simulate the colonial standards of civilization at the expense of the African cultural identity.<sup>143</sup> For the Kingdom of Benin, the request for restitution may therefore be a way for the people to surmount a state of cultural confusion by linking their post-colonial identity to a documented, glorious past.

However, the recognition of the role of restitution as applied to former colonial states may face more challenges because former colonial states do not necessarily acknowledge the same responsibility for past wrongs, have not been excluded from the international community for their colonial actions, and, for the most part, do not exhibit any collective colonial guilt.<sup>144</sup> Unlike with the Holocaust, where there is an almost universal condemnation of the wrong done by the Nazis, with colonialism, there is greater acceptance of the imperial mission. Colonialism is sometimes seen as a form of Social Darwinism, where the might of

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140. *Id.*

141. A.I. Asiwaju, *The Conceptual Framework*, in *PARTITIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES, 1884-1984* 1-18 (A.I. Asiwaju ed. 1985).

142. WANGARI MAATHAI, *THE CHALLENGE FOR AFRICA* 5 (2010).

143. *See, e.g.*, Adelaide Casely-Hayford, *Mista Courifer*, in *AN AFRICAN TREASURY* 164 (Langston Hughes ed., 1960).

144. *See, e.g.*, *Africa, le pauvre*, KWANI?, [www.kwani.org/editorial/report\\_essay/37/africa\\_le\\_pauvre.htm](http://www.kwani.org/editorial/report_essay/37/africa_le_pauvre.htm) (last visited Apr. 30, 2012) (Nicolas Sarkozy's 2007 speech in Senegal, where he claimed that Africans should refrain from dreaming of a golden age in their past, because such an age never existed).

the imperial machine is respected.<sup>145</sup> It seems well recognized that the superior European societies won over the inferior colonized ones; despite the parallels that can be drawn between atrocious colonial practices and the Holocaust.<sup>146</sup> The “White Man’s Burden,” as colonialism was referred to, has been construed as a “favor” to the colonized states.<sup>147</sup> For example, part of the justification for the invasion of Benin was to help end the “horrors” that were the traditional practices of the Edo people.<sup>148</sup> In this narrative, the British are seen as the saviors of the Benin “victims,” and the history and practices of the Edo people are collectively vilified to justify colonial action. As the African proverb goes, “until the lion learns to speak, the tale of the hunt will glorify the hunter.” Until the Benin people regain control of the past, the information that accompanies the exhibited objects and the characterization of their importance will always be favorable to the imperial past.

#### *D. Reasons For Refusal of Restitution*

The museums that hold the Benin cultural treasures and other such colonial plunder often provide a litany of excuses for why restitution is not advisable. Leading cultural property scholars have divided the prevalent views on restitution into two main camps: cultural internationalists and cultural nationalists. Though these divisions are usually applied in the context of a market argument for or against a licit market in antiquities, they are equally applicable in the context of a debate on the restitution of colonial plunder.

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145. Jürgen Zimmerer, *Colonialism and the Holocaust – Towards an Archeology of Genocide*, 50 DEV. DIALOGUE, 95, 101 (2008).

146. *Id.* at 100.

147. Barkan, *supra* note 1, at 20; *see also supra* text accompanying note 138.

148. *See* Bowles, *supra* note 133, at 136.

### 1. *Cultural Nationalism v. Cultural Internationalism*

Cultural nationalism is based on the premise that cultural property belongs at the place or among the descendants of the culture of its origin.<sup>149</sup> According to the leading scholar in the area, John Henry Merryman, cultural nationalism has a tendency to become invidious, to breed rivalry, misunderstanding and conflict, and to divide rather than unite.<sup>150</sup> Despite these views, Merryman finds a role for cultural nationalism in defining culture, conceding that a people deprived of its cultural property is culturally impoverished.<sup>151</sup> Cultural nationalism is most favored by countries with rich cultural heritage. These countries often pass laws intended to protect their cultural heritage from looting and the illicit trade in antiquities; as a result, these countries are often criticized as being retentionist or selfish and prohibiting or limiting access to the general international community.<sup>152</sup> This criticism is not a very accurate characterization. In the Benin case, for example, the request for restitution has been for *some*, and not *all*, of the looted objects.<sup>153</sup>

Cultural internationalism, conversely, is defined as “the idea that everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated, from whatever cultural or geographic source it derives.”<sup>154</sup> Cultural internationalism is thought to be object-oriented, resting on the principles of preservation, truth, and access.<sup>155</sup> In contrast, cultural nationalism focuses on nation-oriented principles of nationalism, legality, and morality.<sup>156</sup> The internationalism debate is further coupled with an argument that the cultural objects are better protected and

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149. JOHN HENRY MERRYMAN, *LAW, ETHICS, AND THE VISUAL ARTS* 342 (2007).

150. *Id.* at 343.

151. *Id.*

152. E.K. Agorsah, *Restitution of Cultural Material to Africa*, 12 AFR. SPECTRUM, 305 (1977).

153. *Id.*

154. IMPERIALISM, ART AND RESTITUTION 12 (John Henry Merryman ed., 2010).

155. *Id.* at 12 n.30.

156. *Id.*



preserved in western museums, some of which have branded themselves “universal” or encyclopedic museums.

Merryman, in advocating for cultural internationalism, points to the famous *Marquis de Somerueles* case as an example of early judicial recognition of the internationalism concept. In the *Marquis de Somerueles*, the court was faced with the question of whether a captured ship’s cargo should be restituted to a scientific institution in Philadelphia.<sup>157</sup> Merryman quotes the court’s opinion that the arts and sciences “are considered not as the [property] of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.”<sup>158</sup> However, even with this supposed recognition of the universal nature of the arts, the court nevertheless ordered the works released to the scientific institution in Philadelphia.<sup>159</sup> The court’s decision in the *Marquis de Somerueles* seems to question the notion that just because art or cultural property may be considered universal, it should be kept by the looter. Should an aggressor be allowed to take a cultural object away his victim and then later claim that its universal nature allows him to keep it? Furthermore, what would an international approach to cultural heritage be? Would the Benin bronzes and ivories be any less universal, from an internationalist’s view, if they were returned to Benin City and viewed there, in their original home?

Nevertheless, some universal museum directors argue that universal museums in the West are better equipped to handle the responsibility of being the stewards of the international cultural property. For example, Neil MacGregor, the director of the British Museum, expresses this stewardship as being ingrained in the British Museum’s charter as a universal museum.<sup>160</sup> In addition, he claims that as we all have African ancestors, the location of the objects outside of Africa does not matter, as long as they are in a

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157. PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE AND THE LAW* 526 (2d ed., 2008).

158. *Id.* at 598 (quoting *The Marquis de Somerueles*, 1 Stew. V.A. 482 (Vice-Adm. Ct. N.S. 1813)).

159. *Id.* at 527.

160. Neil MacGregor, *To Shape The Citizens of “That Great City, The World,”* in *WHOSE CULTURE?: THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES* 43 (James Cuno ed., 2009).

universal museum.<sup>161</sup> In the same article, MacGregor describes the impetus for the punitive expedition as “[t]he king of Benin [taking] the British legation hostage.”<sup>162</sup> MacGregor further explains that after the sacking of the city, the British took the bronzes and ivories from the Oba and sold them for the benefit of the hostages,<sup>163</sup> illustrating the argument that he who controls the objects controls the story. MacGregor’s story here manages to soften the British role in the massacre and expedition; he makes it seem justifiable that the British deprived the Oba and his people of their cultural heritage in order to afford the British “hostages” of the Phillips Massacre some measure of restitution for what they must have gone through.

In one paragraph, MacGregor manages to obfuscate the history of a people and the importance of their cultural heritage. He cites instead the importance the objects had later in European history by describing how the bronzes eventually changed European stereotypes of Africa.<sup>164</sup> However, even acknowledging that the Benin bronzes played this large of a role in changing European stereotypes in the past, would it not be time now to return them to a post-colonial Nigeria? There, they could be used to build up an African country that spent years under colonial rule being convinced of their inferiority to the Europeans. Nigerians could witness and study the magnificent artistic productions of their ancestors and, in this way, the bronzes would play the same admirable role MacGregor credits them with, but in a contemporary setting.

In concluding his article, MacGregor asserts that the British Museum has been willing to make loans of African artifacts to other countries, pointing to loans made to museums in San Francisco and Kenya.<sup>165</sup> However, he doesn’t provide any examples of extensive loans to other African countries or loans of non-African art to African countries. Before he discusses the loan to the National Museums of Kenya, MacGregor offers two

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161. *Id.* at 44.

162. *Id.* at 51.

163. *Id.*

164. *Id.*

165. *Id.* at 44, 53-54.

examples, discussed below, of the role of the universal museums in facilitating dialogue.<sup>166</sup> Both examples seem geared to remind the reader of the violence that exists in Africa, as though to suggest that is the reason an encyclopedic museum cannot be situated in somewhat dangerous Africa.

MacGregor cites the Kenyan exhibition as successful because it allowed the Kenyan people to consider the world from different perspectives, thus fulfilling the role of the universal museum.<sup>167</sup> In citing this example, MacGregor does not mention the fact that the exhibition actually reignited the restitution controversy, prompting some Kenyans to question why the artifacts had to be kept in storage in Britain, as opposed to on display in Kenya and other African countries.<sup>168</sup> Others simply questioned the morality of the loan process, considering the circumstances under which the objects were acquired by the British; one museum-goer asked “[h]ow can you loan something back to the person you stole it from, then expect him to give it back again?”<sup>169</sup>

The location of the objects is also important due to access. Internationalists argue that more people have access to the objects if they are located in Western museums. In this way, internationalism is key to the idea of the universal museum. While the access argument may be true for a large number of international tourists, it is hardly true for many in Nigeria. For them, travel abroad is largely unaffordable, with high immigration fees and other requirements to visit the United States or the United Kingdom. Internet access does not help either because many Nigerians may not have as much access to the internet and online databases of universal museums as may people in the West. The physical location of the objects in Nigeria, with an online database available to the international community, may therefore provide more access to more people both locally and internationally.

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166. MacGregor, *supra* note 160, at 54.

167. *Id.*

168. Mike Pflanz, *Are Stolen Treasures Really Better Off in the West?*, ELGINISM, <http://www.elginism.com/20060413/400/> (last visited Apr. 30, 2012).

169. *Id.*

In 2002, several major museums around the world, including the Art Institute of Chicago and the Metropolitan Museum of Art, both holders of Benin bronzes, signed the *Declaration on the Importance and Value of the Universal Museums*.<sup>170</sup> In relevant part, the declaration stated that:

Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.<sup>171</sup>

In advocating for the internationalism of cultural property, the museum signatories to the declaration try to avoid their eventual extinction if there was a change in status quo. Therefore, they argue that humanity is better when museums are not narrowly focused, because people benefit from an intimate understanding of the world and their place in it.<sup>172</sup> Paradoxically, this is the same reason restitution to former colonized states is crucial. Former colonized peoples could similarly understand their place in the world by understanding and controlling their past.

Advocates for internationalism sometimes craft descriptions of the two opposing views in terms like “good” and “bad,” saying that “[t]o preserve the cultural and artistic diversity of humankind

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170. See generally, INT’L COUNCIL MUSEUMS, DECLARATION ON THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS, available at [http://icom.museum/fileadmin/user\\_upload/pdf/ICOM\\_News/2004-1/ENG/p4\\_2004-1.pdf](http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2004-1/ENG/p4_2004-1.pdf) (last visited Apr. 30, 2012).

171. *Id.*

172. MacGregor, *supra* note 160, at 40.

is good, and to reduce it by the elimination of a species of cultural and artistic manufacture through negligence or choice is bad.”<sup>173</sup> In this context, the universal museum is then seen as doing the “right thing.” The former director of the Art Institute, James Cuno, goes even further by declaring that terms such as “cultural property” are a political contrast, which he considers negative because it allows one political entity to claim its cultural property as important to the entity’s identity.<sup>174</sup> Cuno’s position is somewhat ironic because the universal museum, as described in the declaration of the universal museum, is itself a political construct that allows western museums to claim the importance of their identity through “universal cultural property.”

Cuno further argues in favor of the universal museum by arguing that the clash of civilizations that nationalism implies is “manufactured.”<sup>175</sup> Cuno argues that by supporting universal or encyclopedic museums, we concentrate on what unites us as a universal people, as opposed to what divides us.<sup>176</sup> However, this ignores the very obvious fact that all universal museums are found in the West, or at least that no universal museums are found in Africa. The African museums do not have access to the various artifacts that would make them “universal,” and so they are deemed inferior to the western museums; this cements the cultural division and reminds the former colony of its separation from the western civilization that colonized it, a division that is hardly “manufactured.”

### III. LEGAL CONSIDERATIONS

Although the Benin royal family may have a strong ethical case for restitution, the legal case is somewhat weaker. As discussed below, the legal case for restitution has been weakened by the passage of time and the lack of legal action by the kingdom in American courts.

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173. James Cuno, *View From The Universal Museum*, in *IMPERIALISM, ART AND RESTITUTION* 15-16 (John Henry Merryman ed., 2010).

174. *Id.* at 17-18.

175. *Id.* at 19.

176. *Id.* at 19-20.

*A. The Question of Title: American Institutions' Acquisition of Benin Looted Artifacts*

Following the approach taken in Nazi-looted art restitution cases, any litigation geared towards the restitution of the Benin bronzes and ivories is likely to begin with the question of title. It is likely that most collections of Benin bronzes and ivories outside of Nigeria draw their title from the British punitive expedition. Based on the premise that the nineteenth century international law should be applicable here, the taking of spoils of war from the Oba's palace was contrary to the customs of international law. Therefore, to determine the current title held by the American museums, we must look to nineteenth century English law to determine if title was acquired through other means and subsequently transferred in sales to other parties. As discussed below, applying English law, title to the Benin cultural property likely passed in the nineteenth century when the objects were sold at open auction.

*1. English Law and the "nemo dat" Rule*

Under the English Sales of Goods Act of 1893, a seller could only transfer title to goods if he was the owner of those goods, or was acting under the authority of the true owner in the sale. This is known as the *nemo dat* rule.<sup>177</sup> The key exception to this rule was the "market overt"<sup>178</sup> exception, which stated that "[w]here goods are sold in market overt, according to the usage of the market the buyer acquires good title of the goods, provided he buys them in good faith and without any notice of any defect or want of title on the part of the seller."<sup>179</sup> The *nemo dat* rule is

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177. The *nemo dat quod non habet* rule holds that, in general, no one can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872).

178. Market overt is an open market: a public market or fair legally held by grant from the Crown or by prescription, or probably by authority of parliament. See J. G. Pease, *The Change of The Property In Goods By Sale In Market Overt*, 8 COLUM. L. REV. 375 (1908).

179. *Id.*

codified in the United States in the Uniform Commercial Code Article 2 § 2-403.

The market overt exception was supposed to confer a duty on the true owner to act reasonably in searching for his goods and claiming them in the open market. However, this duty seems to presuppose the owner's ability to act. The market overt exception also indicated the good faith of the purchaser. In the case of the Benin bronzes and the Kingdom of Benin, the true owners did not have the ability to oppose a public sale of their artifacts because they were under colonial rule, with little authority or legal recourse to object to the sales. If colonial occupation is considered a continuous act of war against the Benin people, then they were not in a position to oppose the British sales of their cultural artifacts. Additionally, it was impossible for the Benin royal family to contest later sales in courts in Nigeria because "municipal courts of the colonised countries were precluded from enquiring into sovereign behavior."<sup>180</sup> Without the authority to question the punitive expedition and determine its legality, a court in colonial Nigeria could hardly have adjudicated fairly in a dispute over title. Perhaps any such suit brought in colonized Nigeria, or in Britain, would have been tolled until after Nigerian independence.

For the market overt exception to apply, the buyer must be a good faith purchaser. To qualify as a good faith purchaser under the Sales of Goods Act, the purchaser must not have notice of the possible defect in the title of the good.<sup>181</sup> The circumstances of the expedition were well known in the nineteenth and twentieth centuries when the objects were auctioned, so it is likely that the purchasers of the pieces were at least on notice that title could be contested down the line. These purchasers then donated the works to American museums, passing whatever title was acquired in the earlier purchase. In this way, the donors and the museums may not be considered good faith purchasers in the traditional sense of the term.

In the case of Nazi-stolen artworks, given the socio-political climate of the time, purchasers may reasonably have expected that their title would never be questioned by "weaker" previous

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180. VRDOLJAK, *supra* note 122, at 51.

181. Pease, *supra* note 178, at 375.

owners. It could be argued that Nazi officials and other purchasers of Nazi-looted art might reasonably have expected to keep their loot. The Jewish people might have been seen as being in no position to protest or contest title at that time, considering that most of them were either fleeing Europe or were detained in Nazi camps. Similarly, it would seem contrary to equity and justice to allow purchasers of Benin cultural property to claim that they were good faith purchasers because they could never have foreseen Nigerian independence, or the subsequent demands for restitution.

Good faith purchase is irrelevant in a case for replevin in American courts. Even a good faith purchaser does not acquire title to stolen property. Nevertheless, an American court may conduct a choice of law analysis to determine if European laws should apply to the bronzes, since most of them were likely bought in Europe.<sup>182</sup> Under European law, if the purchasers of the Benin artifacts were not good faith purchasers because they had notice of a defect in title, then they never acquired valid title from the British looters who never had title to begin with.

*B. Restitution of the Benin Bronzes and Ivories Located in the United States*

During World War II, Jewish families and individuals lost their lives as well as their possessions, including numerous artworks, as part of the Nazi aryanization programs. The extensive looting that occurred during that time was thoroughly documented by the Nazis, and was part of a plan to strip the Jewish people of their personhood and cultural identity.<sup>183</sup> After the war, the allies required Germany to restitute various stolen artworks to the countries they had invaded.<sup>184</sup> While these concerted efforts were somewhat effective, it was not until the 1990s that the Holocaust-looted art restitution movement picked up speed, with plaintiffs

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182. See, e.g., *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 294 (S.D.N.Y. 2011).

183. See generally, LYNN NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1995).

184. VRDOLJAK, *supra* note 122, at 140-43.



suing in American courts.<sup>185</sup> Many of the cases were eventually resolved through negotiated settlements. However, some cases, as shown below, were litigated and established precedent for the restitution of Nazi-looted art.

At the core of these restitution cases was a concern for transitional justice, but there was also a concern for property rights. Similarly in the case of the Benin bronzes, if the royal family chose to sue in American courts, the basis of any claim would be largely based on traditional property rights. Following the *nemo dat* rule outlined above, the royal family may challenge the title to the bronzes held by American museums in actions for replevin. Unfortunately, these challenges would likely be unsuccessful due to the passage of time.

### *1. Legal Standing and Timeliness*

During the 1997 Benin Centenary celebrations, in response to calls seeking redress against the British from the International Court of Justice, the Oba reiterated that only the Nigerian Federal government could submit a plea to the court.<sup>186</sup> While this could be taken as a statement that the royal family has passed on any claims they may have to the Nigerian government, it is more probable that this was simply recognition that, in an arena such as the International Court of Justice, only sovereign states may bring forth claims. Nigeria may have standing if American courts recognize the country as representing the royal family or the Benin people. However, the royal family would most likely have standing in American domestic courts. Even if the Oba owned these works as trustee for the Benin people, the royal family would still be the right party to bring action against any American institutions with collections of Benin cultural property.

This leads to the question of when the royal family could have legally brought their claim for restitution against American museums. Arguably, the earliest time that this could have occurred was following Nigeria's independence in 1960.

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185. GERSTENBLITH, *supra* note 157, at 546-47.

186. *See generally*, Joseph Nevadomsky, *The Great Benin Centenary*, 30 AFR. ARTS 3 (1997).

However, instead of seeking judicial intervention in the United States, the Nigerian government and the Benin royal family have made various attempts on the international stage to make restitution claims, mainly against Britain.<sup>187</sup> These requests have been consistent since at least the 1970s and have yielded almost no returns.<sup>188</sup> Unfortunately, the apparent delay in seeking judicial redress in the United States would likely allow the American museums to claim a statute of limitations defense. Other defenses are available to the museums, but the statute of limitations may be their strongest. While the statute of limitations may be waived in certain cases following rules outlined below, the royal family may face an uphill battle in trying to explain why they waited fifty years to seek judicial intervention.

## 2. *Demand and Refusal Rule v. Discovery Rule*

Generally, claims for the return of stolen personal property may be brought as suits for conversion or replevin. In order to succeed in these types of claims, the plaintiff must show that she has title to the property in question and should therefore be awarded possession.<sup>189</sup> Both actions are often governed by various statutes of limitations, barring claims brought after the applicable time has passed. The time limit is judged from the accrual of the cause of action, although most statutes do not define accrual, and it is therefore, up to the courts to interpret this term. The statute of limitations may nevertheless be tolled in certain cases, following different doctrines depending on jurisdiction. There are two main rules applicable in tolling the statute of limitations in replevin actions for the recovery of art and cultural property in American courts: the demand and refusal rule and the discovery rule. The

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187. Such appeals led to the Restitution of Works of Art to Countries Victims of Expropriation, G.A. Res. 3187 (XXVIII), (Dec. 18, 1973).

188. The Nigerian Government has been able to buy some of the bronzes along the way. This may be considered indication of recognition of the absence of a cause of action. *See, e.g.*, *In re Peters*, 821 N.Y.S. 2d 61 (2006). However, it should be noted that the purchases were made by the Nigerian government, so this should not affect the royal family's claim unless the government was acting as an agent, or a successor in rights.

189. *See, e.g.*, *Carroll v. Curry*, 912 N.E.2d 272 (Ill. App. Ct. 2009).

demand and refusal rule is followed by a minority of courts, and is applicable mainly in New York; it would apply if the royal family brought suit against the Metropolitan Museum of Art.

The majority rule is the discovery rule. Should the royal family seek to sue the Art Institute of Chicago and the Field Museum, this is the rule that would most likely be applicable in Illinois. Though Illinois law recognizes a demand and refusal rule, demand and refusal are not substantive elements as they are under New York law. Illinois courts do not require a demand before bringing suit in a replevin action where the circumstances indicate its futility.<sup>190</sup> In addition, Illinois courts tend to favor the discovery rule in tort actions “where the passage of time does little to increase the problems of proof.”<sup>191</sup> This language seems to favor the application of the discovery rule in the Benin case. The passage of time has done little to increase the problems of proof here; original ownership of the bronzes and ivories can hardly be contested, and the actions of the British in the punitive expedition are well-documented historical facts. Since Benin ownership and British acquisition would likely be the crucial facts in a case for replevin, it is likely an Illinois court would apply the majority discovery rule. However, a replevin action for the return of artworks taken from the original owner in circumstances such as these would be a case of first impression in Illinois. It is therefore speculative as to which rule would apply.

#### *a. Demand and Refusal Rule*

According to the demand and refusal rule, the statute of limitations does not begin to run until the wronged owner makes a specific demand for the property and the current possessor refuses to return the property.<sup>192</sup> The demand and refusal are substantive elements of the action; there must be a demand for the return of the property and a subsequent refusal by the possessor in order for the

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190. *Id.* at 276. When the facts of a case indicate that any demand would be ineffective because the party on whom the demand is made claims title, then demand would be futile. *See Id.*

191. *Nolan v. Johns-Manville Asbestos*, 421 N.E.2d 864, 867 (Ill. 1981).

192. GERSTENBLITH, *supra* note 157, at 433.

cause of action to accrue.<sup>193</sup> Under New York law, the statute of limitations for actions in replevin or conversion is three years from the accrual of the cause of action.<sup>194</sup> The statute of limitations begins to run against the thief or bad faith purchaser on the date of the theft or on the date of the bad faith purchase, even when the owner is not aware of the theft.<sup>195</sup>

The demand and refusal rule was first applied in the context of an art case by the New York Court of Appeals in *Menzel v. List*.<sup>196</sup> The plaintiff in *Menzel* sought to recover a painting, which she left in their apartment in Brussels when she fled the invading Nazis in March of 1941.<sup>197</sup> Since the Nazis considered the painting in question “decadent Jewish art,” they seized it on or about March 31, 1941, and left a certification or receipt indicating that the painting, among other works of art, had been taken into safekeeping.<sup>198</sup> Menzel escaped to the United States where she resettled.<sup>199</sup>

Menzel searched for the painting once the war ended, but it was not until 1962 that she discovered it was in the possession of the defendant Albert List.<sup>200</sup> Menzel demanded the return of the painting, and List refused to comply.<sup>201</sup> Menzel then filed suit in a replevin action to recover the painting.<sup>202</sup> List raised numerous defenses, including the statute of limitations, the act of state doctrine, and abandonment.<sup>203</sup> The court dismissed List’s claims that the painting was either abandoned by Menzel or taken rightfully by the Germans.<sup>204</sup> The court characterized the seizure of the painting as pillage or plunder, and since the painting was

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193. *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969).

194. N.Y.C.P.L.R. § 214(3) (McKinney 2012).

195. *See Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 481-82 (S.D.N.Y. 2010).

196. *Menzel*, 246 N.E.2d at 742.

197. *Menzel v. List*, 267 N.Y.S.2d 804, 806 (N.Y. Sup. Ct. 1966).

198. *Id.*

199. *Id.* at 807.

200. *Id.*

201. *Menzel*, 267 N.Y.S.2d at 807.

202. *Id.*

203. *Id.* at 809.

204. *Id.* at 810.

private property, this was against international law.<sup>205</sup> The court then reiterated the demand and refusal rule, stating that “[i]n replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant’s refusal to convey the chattel upon demand.”<sup>206</sup> The rule in *Menzel*, allowing the statute of limitations to run at the moment of theft when the possessor knew of the theft, seemed to favor the thief, not the good faith purchaser, and has been criticized for its apparent unfairness.<sup>207</sup>

However, the Second Circuit dispelled that perception in *Kunstsammlungen zu Weimar v. Elicofon*. In *Elicofon*, the court recognized that, under equitable estoppel, the bad faith purchaser would not be allowed to claim the protection of the statute of limitations anyway.<sup>208</sup> The *Elicofon* litigation was initiated to recover two stolen Albert Dürer paintings.<sup>209</sup> The paintings disappeared from Germany during the occupation of Germany by the Allied Forces in 1945.<sup>210</sup> In 1966, the paintings were discovered in the possession of Edward Elicofon, who had purchased them in New York from an American serviceman in 1946.<sup>211</sup> The successor in interest to the original German museum where the paintings were housed, the *Kunstsammlungen zu Weimar*, sought to recover the paintings from Elicofon.<sup>212</sup>

The appellate court affirmed a grant of summary judgment in favor of the *Kunstsammulungen zu Weimar*, rejecting Elicofon’s claim that the statute of limitations on the claim began to run in 1946, when he bought the paintings.<sup>213</sup> Elicofon insisted that a rule where the statute of limitations ran from demand upon a bona fide

205. *Id.*

206. *Id.*

207. See Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 640 (2011).

208. *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1163 (2d Cir. 1982).

209. *Id.* at 1152-53.

210. *Id.* at 1155-56.

211. *Id.* at 1156.

212. *Id.*

213. *Id.* at 1165-66.

purchaser would indefinitely postpone commencement of the action, while allowing the thief to have long since gained immunity from suit.<sup>214</sup> The appellate court disagreed with this assertion, finding that the thief who concealed his possession, thereby making it impossible for the owner to bring suit within the limitations period, would likely be estopped from asserting the statute of limitations as a defense.<sup>215</sup> Secondly, the appellate court affirmed the district court's holding that any delay in making a demand was reasonable.<sup>216</sup> The district court stated that a demand could not be indefinitely postponed, and had to be made within a reasonable time.<sup>217</sup> The district court also indicated that the question of what constituted a reasonable time to make a demand depended upon the circumstances of the case.<sup>218</sup> Elicofon had urged the district court to interpret the requirement of reasonableness as bestowing a duty on the original owner to diligently search for the property.<sup>219</sup> However, the court did not decide the issue of a diligence requirement because it found that the *Kunstsammlungen zu Weimar* had been diligent in its efforts to recover the paintings.<sup>220</sup>

Elicofon's suggestion would later be applied in *DeWeerth v. Baldinger*, where the court held that under New York law, an original owner was indeed required to have diligently searched for her stolen property.<sup>221</sup> In *DeWeerth*, the plaintiff's father purchased a Monet painting in or about 1908.<sup>222</sup> DeWeerth inherited the painting after her father's death in 1922.<sup>223</sup> In August

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214. *Elicofon*, 678 F.2d at 1163.

215. *Id.*

216. *Id.* at 1165.

217. *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 849 (E.D.N.Y. 1981).

218. *Id.*

219. *Id.*

220. *Id.* at 849-50. The case details several actions that the *Kunstsammlungen* took that evidence this diligence, especially the extensive documentation of the theft by Dr. Scheidig who was the Deputy Director of the *Kunstsammlungen* from 1940 to 1967. *Id.* at 833.

221. *DeWeerth v. Baldinger*, 836 F.2d 103, 108 (2d Cir. 1987).

222. *Id.* at 104.

223. *Id.*

1943, during World War II, DeWeerth sent the painting to her sister in Southern Germany for safekeeping.<sup>224</sup> In the fall of 1945, DeWeerth's sister informed her that the Monet had disappeared.<sup>225</sup>

DeWeerth made various unsuccessful efforts to locate the painting.<sup>226</sup> In or soon after July 1981, DeWeerth discovered that the painting had been exhibited in 1970 in New York.<sup>227</sup> She thereafter learned that the defendant, Baldinger, possessed the Monet.<sup>228</sup> By letter to Baldinger in 1982, DeWeerth demanded return of the Monet.<sup>229</sup> Baldinger refused the demand the following year, and DeWeerth brought an action to recover the painting.<sup>230</sup> Baldinger argued that the action should have been barred by laches and the statute of limitations due to DeWeerth's long delay in asserting her claim, and also because she had not diligently sought to discover the painting's whereabouts until 1983.<sup>231</sup> The trial court held in favor of DeWeerth, dismissing Baldinger's defenses and counterclaim with prejudice, and ordering Baldinger to deliver the painting to DeWeerth.<sup>232</sup>

On appeal to the Second Circuit Court of Appeals, the issue was "whether New York law, which govern[ed] th[e] dispute, require[d] an individual claiming ownership of stolen personal property to use due diligence in trying to locate the property in order to postpone the running of the statute of limitations in a suit against a good-faith purchaser."<sup>233</sup> The Second Circuit decided that New York courts would indeed impose a duty of reasonable diligence on attempts to locate stolen property.<sup>234</sup> The court then

224. *Id.* at 105.

225. *Id.*

226. *Id.*

227. *DeWeerth*, 836 F.2d 103 at 105.

228. *Id.*

229. *Id.*

230. *Id.* at 106.

231. *Id.* at 107.

232. *DeWeerth v. Baldinger*, 658 F. Supp. 688, 698 (S.D.N.Y. 1987).

233. *DeWeerth*, 836 F.2d at 104.

234. *Id.* at 108. The Second Circuit chose not to certify the question of the duty of due diligence to the New York Court of Appeals for a determination, as this was a question of state law. *Id.* The court estimated "what the state's highest court would rule to be its law." *Id.* Here it turns out the court estimated incorrectly.

analyzed DeWeerth's actions in the search for her paintings, comparing her search to that undertaken in *Elicofon*, and held that DeWeerth was not diligent in her search.<sup>235</sup> The court thus reversed the district court's judgment in favor of DeWeerth.<sup>236</sup>

The Second Circuit Court of Appeals' interpretation of New York law's duty of due diligence was rejected in *Solomon R. Guggenheim Found. v. Lubell*.<sup>237</sup> *DeWeerth* is no longer good law on this point. *Lubell* was a replevin action brought to recover a gouache<sup>238</sup> by Marc Chagall.<sup>239</sup> The Guggenheim claimed that the gouache was stolen in the mid-1960s by an unknown person.<sup>240</sup> The Guggenheim learned of Lubell's possession of the gouache in August 1985.<sup>241</sup> On January 9, 1986 Guggenheim made a demand on Lubell to return the gouache, and Lubell refused.<sup>242</sup>

Lubell stated that she and her husband purchased the gouache in May 1967 without knowledge of any defects in the gallery's title.<sup>243</sup> She raised the statute of limitations, laches, adverse possession, and her status as a good faith purchaser for value as affirmative defenses.<sup>244</sup> Lubell filed a motion for summary judgment with the Supreme Court of New York based on the statute of limitations.<sup>245</sup> The motion was granted on the ground that the Guggenheim's efforts to locate the gouache were not

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235. *Id.* at 111. The court determined that DeWeerth was not diligent because she did not publicize her loss of the painting in any one of several available listings designed to keep museums, galleries, and collectors vigilant for stolen art. *Id.* The court further stated that “[m]ost indicative of DeWeerth’s lack of diligence [was] her failure to conduct any search for 24 years . . . Significantly, if DeWeerth had undertaken even the most minimal investigation during this period, she would very likely have discovered the [painting], since there were several published references to it in the art world.” *Id.*

236. *Id.* at 112.

237. *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 619-20 (N.Y. App. Div. 1990).

238. A gouache is a type of painting created using opaque watercolors.

239. *Lubell*, 550 N.Y.S.2d at 619.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Lubell*, 550 N.Y.S.2d 618 at 619.



reasonably diligent.<sup>246</sup> On appeal, the appellate division of the Supreme Court of New York held that whether or not the Guggenheim was obligated to do more than it did in searching for the gouache depended on the reasonableness of inaction; the court determined that was a question of fact relevant to the defense of laches, not the statute of limitations.<sup>247</sup> The appellate division thus held that Lubell's motion should not have been granted, and dismissed the defense of statute of limitations.<sup>248</sup> The decision was affirmed on appeal to the Court of Appeals of New York.<sup>249</sup> The state courts thus wholly repudiated the *DeWeerth* court's conclusion that New York law imposed a duty of due diligence on the original owner.

In New York, the law on a replevin claim remains the same as the court announced in *Menzel*. In addition, under *Menzel* and *Lubell*, the burden of proving that property was not stolen, if the current possessor contests theft, lies with the current possessor. Questions of the owner's due diligence and reasonableness in making the demand have also been deemed to be relevant to a laches defense, and not to the demand and refusal rule.<sup>250</sup> In addition, it is likely that the demand for return must be made to the specific possessor, and presumably in a direct manner. This requirement seems to follow the reasoning behind the demand rule: the demand gives notice to the possessor who, before a demand, had done nothing wrong; it is the refusal that turns the current possessor into a tortfeasor. However, the refusal does not have to be specific. New York courts have held that the refusal "need not use the specific word 'refuse' so long as it clearly conveys an intent to interfere with the demander's possession or

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246. *Id.* This was, perhaps, because the museum did not report the theft of the gouache.

247. *Id.*

248. *Id.* at 624.

249. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

250. *See, e.g., Republic of Turkey v. Metro, Museum of Art*, 762 F.Supp. 44, 46 (S.D.N.Y.1990); *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 483 (S.D.N.Y. 2010).

*use of his property.*<sup>251</sup> The refusal need not be in words either, but may consist of actions that are consistent with refusal.<sup>252</sup>

Should the Benin royal family choose to pursue an action for replevin against the Metropolitan Museum of Art, it would have to file suit within three years of receiving refusal from the museum after making a specific demand for the return of the Benin cultural property. While there have been numerous public requests for the return of the Benin bronzes and ivories since at least the 1970s, it is likely that the royal family would have to show that it made a specific request directed at the museum. The case might have a more favorable outcome in New York courts than anywhere else. Under *Lubell*, even with knowledge, actual or imputed, of the location of the stolen property, the case might still be considered timely despite delay in making the request. Questions of diligence in locating the property would be relevant in the context of a laches defense; however, in that context, the museum would have to show prejudice. The defense of laches is further discussed below.

#### *b. The Discovery Rule*

The statute of limitations in Illinois for replevin actions is five years after the cause of action accrues.<sup>253</sup> While Illinois courts recognize a demand and refusal rule in replevin cases, it is not a substantive requirement that marks the accrual of the action. Illinois courts do not require a demand, for example, in cases where that demand may prove to be futile.<sup>254</sup> Nevertheless, in September 2008, the Benin royal family wrote a letter to the Art Institute of Chicago requesting restitution of some of the Benin bronzes held in the museum's collection.<sup>255</sup> The letter came as the Art Institute of Chicago was hosting a travelling exhibit of Benin

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251. *Grosz*, 772 F. Supp. 2d at 483 (emphasis in original).

252. *Id.* at 483-84.

253. 735 ILL. COMP. STAT. § 5/13-205 (West 2012).

254. *Carroll v. Curry*, 912 N.E.2d 276 (Ill. App. Ct. 2009).

255. Letter from Edun Agharese Akenzua to the Art Institute of Chicago (Sept. 8, 2008), available at [http://www.modernghana.com/GhanaHome/image\\_preview2.asp?img=ZWR1bl9sZXR0ZXI1LmpwZw==&t](http://www.modernghana.com/GhanaHome/image_preview2.asp?img=ZWR1bl9sZXR0ZXI1LmpwZw==&t) (last visited Apr. 30, 2012).

art from various museums in Europe; the exhibit was titled *Benin - Kings and Rituals: Royal Arts from Nigeria*.<sup>256</sup>

The 2008 letter would likely qualify as a specific demand. Since the Art Institute of Chicago did not respond to the demand, its actions might be considered a refusal that should have prompted the royal family to file suit for replevin. At that point, the royal family's action accrued, and the clock likely began to run on the statute of limitations. If the regular statutory provisions of the Illinois replevin statute apply, then unless the royal family files suit before September 2013, the statute of limitations would probably run against the Art Institute of Chicago due to the letter mentioned above.

However, under the discovery rule, the five-year statute of limitation could also have started to run when the royal family first discovered the location of the bronzes and ivories in the collections of the Field Museum and the Art Institute of Chicago. This likely occurred before 2008 because both the Art Institute and the Field Museum displayed their collections before this date; therefore, the five year statute of limitations would have passed by now. Because Illinois courts have at times applied the discovery rule,<sup>257</sup> it is possible that they would follow that rule in determining when the cause of action accrued. The discovery rule, as first articulated in *O'Keeffe v. Snyder*, is used to toll the statute of limitations until the injured party discovers, or by exercise of reasonable diligence and intelligence *should* have discovered, facts which form the basis of a cause of action.<sup>258</sup>

In *O'Keeffe*, the plaintiff, artist Georgia O'Keeffe, contended that three of her paintings, *Cliffs*, *Seaweed*, and *Fragments* were stolen in 1946 from a gallery operated by her late husband, Alfred Stieglitz.<sup>259</sup> According to O'Keeffe, she and Stieglitz discovered *Cliffs* missing from the wall of an exhibit in March 1946.<sup>260</sup> About two weeks later, O'Keeffe noticed that two other paintings were

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256. *Rituals at Court*, ART INST. CHI., <http://www.artic.edu/aic/collections/exhibitions/benin/rituals> (last visited Mar. 10, 2013).

257. *See Mucha v. King*, 792 F.2d 602, 611 (7th Cir. 1986).

258. *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

259. *Id.* at 865.

260. *Id.*

missing from a storage room.<sup>261</sup> O’Keeffe did not tell anyone, even Stieglitz, about the missing paintings.<sup>262</sup> Though O’Keeffe suspected a particular person of the thefts, neither she nor Stieglitz confronted that person.<sup>263</sup>

There was no evidence of a break-in at the gallery on the dates when O’Keeffe discovered the disappearance of her paintings, and neither Stieglitz nor O’Keeffe reported the paintings missing to any law enforcement agency.<sup>264</sup> Similarly, neither O’Keeffe nor Stieglitz advertised the loss of the paintings in *Art News* or any other publication.<sup>265</sup> O’Keeffe and Stieglitz discussed the thefts with associates in the art world, including the director of the Art Institute of Chicago, but did not ask them to do anything.<sup>266</sup> In 1947, after her husband’s death, O’Keeffe retained the services of Doris Bry, to help settle her husband’s estate.<sup>267</sup> O’Keeffe declined Bry’s initial advice to report the theft of the paintings; however, in 1972, O’Keeffe authorized Bry to report the theft to the Art Dealers Association of America, Inc., which maintained a registry of stolen paintings.<sup>268</sup>

In September 1975, O’Keeffe learned that the paintings were on consignment in the Andrew Crispo Gallery in New York.<sup>269</sup> On February 11, 1976, O’Keeffe discovered that Ulrich A. Frank had sold the three paintings to Barry Snyder.<sup>270</sup> O’Keeffe demanded that the paintings be returned; following Snyder’s refusal, O’Keeffe instituted an action for replevin.<sup>271</sup> Frank received the paintings from his father, who died in 1968.<sup>272</sup> Frank did not know how his father came to possess the paintings, but he stated he saw

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261. *Id.*

262. *Id.*

263. *Id.*

264. *O’Keeffe*, 416 A.2d at 865-66.

265. *Id.* at 866.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *O’Keeffe*, 416 A.2d at 866.

271. *Id.*

272. *Id.*

them in his father's apartment as early as 1941-1943.<sup>273</sup> While conceding the paintings were stolen for purposes of a summary judgment proceeding, Snyder argued that O'Keeffe's action was barred by the statute of limitations.<sup>274</sup>

Applying New Jersey law, the trial court found that O'Keeffe's cause of action accrued in March 1946, the time of the alleged theft, and concluded that her action was barred.<sup>275</sup> The Appellate Division found that "an action might have accrued more than six years before the date of suit if possession by the defendant or his predecessors satisfied the elements of adverse possession."<sup>276</sup> However, the Appellate Division concluded that "Snyder had not established those elements, and that O'Keeffe's action was not barred by the statute of limitations."<sup>277</sup> On appeal, the Supreme Court of New Jersey applied the discovery rule, characterizing it as a principle of equity meant to "mitigate unjust results that otherwise might flow from strict adherence to a rule of law."<sup>278</sup> The court held that O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.<sup>279</sup> The court then remanded the case for a determination of how the discovery rule was applicable in O'Keeffe's case.<sup>280</sup> The court stressed that, on remand, the trial court should consider O'Keeffe's diligence in searching for the paintings, considering the avenues for reporting the thefts available at the time.<sup>281</sup> However, the case settled before it was retried and, therefore, a court never made a determination of whether or not O'Keeffe had acted with reasonable due diligence.<sup>282</sup>

The Seventh Circuit, applying Indiana law, adopted this discovery rule in *Autocephalous Greek-Orthodox Church of*

273. *Id.*

274. *Id.*

275. *Id.* at 868.

276. *O'Keeffe*, 416 A.2d at 868.

277. *Id.*

278. *Id.* at 869.

279. *Id.* at 870.

280. *Id.*

281. *Id.*

282. GERSTENBLITH, *supra* note 157, at 450.

*Cyprus v. Goldberg & Feldman Fine Arts.*<sup>283</sup> In that case, the Kanakaria Church in Cyprus was looted of some mosaics following the Turkish invasion of Northern Cyprus in 1974.<sup>284</sup> After the invasion, the government of the Republic of Cyprus received reports from the occupied area that several churches had been looted and destroyed, and that many mosaics had been stolen or destroyed.<sup>285</sup> Sometime between August 1976 and October 1979, the interior of the Kanakaria Church was vandalized, and the mosaics were forcibly removed from the apse of the church.<sup>286</sup> The mosaics were severely damaged during their removal.<sup>287</sup>

The Republic of Cyprus' Department of Antiquities first learned that the Kanakaria mosaics were missing in November of 1979.<sup>288</sup> Immediately upon learning that the mosaics were missing, Cyprus contacted the United Nations Educational, Scientific and Cultural Organization ("UNESCO") to inform it of the significance of the lost art, and to seek its assistance.<sup>289</sup> Thereafter, Cyprus notified several people and entities that it believed could assist in disseminating information about the missing mosaics and recovering them.<sup>290</sup> Cyprus also notified the International Council of Museums and the International Council of Museums and Sites about the missing mosaics.<sup>291</sup> Cyprus introduced a resolution concerning the missing mosaics to Europa Nostra, a European organization interested in the conservation of the architectural heritage of Europe.<sup>292</sup> Furthermore, Cyprus sent the Europa Nostra resolution to the Council of Europe, which it believed would give wide publicity to the problem.<sup>293</sup>

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283. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990).

284. *Id.* at 280-81.

285. *Id.*

286. *Id.* at 281.

287. *Id.*

288. *Id.*

289. *Autocephalous Greek-Orthodox Church of Cyprus*, 917 F.2d at 281.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

Additionally, Cyprus contacted both European and American museums about the missing mosaics.<sup>294</sup> The Embassy of Cyprus in Washington, D.C. issued press releases, and mailed information on a routine basis concerning the loss of Cyprus's cultural property, specifically the missing mosaics, to journalists, members of Congress, and legislative assistants working in foreign affairs.<sup>295</sup> The information was also available to academics, archaeologists, and those in organizations that expressed an interest in Greek and Cypriot affairs.<sup>296</sup> In addition, the information disseminated by the Embassy of Cyprus included speeches given around the world by Greek Cypriot officials asking for assistance in recovering the mosaics.<sup>297</sup> As a result of these efforts, the Republic of Cyprus located the mosaics in 1988, while the defendant Goldberg was trying to sell them after acquiring them in Europe.<sup>298</sup>

Because jurisdiction in the case was based on diversity, the Seventh Circuit applied Indiana law on replevin.<sup>299</sup> Following an analysis of long-standing Indiana law, as well as *O'Keeffe v. Snyder*, the court held that the plaintiff's action was timely.<sup>300</sup> The court concluded that the Kanakaria Church and the Republic of Cyprus had been diligent in their search, and the statute of limitations was therefore tolled until they discovered, or were reasonably on notice of, the mosaics' location.<sup>301</sup>

The circumstances of the theft in the cases above differ from the situation of the theft of the Benin objects. Nevertheless, the discovery rule relies heavily on the conduct of the original owner in trying to locate and recover their property. The rule requires that the original possessor was diligent in both the search for and the attempts to recover the property. In the Benin case, the court would have to begin with a determination of when the royal family knew, or should have known, of the American collections. The

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294. *Id.*

295. *Autocephalous Greek-Orthodox Church of Cyprus*, 917 F.2d at 281.

296. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1380 (S.D. Ind. 1989).

297. *Id.*

298. *Autocephalous Greek-Orthodox Church of Cyprus*, 917 F.2d at 281.

299. *Id.* at 286.

300. *Id.* at 290.

301. *Id.*

court would then likely have to make a determination on whether it was reasonable for the royal family not to pursue legal action earlier. The discovery rule seems to be disadvantageous to the royal family. At least as early as 2008, the family was aware of the Art Institute of Chicago's collection. Even assuming that this was the earliest notice they had of the collection, they have not brought suit for recovery, and the statute of limitations will be up in 2013.

It is unclear if the family has any notice of the Field Museum collection, which is possibly less well known than the Art Institute of Chicago's collection. Though there have been public requests for the pieces, the royal family would have to explain what it did specifically to locate the bronzes and ivories in the Field Museum collection. Without any such diligence, the application of the discovery rule to toll the statute of limitations would likely not help the royal family's case. It is possible that courts would require the diligence to rise to the level of that in the Kanakaria mosaics case.

*c. Laches*

In addition to the statute of limitations, another obstacle that the Benin royal family may face in a legal claim against the American museums is the defense of laches. Laches is an equitable affirmative defense with two elements: (1) the unreasonable delay by a victim; and (2) prejudice caused by the unreasonable delay.<sup>302</sup> Laches is based on the notion that courts are reluctant to aid a plaintiff who has "knowingly slept on his rights."<sup>303</sup>

What constitutes an unreasonable delay depends on a court's fact-based inquiry into a case. Courts have found delays ranging from twenty to seventy years reasonable because of the circumstances of each case.<sup>304</sup> For the royal family, the initial reason for delay may have been colonial rule; but since Nigeria was granted independence in 1960, the reasonableness of their delay since then is highly questionable. Though there may be

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302. Tully v. State, 574 N.E.2d 659, 662 (Ill. 1991).

303. *Id.*

304. *See, e.g.,* Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008).



many different reasons for delay, a plaintiff's lack of funds to file a lawsuit may not be considered an effective excuse for unreasonable delay.<sup>305</sup> It is unclear how a court would view the potential explanation that the royal family was pursuing diplomatic avenues to recovery. But since these diplomatic efforts would have likely proved ineffective in recovering property from private museums, the delay in filing suit due to this reason would seem unreasonable.

A court faced with the determination of unreasonableness in the delay would also likely look at the manner in which the American museums acquired their collections. Most acquisitions were made through donations from wealthy patrons who purchased the bronzes and ivories in Europe. Currently, a diligent search for bronzes in the publicly available databases of the Metropolitan Museum of Art<sup>306</sup> and the Art Institute of Chicago<sup>307</sup> reveals that they openly list the acquisition of the pieces and trace provenance to the 1897 looting. However, these databases have only been established somewhat recently.<sup>308</sup> Therefore, the royal family might have a convincing argument that since the pieces were in private collections and then donated privately to museums, they did not have a way to find the bronzes or ivories in American museums.

Furthermore, unlike the cases of Nazi-stolen art, there is no database of stolen or plundered cultural property taken in colonial times where the royal family could have registered their loss. After independence, there were no tribunals to adjudicate the royal family's claims. The arenas in which the royal family could have

305. See, e.g., *Sanchez v. Trustees of the Univ. of Pennsylvania*, 04 CIV. 1253 (JSR), 2005 WL 94847 (S.D.N.Y. Jan. 18, 2004).

306. *Search the Collections: Benin Bronzes*, METRO. MUSEUM ART, <http://www.metmuseum.org/collections/search-the-collections?ft=Benin+Bronzes&noqs=true> (last visited Mar. 10, 2013).

307. *Search Collection Results*, ART INST. CHI., <http://www.artic.edu/aic/collections/artwork-search/results/benin> (last visited Mar. 10, 2013).

308. The Art Institute of Chicago's online database was established in 2008. See Blair Kamin, *Art Institute Puts Inland Architect Image Database Online*, CHI. TRIB., Apr. 05, 2011, <http://featuresblogs.chicagotribune.com/th skyline/2011/04/art-institute-puts-inland-architect-image-database-online.html>.

listed the loss of their cultural property were therefore severely limited. By the time Nigeria was independent, most of the bronzes and ivories had already been sold, and some even donated to museums. These sales and donations may have made it harder to track individual pieces, a task also complicated by the lack of written records of what was taken by the British. It is therefore hard to point to what the royal family might have been required to do in order to be considered diligent. After all, the standard is not whether they did *everything* that might have been done with the benefit of hindsight, but whether their efforts were reasonable given their circumstances.<sup>309</sup>

The second prong of the laches defense requires a show of prejudice suffered by the current possessor. Typically, the kind of prejudice that will support a laches defense arises out of a loss of evidence, the unavailability of important witnesses, the conveyance of the property in dispute for fair market value to a bona fide purchaser, or the expenditure of resources in reliance upon the status quo ante.<sup>310</sup> Therefore, prejudice in this context is normally either evidence-based or expectations-based.<sup>311</sup> The evidence-based inquiry generally includes a requirement on the part of the defendant to show that they would not be able to prove their case due to lack of evidence caused by the passage of time.<sup>312</sup> However, in order to show prejudice, the current possessor has to be able to point to specific missing evidence necessary to prove her claim, or specific unavailable witnesses, and what they would have testified to.<sup>313</sup> As one court has put it, “proving prejudice requires more than the frenzied brandishing of a cardboard sword; it requires at least a hint of what witnesses or evidence a timeous investigation might have yielded.”<sup>314</sup>

In the potential Benin case, the key issues of facts of original ownership and the British punitive expedition are established historical facts that would be of little contention. The major

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309. *Lubell*, 550 N.Y.S.2d 618 at 619.

310. *Id.* at 57.

311. *Id.*

312. *Id.* at 58.

313. *Id.*

314. *Id.*

difficulty would be in proving theft or pillage, as opposed to spoils of war, under international law. Since this is not a question of fact, a museum asserting a laches defense would likely have a hard time pointing to specific evidence that they are denied due to the royal family's delay. Once again, it would seem that New York would therefore be the most favorable forum for the royal family's action in replevin.

#### IV. CONCLUSION

In 1979, a Nigerian filmmaker, Eddie Ugbomah, produced a movie entitled *The Mask*.<sup>315</sup> The movie was loosely based on the British looting of Benin City, and the British Museum's acquisition of the Queen Idia mask. In the movie, Ugbomah's protagonist is a Nigerian James Bond,<sup>316</sup> who, at Nigeria's request, manages to steal the mask from the British Museum. It has been a hundred and fifteen years since Benin City was invaded and looted. Since independence, Nigeria has attempted to recover the cultural property of Benin by relying mainly on failed diplomatic efforts. While sending a secret agent to steal back the collections of western museums is clearly not a good idea, neither, it seems, is the diplomatic approach. A new approach is needed.

One can only speculate as to what approach might be effective. Though the royal family, and indeed the nation of Nigeria, might have a strong moral claim for restitution, museums and private collectors have not made gestures to indicate they would retribute any pieces without the force of legal authority. However, while the legal approach has worked for cases of Nazi-restitution, it may not be effective for the Benin case. Too much time has passed, and as discussed above, the royal family would run into several issues in proving its case. Nevertheless, the Benin royal family might attempt the legal approach, even without complete assurance of success, in an effort to incentivize the museums to negotiate. The American Museums might want to avoid the cost and publicity of a lawsuit, and may be willing to negotiate with the royal family, which may lead to some pieces being returned to the

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315. RUSSELL CHAMBERLIN, *LOOT! THE HERITAGE OF PLUNDER* 191 (1983).

316. *Id.*

Nigerian people. However, this approach is unlikely because the legal case for restitution is weak.

Another approach that Nigeria may use to attempt to force western museums to negotiate is to use other Nigerian artifacts that are well sought out in the west. As has been suggested in the call for the return of illicit Turkish antiquities,<sup>317</sup> Nigerian museums might attempt to restrict or deny loans of other works to universal museums in collaborative exhibitions. The Nigerian government, through its museums, could condition the loan of other Nigerian cultural artifacts to western museums on the reciprocal loan of Benin artifacts to Nigerian museums. While this may only be a small incentive, it may prove effective in at least sparking negotiations. Although this approach would not lead to a permanent transfer of title to the royal family or the Nigerian government, it would allow the Benin bronzes and ivories to return home. The benefit to the western museums would be access to more artifacts that they may argue, under cultural nationalism, are unfairly retained. Ultimately, the return of the Benin bronzes and ivories to Nigeria, even if on temporary or permanent loan, would allow the Nigerian people to commune with their cultural property by giving more people access.

*Salome Kiwara-Wilson\**

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317. See Martin Bailey, *Turkey Blocks Loans to U.S. and U.K.*, ART NEWSPAPER, Mar. 1, 2012, <http://www.theartnewspaper.com/articles/Turkey-blocks-loans-to-US-and-UK/25869>.

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