

## Shaping the European Art Market:

### Post-Colonial Restitution Demands and Twenty-First Century Legal Instruments

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**Abstract:** *Almost no part of the world was unaffected by European colonisation. The largest European colonial empire, that of the British, was as large as 35.5 million km<sup>2</sup> in 1920, covering more than 25% of the planetary landmass.<sup>1</sup> The other notable European colonial empires included the French, the Portuguese, the Spanish, and the Dutch, as well as Russia, a transcontinental country. The Belgian colonial empire appeared at a slightly later stage. This paper concerns developments in the European colonial empires after the Berlin Conference of 1884, on the contemporary art trade. These empires witnessed the rise and fall of cultures, communities, and languages, among others. The economic, religious, and political consequences of colonialism included looting, destruction, and the unlawful retention of property, including cultural artefacts, heritage, and art. The legal ramifications of the genocide and plunder of that era remain in dispute to this day. Several European institutions, both cultural and commercial, hold art from formerly colonised states. The international and domestic regulation of that matter is of considerable import in the present day.*

*To what extent does post-colonial demand for restitution and 21<sup>st</sup>-century legal instruments affect the art market? This paper begins by investigating and analysing the evolution of the African art market in Europe by accounting for colonisation as well as for the origin and the evolution of the European trade in African art. It then delves into current restitution controversies and their influence on the art market. It critically analyses of the restitution of colonial art as interpreted by the courts of different European countries and analyses the plundering of art in the context of colonisation. The exposition also touches on issues such as independence, ownership, restitution, gifts, co-operation, the role of domestic legal instruments, and Belgian jurisprudence.*

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<sup>1</sup> Rein Taagepera, 'Expansion and Contraction Patterns of Large Polities: Context for Russia' (1997) 41(3) *International Studies Quarterly* 480.

## Introduction

*“The auction world has changed, leaving the art market saying, ‘don’t touch it’ when it comes to African art”.*<sup>2</sup>

- Hubert d’Ursel

In the past decade, the art market, which is populated by actors as varied as auction houses, galleries, museums, consignors, and collectors, has undergone a social, cultural, and legal transformation. That transformation has had to do with the European trade in African artefacts. According to Hubert d’Ursel, a former Sotheby’s Board Director and currently the Director of the Fine Art Group, auctions have changed due to the intensification of African demands for post-colonial restitution.<sup>3</sup> Those demands have undoubtedly grown stronger during the 21<sup>st</sup> century, a development to which various recent socio-political and legal developments have contributed considerably.<sup>4</sup> Before analysing the influence of those developments on the art market or regulation, however, it is important to overview the history of colonial looting and its implications for the European art market and for European art institutions.<sup>5</sup> The practice of colonisation is ancient; this paper focuses on the colonisation of Africa between late modernity and the recent past, that is, between the start of the 19<sup>th</sup> and the end of the 20<sup>th</sup> century.<sup>6</sup>

Many war crimes and crimes against humanity were committed in Africa during the colonial period. These included plunder, destruction, and crimes against cultural heritage. The affected countries are still experiencing the long-term economic, social, political, and cultural repercussions. According to a 2021 Interpol report, *“Crimes against cultural heritage include the looting, theft, traffic and sale of cultural items that constitute an important pillar of a country’s history”*.<sup>7</sup> The large-scale economic exploitation of the African continent through looting and other forms of resource extraction arguably resulted in underdevelopment.<sup>8</sup> European power in Africa

<sup>2</sup> Interview with Hubert D’Ursel, Director of The Fine Art Group (Brussels, 8 June 2022).

<sup>3</sup> *Ibid.*

<sup>4</sup> Ana Temudo, ‘Current Challenges for African Cultural Heritage: A Case Study of Guinea-Bissau’ (2021) 13(1) *Museus e Estudos Interdisciplinares*.

<sup>5</sup> This question is analysed further in Section I, Part A.

<sup>6</sup> Brian Brivati, Julia Buxton and Anthony Seldon, *The Contemporary History Handbook* (Manchester University Press 1996) 121.

<sup>7</sup> INTERPOL, ‘Survey Of Interpol Member Countries: Assessing Crimes Against Cultural Property 2020’ (2021) <[https://file:///Users/paulinemoorkens/Downloads/2020%20Assessing%20Crimes%20Against%20Cultural%20Property%20\(3\).pdf](https://file:///Users/paulinemoorkens/Downloads/2020%20Assessing%20Crimes%20Against%20Cultural%20Property%20(3).pdf)> last accessed 28 June 2023.

<sup>8</sup> Walter Rodney, *How Europe Underdeveloped Africa* (Bogle-L'Ouverture Publications 1972).

manifested in the employment of diverse control tactics, which included but were not limited to punitive expeditions.<sup>9</sup> Those expeditions entailed pillaging African cultural heritage and art. For example, a British expedition looted the Benin Bronzes in 1897.<sup>10</sup> The taking, pillaging, and destruction of objects of art or cultural heritage was orchestrated and executed not only by military forces but also by professionals who had been retained by European art institutions and by missionary priests who were acting on behalf of the Church,<sup>11</sup> such as the members of the Order of Friars Minor Capuchin.<sup>12</sup>

The objects taken were often displayed in art institutions and missionary museums, such as the 1925 Vatican Mission Exposition (*Esposizione missionaria vaticana*), which featured more than 100,000 artefacts, including statues and drawings.<sup>13</sup> The European plundering of Africa raises legal, socio-political, cultural, and diplomatic issues today, particularly in view of the fact that approximately 90% of African art is estimated to remain in Europe to this day.<sup>14</sup> For example, 70,000 African objects are held in the *Musée du quai Branly – Jacques Chirac* in France. Post-colonial demands for restitution and their impact on the European art market are thus live issues.<sup>15</sup>

This paper is a study of the interplay between these demands and contemporary legal instruments. As noted previously, it investigates the history of colonial plunder. It also covers the evolution of the European market for African art. The current restitution controversies that affect auction houses and museums are taken into account, as are the extant instruments of hard and soft international law. The role of domestic legislation and case law in Belgium, a country that lies at the heart of the post-colonial restitution controversy, in the art market is also examined. Finally, the exposition explores issues such as independence, ownership, restitution, gifts, and cultural co-operation between states.

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<sup>9</sup> Jimena Escoto, 'Colonial Looting of African Art: A Century In Exile' DailyArt Magazine <<https://www.dailyartmagazine.com/colonial-looting-african-art/>> last accessed 30 July 2023.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Pierre Guidi, 'For good, God, and the Empire': French Franciscan Sisters in Ethiopia 1896–1937' 47(3) History of Education 1-15.

<sup>13</sup> *Ibid.* These issues are discussed in more detail in the following sections.

<sup>14</sup> Tife Owolabi, 'Nigeria's Looted Benin Bronzes Returned, More Than A Century Later' Reuters (20 February 2022).

<sup>15</sup> *Ibid.*

### 1. Colonial History and the Plunder of African Cultural Heritage

Colonialism in Africa changed after the Berlin Conference, which is also known as the Congo Conference (*Kongokonferenz*) and the West Africa Conference (*Westafrika-Konferenz*), and after the New Imperialist Conquests.<sup>16</sup> The term “New Imperialist Conquests” refers to the period between 1873 and 1914, which was marked by “*intensified imperialistic expansion*”.<sup>17</sup> The main colonisers included the United Kingdom, France, Belgium, Portugal, Spain, Italy, and Germany.<sup>18</sup> It is important to define colonialism before examining its development in and consequences for Africa. Colonialism involves conquest as well as the exercise of political, economic, social, and military control by one state over another polity, a region, or an area.<sup>19</sup> In essence, colonialism is control “*over a dependent territory*”.<sup>20</sup> Colonisation, conversely, is the seizure of political and economic control over a foreign population.<sup>21</sup> Imperialism involves dominion over a territory through geographical acquisition or political and economic control.<sup>22</sup> The Scramble for Africa<sup>23</sup> saw colonialism, colonisation, and imperialism intertwine. The modern history of colonisation of Africa began in 1884, during the New Imperialist period. The Berlin Conference had as its purport the regulation of trade and European colonisation in Africa.<sup>24</sup> The role of the Conference in the colonial partitioning of Africa is debated, but its General Act is widely considered to have formalised the Scramble for Africa.<sup>25</sup> The Conference effectively ended the autonomy of Africans by abolishing several systems of self-governance.<sup>26</sup>

<sup>16</sup> Kwame Anthony Appiah & Henry Louis Gates, *Encyclopaedia of Africa* (Oxford University Press 2010).

<sup>17</sup> Harry Magdoff, ‘New Imperialism’ (Encyclopaedia Britannica, 2020) <<https://www.britannica.com/topic/New-Imperialism>> last accessed 16 August 2022.

<sup>18</sup> Appiah and Gates (n 16).

<sup>19</sup> Stanford Encyclopaedia of Philosophy, ‘Colonialism’, Stanford Encyclopaedia of Philosophy (9 May 2006) <<https://plato.stanford.edu/entries/colonialism/>> last accessed 13 June 2023.

<sup>20</sup> *Ibid.*

<sup>21</sup> University of Saskatchewan, ‘Terminology’ (University of Saskatchewan 2022)

<<https://teaching.usask.ca/curriculum/indigenous-voices/power-and-privilege/chapter-1.php#:~:text=Colonization%20vs%20Colonialism&text=Colonization%3A%20is%20the%20action%20or,settlers%2C%20and%20exploiting%20it%20economically>> last accessed 13 June 2023.

<sup>22</sup> Peter Duignan, ‘Imperialism’ (Encyclopaedia Britannica 2022) <<https://www.britannica.com/topic/imperialism>> last accessed 13 June 2023.

<sup>23</sup> Also known as the Conquest of Africa or the Partition of Africa, the Scramble for Africa refers to the “*invasion, annexation, division, and colonisation*” of large parts of Africa by the European powers during the New Imperialist period.

<sup>24</sup> Adekunle Ajala, ‘The Nature of African Boundaries’ (1983) 18(2) Institute of African Affairs at German Institute of Global and Area Studies 177–189.

<sup>25</sup> Simon Katzenellenbogen, ‘It Didn't Happen at Berlin: Politics, Economics and Ignorance in the Setting of Africa's Colonial Boundaries’ in Nugent, Peter and Asiwaju, AI(eds) *African Boundaries: Barriers, Conduits and Opportunities* (Pinter 1996).

<sup>26</sup> Adekunle Ajala, ‘The Nature of African Boundaries’ (1983) 18(2) Institute of African Affairs at German Institute of Global and Area Studies 177–189.

## 2. The Looting of Art and Cultural Heritage During Colonisation

There have been various attempts to define cultural heritage throughout history. Vesselin and Tolina Loulanski defined it as “*culture and landscape that are cared for by the community and passed on to the future to serve people’s need for a sense of identity and belonging*”.<sup>27</sup> According to Christian Koboldt, conversely, cultural heritage is an expression of the identity of a community or a society at a particular point in time.<sup>28</sup> This paper adopts the definition of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), according to which cultural heritage comprises “*artefacts, monuments, a group of buildings and sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific and social significance*”.<sup>29</sup> This definition captures tangible and intangible heritage, insofar as it is embedded into sites, monuments, and cultural or natural artefacts.<sup>30</sup> Tangible cultural heritage includes movable objects of cultural significance, such as utensils and artworks. Immovable cultural heritage includes buildings, monuments, and ritual and archaeological sites.<sup>31</sup> Intangible heritage includes beliefs, music, and such like.<sup>32</sup>

Prior to the Berlin Conference, European missionaries, hunters, explorers, and traders had already engaged in large-scale looting in Africa. The Afro-Portuguese ivories supply a salient example.<sup>33</sup> During the 1870s, a large number of sculptures, artworks, and curios from African exploratory expeditions arrived in Europe.<sup>34</sup> The monetary value of these objects was low at that time, and many were sold in markets or pawned.<sup>35</sup> The early 20<sup>th</sup> century saw the most intensive looting. However, between the 1960s and the 1980s, African independence resulted in demands for restitution, which were directed at the former colonial empires as well as at particular individuals.<sup>36</sup> The cultural and national identities of the newly independent nations were both at stake. By 1969, the Organisation of African Unity had released a manifesto that cast culture as the “*cement of every*

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<sup>27</sup> Vesselin Loulanski and Tolina Loulanski, *Cultural Heritage and Sustainable Development* (LAP Lambert Academic Publishing 2015).

<sup>28</sup> Christian Koboldt, ‘Optimising the Use of Cultural Heritage’ (Centre for the Study of Law and Economics, Department of Economics, Universitat des Saarlandes 1995).

<sup>29</sup> UNESCO 2009 Framework for Cultural Statistics (FCS).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Enid Schildkrout & Curtis Keim, *The Scramble for Art in Central Africa* (Cambridge University Press 1998).

<sup>34</sup> Denise Murrell, *African Influences in Modern Art: Heilbrunn Timeline of Art History* (The Metropolitan Museum of Art 2008).

<sup>35</sup> *Ibid.*

<sup>36</sup> Interview with Hubert D’Ursel, Director at The Fine Art Group (Brussels, 8 June 2022) <<https://www.INSERT URL>> last accessed 20 August 2023.

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*social group... it is its soul, its materialisation and its capacity for change*".<sup>37</sup> It also argued that "*the people must be the first to benefit from their economic and cultural riches*".<sup>38</sup>

According to the French art historian Bénédicte Savoy, nearly all African "*ancient artistic heritage is now preserved in European countries*".<sup>39</sup> The website of the British Museum indicates that it holds more than 105,635 African works of art and cultural artefacts.<sup>40</sup> In practice, the estimates of the number of objects that comprise its African collection vary. It has been claimed that the museum holds more than 73,000 items.<sup>41</sup> Similar observations can be made about the Royal Museum for Central Africa (*Koninklijk Museum voor Midden-Afrika* or *Musée royal de l'Afrique centrale*) in Belgium. Its departments of zoology, cultural anthropology, geology and mineralogy, and history hold more than 10 million objects and items from vegetal, mineral, and animal nature from Central Africa. Previously, it also functioned as a scientific centre. Many of the items originate from the Congo, and only 5% of the collection is on display.<sup>42</sup> As with the British Museum, estimates vary – according to some, the Royal Museum for Central Africa holds 180,000 African objects. The *Weltmuseum* in Austria holds 37,000 pieces, the *Ethnologisches Museum* in Germany holds 75,000, and the *Nationaal Museum van Wereldculturen* in the Netherlands holds 66,000.<sup>43</sup>

Large numbers of looted African artworks can also be found at military, missionary, regional, natural-history, and university museums as well as in art collections, galleries, private institutions, and libraries.<sup>44</sup> Conversely, the cumulative size of the U.S. collection of African art does not exceed 50,000 pieces.<sup>45</sup> This geographical distribution reflects the history of European

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<sup>37</sup> Organization of African Unity, 'Pan-African Cultural Manifesto' (Organization of African Unity 1969) <[https://ocpa.irmo.hr/resources/docs/Pan\\_African\\_Cultural\\_Manifesto-en.pdf](https://ocpa.irmo.hr/resources/docs/Pan_African_Cultural_Manifesto-en.pdf)> last accessed 29 June 2023.

<sup>38</sup> *Ibid.*

<sup>39</sup> Bénédicte Savoy, *Africa's Struggle for Its Art: History of a Postcolonial Defeat* (Princeton University Press 2022).

<sup>40</sup> British Museum, 'Collections Search'

<[https://www.britishmuseum.org/collection/search?keyword=africa&place=Africa&sort=object\\_name\\_asc&view=grid&page=5](https://www.britishmuseum.org/collection/search?keyword=africa&place=Africa&sort=object_name_asc&view=grid&page=5)> last accessed 28 June 2023.

<sup>41</sup> Farah Nayeri, 'Return of African Artifacts Sets a Tricky Precedent for Europe's Museums' (New York Times 27 November 2018) <<https://www.nytimes.com/2018/11/27/arts/design/macron-report-restitution-precedent.html>> last accessed 16 August 2023.

<sup>42</sup> Africa Museum, <<https://www.africamuseum.be/fr>> last accessed 28 June 2023.

<sup>43</sup> Bénédicte Savoy, *Africa's Struggle for Its Art: History of a Postcolonial Defeat* (Princeton University Press 2022).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

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colonisation.<sup>46</sup> As mentioned previously, as much as 90% of all African art may be in Europe.<sup>47</sup> This significant accumulation poses important ethical and legal questions about the future of the European art market.

### 3. Growth of African Art in the European Art Market

In Europe, trade in traditional African art started to intensify towards the end of the 19<sup>th</sup> century. This development was driven by demand. Judith Perani and Fred T. Smith described the notion of traditional African art to which most Europeans and modern academics subscribe as “*indigenous art traditions [that were] viable and active before European colonisation of Africa*”.<sup>48</sup> The value that is ascribed to traditional objects is linked to their association with the pre-colonial period.<sup>49</sup> This tendency can be explained in several ways. After the dissemination of Christianity and, later, of Islam, traditional African artistic practices came to be associated with indigenous religions and traditions.<sup>50</sup> The pagan artefacts that were not destroyed were taken to European museums and private collections. The uses of these objects in Europe differed considerably from their treatment at their places of origins. For example, many of the artefacts that stand behind glass boxes at the *Musée du quai Branly - Jacques Chirac* were originally used in Malian rituals. In fact, the *Musée National du Mali* regularly lends cultural objects from its collections to communities for the performance of traditional rites.<sup>51</sup>

Although the objects were initially displayed in ethnological contexts, large private collections of African art emerged in Europe as a consequence of the work of art collectors and dealers.<sup>52</sup> The art dealers Louis Carré and Charles Ratton played an important role in that process.<sup>53</sup> In the second part of the 20<sup>th</sup> century, several museums in Europe were dedicated solely to African art. The

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<sup>46</sup> *Ibid.*

<sup>47</sup> Tife Owolabi, ‘Nigeria's Looted Benin Bronzes Returned, More Than A Century Later’ (Reuters, 20 February 2022) <<https://www.reuters.com/world/africa/nigerias-looted-benin-bronzes-returned-more-than-century-later-2022-02-19/>> last accessed 28 June 2023.

<sup>48</sup> Judith Perani and Fred Smith, *The Visual Arts of Africa: Gender, Power, and Life Cycle Rituals* (Prentice Hall 1998).

<sup>49</sup> Peri Klemm, ‘African Art and The Effects Of European Contact And Colonization’ (Khan Academy 2022) <<https://www.khanacademy.org/humanities/art-africa/african-art-introduction/african-art-europe/a/african-art-effects-of-european-colonization>> last accessed 14 July 2023.

<sup>50</sup> *Ibid.*

<sup>51</sup> Jimena Escoto, ‘Colonial Looting of African Art: A Century In Exile’ (DailyArt Magazine, 18 July 2022)

<<https://www.dailyartmagazine.com/colonial-looting-african-art/>> last accessed 30 July 2023.

<sup>52</sup> Kathleen Bickford Berzock and Christa Clark, *Representing Africa in American Art Museums* (University of Washington Press 2011),.

<sup>53</sup> *Ibid.*

*Musée Dapper* in Paris, for example, was opened in 1986.<sup>54</sup> Other museums set space aside for African artefacts.<sup>55</sup> Traditional African art shaped the development of avantgarde and abstract art, as well as of the primitivist art form.<sup>56</sup> The typical African representation of the human body was incorporated into impressionist art, which is noticeable in the artworks of Picasso and Matisse, among others.<sup>58</sup> Traditional African art also contributed heavily to the development of early modernism through the use of “*fragmented Cubist shapes and a vivid colour palette*”.<sup>59</sup> The European art-market boom of the late 20<sup>th</sup> century can be attributed to economic prosperity and to the start of the digital era in the Western world after the 1980s.<sup>60</sup> It was this expansion that highlighted the problem of looted and stolen art.

#### 4. 21<sup>st</sup>-century Post-Colonial European Art Market

In 1978, UNESCO Director General Amadou-Mahtar M’Bow made a plea for restitution by saying that some communities and peoples had “*been deprived of their cultural heritage, therefore, [we] ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish. This is a legitimate claim*”.<sup>61</sup> The cultural objects derive their value from the materials that were used to make them, from their tribal significance, from their history, and importantly, from their typology.<sup>62</sup> Post-colonial demands for restitution have been accompanied by the rise of the post-colonial art form, that is, of “*art produced in response to the aftermath of colonial rule*”.<sup>63</sup>

Europeans are familiar with both the origin and the cultural significance of the items that auction houses and art dealers hold. Recent legislation and guidelines have made it more difficult to buy, sell, and donate traditional African art. The most hotly debated question is whether these objects

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Primitivism is an artform which revolves around aesthetic idealisation and the emulation of primitive experiences.

<sup>57</sup> Denise Murrell, ‘African Influences in Modern Art: Heilbrunn Timeline of Art History’ (The Metropolitan Museum of Art 2008).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> Kelly Diane Walton, ‘Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen’ (1999) 549 *Fordham IP Media & Ent LJ*.

<sup>61</sup> Jimena Escoto, ‘Colonial Looting of African Art: A Century In Exile’ (DailyArt Magazine, 18 July 2022). <<https://www.dailyartmagazine.com/colonial-looting-african-art/>> last accessed 30 July 2023.

<sup>62</sup> *Ibid.*

<sup>63</sup> Tate Modern, ‘Post-colonial Art’ (Tate Modern 2022) <<https://www.tate.org.uk/art/art-terms/p/postcolonial-art>> last accessed 26 July 2022.



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should be returned to the various African states and communities of whose cultural heritage they form part. According to an UBS market study, global art generated \$65 billion in sales in 2022.<sup>64</sup> \$15 billion dollars to that market.<sup>65</sup> In the 21<sup>st</sup> century, traditional artworks have been sold for as much as \$1.7 million, as in the 2017 Sotheby's sale of a Luba-Shankadi neckrest from the Congo.<sup>66</sup> Towards the end of the 20<sup>th</sup> century, renowned auction houses, such as Sotheby's and Christie's, created specialised African art departments.<sup>67</sup> Auction houses enabled many European collectors to access African art for the first time.<sup>68</sup>

## 5. Restitution Controversies

Auction houses and museums have been embroiled in various restitution controversies in the last decades. A number of European states, such as the United Kingdom, France, Germany, Belgium, and the Netherlands, have also been involved in such disputes. The art market remains largely unregulated. The colonial and the post-colonial trade in African art has often proceeded without much attention being paid to questions of provenance. As the former Principal Deputy Solicitor General of the United States Paul M. Bator wrote, auction houses do not usually “*reveal the provenance of an object that is to be sold to buyers or the public*”.<sup>69</sup> The same is true of museums, who tend to be silent on the provenance of their African artefacts as well as on the mode of their acquisition. Due to negligence or complicity, African artefacts remain difficult to track, which renders the prospect of restitution remote.<sup>70</sup> The role of auction houses in authentication has also excited controversy. Due to scarce documentation and the widespread neglect of research on authentication and provenance, sequences of multi-layered transactions ultimately “*insulate the original guilty knowledge until, in many cases, it just disappears*”, as argued by Jessica Darraby.<sup>71</sup>

<sup>64</sup> UBS, ‘Art Basel And UBS Global Art Market Report 2022’ (UBS 2022) <<https://www.ubs.com/global/en/our-firm/art/collecting/art-market-survey.html>> last accessed 26 July 2023.

<sup>65</sup> ‘Global Art Market: Revenue Of Africa 2018-2023’ (Statista 2022) <<https://www.statista.com/statistics/1063130/africa-art-market-contribution/>> last accessed 26 July 2023.

<sup>66</sup> Scott Reyburn, ‘Restitution Fears Unsettle The Trade In African Art’ (New York Times, 29 January 2019).

<sup>67</sup> Jacqueline Martinez, ‘Top 10 Oceanic and African Art Auction Results from The Past Decade’ (The Collector, 15 November 2019).

<sup>68</sup> *Ibid.*

<sup>69</sup> Kelly Diane Walton, ‘Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen’ (1999) 549 Fordham IP Media & Ent LJ.

<sup>70</sup> *Ibid.*

<sup>71</sup> Lisa Borodkin, ‘The Economics of Antiquities Looting and a Proposed Legal Alternative’ (1995) 95(2) Columbia Law Review.

Historically, the appearance of flagged African art in catalogues would lead to withdrawal, which was often fatal to tracing efforts.<sup>72</sup> There were some successes, especially in the context of art that was looted by the Nazis during World War II. The restitution of African art from auction houses and museums has been more contentious. There have been some recent repatriations. These include the return of 26 Benin Bronzes by France in 2021; the agreement between Germany and Nigeria for the return of 1,000 such sculptures;<sup>73</sup> and the agreement between the Horniman Museum and Gardens of the UK and Nigeria, which resulted in the return of a further 72 Bronzes.<sup>74</sup>

Restitution undeniably disrupts the trade in African art as well as the operation of museums and auction houses across the globe. The sentiments of auctioneers, curators, and gallery owners range from apathy to antipathy.<sup>75</sup> Widespread criticism followed the release of a French report on African art repatriation. Art-fair and auction-house representatives and workers were highly critical of its content. Notably, tribal specialist Serge Schoffel wrote that it was the work of “*Western scientists, collectors and dealers that preserved these pieces... Now we are looking like crooks*”.<sup>76</sup> Since African museums are increasingly demonstrating that they can house repatriated objects, the argument for preservation in Europe is being progressively rebutted. The Western art market and art institutions are under more pressure than ever to consider requests for restitution, and the recent institutional responses to such demands have caused tensions to escalate.

## 6. International Restitution Instruments

After the end of World War II, numerous legal instruments were promulgated in order to prevent the plundering of cultural heritage and art. Both hard and soft laws were introduced to prevent future looting and to redress past wrongs. Soft law is non-binding, and includes principles, agreements, and declarations. It serves as a means of preventing international crimes, such as cultural heritage spoliation.<sup>77</sup>

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<sup>72</sup> Kelly Walton, ‘Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen’ (1999) 549 *Fordham IP Media & Ent LJ*.

<sup>73</sup> Philip Oltermann, ‘Germany Hands Over Two Benin Bronzes To Nigeria’ (*Guardian*, 1 July 2022).

<sup>74</sup> Danica Kirka, ‘UK Museum Agrees To Return Looted Benin Bronzes To Nigeria’ (*Washington Post*, 8 August 2022).

<sup>75</sup> Scott Reyburn, ‘Restitution Fears Unsettle The Trade In African Art’ (*New York Times*, 29 January 2019).

<sup>76</sup> *Ibid.*

<sup>77</sup> Marc-André Renold, Alessandro Chechi, Justine Ferland and Ece Velioglu-Yildizci, ‘Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations’ (2016). Directorate-General for Internal Policies of the European Parliament

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The soft-law instruments that are germane to the present ends include the 1954 Hague Convention, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Prior to World War II, colonial looting was not treated as a problem that would require international-law solutions. Article 1(3) of the First Protocol of the Hague Convention stipulates that cultural and individual property that is looted during a conflict has to be returned.<sup>78</sup> Each of the contracting parties “*undertakes to return... to the competent authorities of the territory previously occupied, the cultural property which is in its territory*”.<sup>79</sup> In the contexts of plundered or looted art, cultural property, and heritage, the right to restitution is unalienable, and states must act to enforce it. Since looted artworks are not taken for preservation or with a view to being returned (as per Article 5 of the 1954 Convention), such works ought to be restored to their countries of origin.<sup>80</sup>

That the applicable international legal instruments do not operate retroactively is highly contentious. Neither the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects nor the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property operate retroactively.<sup>81</sup> According to Article 28 of the Vienna Convention on the Law of Treaties of 1969, retroactive effect depends on the will of the contracting parties and on “*any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*”.<sup>82</sup>

The lack of retroactivity obstructs African restitution efforts because the plunder that they aver mainly occurred at the end of the 19<sup>th</sup> century and in the first part of the 20<sup>th</sup> century, well before the enactment of the treaties.<sup>83</sup> Special agreements can be struck for cases which do not fall under

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<[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL\\_STU\(2016\)556947\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf)> last accessed 27 July 2023.

<sup>78</sup> UNESCO Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict 1954

<sup>79</sup> *Ibid.*

<sup>80</sup> “Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall, as far as possible, support the competent national authorities of the occupied country in safeguarding and preserving its cultural property”.

<sup>81</sup> Andreas Giorgallis, ‘Restitution of Colonial Cultural Objects: A Glimpse From An International Law Approach’ (2021) Cambridge International Law Journal.

<sup>82</sup> Vienna Convention on the Law of Treaties 1969.

<sup>83</sup> Giorgallis (n 81).

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Article 15 of the 1970 Convention.<sup>84</sup> Furthermore, Article 10 of the 1995 Convention provides that illegal transactions cannot be legitimised.<sup>85</sup> In addition, Article 11 of the 1970 Convention provides that the export and transfer of “*ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit*”.<sup>86</sup> The interpretations of Article 11 can vary. One can argue that restitution is available because acquisition through occupation, in this case in virtue of colonisation, is illicit and therefore null.<sup>87</sup> However, the notion of illicitness can mean different things in different jurisdictions, which undermines its effectiveness.

In law, the 21<sup>st</sup> century was a period of transition. Globally, demands for repatriation have grown in both volume and intensity. According to Andreas Giorgallis, international cultural restitution is an intermediate step between *lethe*, which means “oblivion”, and *mnemosyne*, which means “remembrance”.<sup>88</sup> Institutions have been established to facilitate negotiation, mediation, and conciliation. One example is the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, which dates from 1978.<sup>89</sup> However, the scarcity of binding law remains problematic. Contemporary international-law solutions may have a voluntary or a declaratory basis.<sup>90</sup> Voluntary-basis regulation entails returning cultural heritage, cultural property, and art upon the conclusion of special agreements that are preceded by negotiations as well as conciliation and mediation.<sup>91</sup> Declaratory-basis regulation can result from failure to recognise the injustices of the past.<sup>92</sup> The ease with which states, institutions, and private collectors can refuse to acknowledge those injustices makes the restitution process arduous and uncertain. At present, the First and the Second Protocol to the Hague Convention are the most effective international-law instruments for

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<sup>84</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

<sup>85</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.

<sup>86</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

<sup>87</sup> Marc-André Renold, Alessandro Chechi, Justine Ferland and Ece Velioglu-Yildizci, ‘Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations’ (2016) Directorate-General for Internal Policies of the European Parliament.

<sup>88</sup> Giorgallis (n 81).

<sup>89</sup> UNESCO Resolution 4/7.6/5 of the 20<sup>th</sup> General Conference 1978.

<sup>90</sup> Giorgallis (n 81).

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

restitution. Both provide that cultural property that is taken extraterritorially must be returned to its rightful owners.

### 7. Role of Domestic Legal Instruments and Case Law in Belgium

The history of the Belgian colonial empire between 1884 and 1960 is disputed. The rapid colonisation of the Congo after 1884 and that of Ruanda-Urundi, which began in 1916, left a highly incendiary political, social, and economic legacy. The former Congo Free State allowed King Leopold II of Belgium to expand his influence in the region and to appropriate resources such as rubber, ivory, diamonds, gold, copper, and zinc.<sup>93</sup>

During the 75 years of Belgian presence in the Congo, missionaries, political officials, citizens, and collectors took interest in Congolese art and expatriated vast numbers of artefacts to Belgium and to Europe as a whole. The atrocities that were committed in the Congo went unrecognised for decades. However, in 2020, King Philippe of Belgium apologised on behalf of the country for the harm that colonisation caused.<sup>94</sup> By February 2022, the Belgian Prime Minister Alexander de Croo had met with Congolese Prime Minister Jean-Michel Sama Lukonde in order to establish a joint committee that would study the artefacts that were looted during the colonial period.<sup>95</sup> The Belgian government provided the Congolese government with an inventory of 84,000 artefacts that are currently housed in the Royal Museum for Central Africa in Belgium. In a press release, the Belgian State Secretary for Scientific Policy Thomas Dermine wrote that the inventory would be an “*important step in the implementation of the new approach to... [w]orking together in complete transparency, on the basis of an inventory and provenance studies, within a committee composed equally of experts from both countries*”.<sup>96</sup>

Belgium has adopted various domestic legal instruments that pertain to restitution, including the Criminal Code, Law 2003-08-05/32 on grave violations of international human rights, and the Flemish Parliament Act of 7 May 2004 on the organisation and funding of a cultural heritage policy

<sup>93</sup> Simon Katzenellenbogen, ‘It Didn't Happen at Berlin: Politics, Economics and Ignorance in the Setting of Africa's Colonial Boundaries’ in Peter Nugent and AI Asiwaju (ed) *African Boundaries: Barriers, Conduits and Opportunities* (Pinter 1996).

<sup>94</sup> Carine Dikiefu Banona & Jean-Sébastien Sépulchre, ‘Belgium – Moving from Regrets to Reparations’ (Human Rights Watch, 30 June 2020).

<sup>95</sup> Vivienne Chow, ‘Inching Toward Restitution, Belgium Has Handed Over An Inventory of 84,000 Artifacts to The Democratic Republic Of Congo’ (Artnet News, 22 February 2022).

<sup>96</sup> *Ibid.*

for heritage covenants and the provision of advice. In addition, the country has adopted various international-law instruments, including the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), and the decree on the Protection of Movable Cultural Heritage of Particular Interest (2003).

Several laws and decrees originate from the French-speaking, German-speaking, and Flemish-speaking communities because cultural matters are a regional competence at present. Article 136(34) of the Belgian Criminal Code (*Code penal*), which was introduced in 2003 through *Loi* 2003-08-05/32, provides that, in accordance with the 1954 Hague Convention, the destruction of cultural property and cultural heritage by voluntary action or negligence is punishable by law.<sup>97</sup> Article 136 of the Criminal Code entered into force on the same day as the Second Protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

Accordingly, the Article 136 offences are also crimes under international law. As per the provisions of that title, those offences, along with the war crimes that are referred to in the Geneva Convention of 1949 and in the First and Second Protocols of Protocols, which were adopted in 1977, are punishable by the laws and customs that are applicable to armed conflicts.<sup>98</sup> Furthermore, the Belgian Criminal Code accords with Article 8 § 2 of the Statute of the International Criminal Court. Therefore, crimes which are punishable by the Code as undermining the protection of persons and property are punishable by law.<sup>99</sup>

Until recently, African art was largely considered a part of Belgian cultural heritage. Accordingly, some have argued that there is no legal argument for restitution. However, after the provision of the 2002 inventory to the government of the Congo, the Belgian Parliament is now examining the possibility of rendering all objects that were obtained during the colonial era alienable.<sup>100</sup> At

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<sup>97</sup> *Loi* 2003-08-05/32.

<sup>98</sup> *Code Pénal Belge* 1948.

<sup>99</sup> *Ibid.*

<sup>100</sup> Vivienne Chow, 'Inching Toward Restitution, Belgium Has Handed Over An Inventory of 84,000 Artifacts to The Democratic Republic Of Congo' (Artnet News, 22 February 2022).

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present, it is illegal to remove items from the Royal Museum for Central Africa. The same is true of all works that are currently held in federal collections.<sup>101</sup>

In June 2022, King Philippe returned a ceremonial mask to the National Museum of the Congo on an indefinite loan. The government intends to create a new law which would provide for restitution on a “*case-by-case basis*”.<sup>102</sup> Foreign authorities would be allowed to apply for the repatriation of artefacts. The applications would be reviewed by a committee that will comprise experts from the two countries.<sup>103</sup> This process would help the Congo to complete its journey to independence, and it would strengthen the cultural co-operation between the two countries.<sup>104</sup>

Unlike Belgium, which lacks cultural-heritage laws, other countries, such as the UK, have passed legislation on heritage, culture, and their preservation. These include the Ancient Monuments and Archaeological Areas Act 1979, the Dealing in Cultural Objects (Offences) Act 20003, and the Cultural Property (Armed Conflicts) Act 2017.

However, Belgium does hold a number of decrees, despite not having adopted as many statutes as its neighbouring nations. The Belgian instruments include the Decree on the Protection of Movable Cultural Heritage of Particular Interest of 2003, the 2004 Flemish Parliament Act on the organisation and funding of a cultural-heritage policy for heritage covenants and the provision of advice, and the 2005 Flemish Government Decree that implements the Heritage Act at museums, cultural-heritage publications, and cultural-heritage projects.

It is important to note that finances and time of creation are relevant criteria in EU and UK law.<sup>105</sup> Annex I of EC Regulation 116/2009 defines “cultural objects” as “*archaeological objects more than 100 years old which are the products of (1) excavations and finds on land or under water, (2) archaeological sites, (3) archaeological collections*”.<sup>106</sup> Cultural objects and cultural heritage are

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<sup>101</sup> Taylor Dafoe, ‘Stopping Short of Restitution, King Philippe of Belgium Gives the Democratic Republic of Congo a Stolen Mask on Indefinite Loan’ (Artnet News, 9 June 2022).

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> Sarah Van Beuren, ‘Restitution or Cooperation? Competing Visions of Post-Colonial Cultural Development in Africa’ (Käte Hamburger Kolleg / Centre for Global Cooperation Research 2015).

<sup>105</sup> EC Regulation 116/2009 of 18 December 2008, OJ L 39/1 (2009); Council Directive 54 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of Member States Council Directive (EEC) 93/7 of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State OJ L 74/74, 27.3.93 (with amendments from 1997 and 2001).

<sup>106</sup> *Ibid.*

not defined in the same manner in many national laws. There are no nationwide and pieces of secondary legislation that govern foreign cultural heritage in, among others, Belgium, France, the Netherlands, and the UK. This makes it difficult for African states to seek restitution. At the same time, the current legislation obstructs the European trade in African art.

## 8. Independence and Ownership

Questions about cultural property were not resolved during the period in which most African countries became independent. Colonial states such as Belgium were unwilling to return artefacts which had already entered federal collections.<sup>107</sup> A number of former colonial empires, including not only Belgium but also France, the UK, and Spain, as well as many others, argued that the formerly colonised nations did not have the expertise or the resources to protect and conserve these collections. Many museum custodians and directors in Europe argued that the artefacts had to remain in Europe because they possessed appropriate means of conserving and protecting them.

In 1960, the Director of the Royal Museum for Central Africa, Lucien Cahen, wrote that it was not restitution but cultural collaboration in a “*context of exchange and in an atmosphere of understanding and mutual respect*” that would ideally be preferred.<sup>108</sup> A series of negotiations led to the conclusion of an agreement between Belgium and the Congo in 1974. The return of the artefacts remained optional rather than mandatory for Belgium.<sup>109</sup>

The plaintiff in any action for restitution must be able to demonstrate “ownership” of an artefact in order to support its claim. Many states depend on the cultural-heritage legislation that they have enacted to prove title. However, states do not always agree on what constitutes a “cultural artefact” and do not always identify the objects to which they ascribe special value comprehensively.<sup>110</sup> International-law instruments and intergovernmental organisations have played an important role in ownership disputes. After the ratification of the 1970 Convention, the then-President of the

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<sup>107</sup> *Ibid.*

<sup>108</sup> Van Beuren (n 104).

<sup>109</sup> *Ibid.*

<sup>110</sup> Camille Labadie, ‘Decolonizing Collections: A Legal Perspective on the Restitution of Cultural Artifacts’ (Université du Québec à Montréal 2021).



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Zaire,<sup>111</sup> Mobutu Sese Seko (hereafter Mobutu) relied on the position of UNESCO to dispute the stance that Belgium had adopted in its negotiations with his government.<sup>112</sup>

As noted above,<sup>113</sup> the relevant soft-law instruments are not retroactive and therefore do not enable African states to take legal steps to ensure the return of the objects.<sup>114</sup> In 1973, Mobutu challenged the non-retroactivity clause in a speech at the 28<sup>th</sup> Session of the United Nations General Assembly. He said that it is “*natural and just to restitute to these underdeveloped countries their beacons of light, their authentic images of a continued future*”.<sup>115</sup>

This speech was followed by a proposal for a resolution on the return of African objects, which was supported by nine other African states. Despite being passed with 113 votes for, zero against, and 17 abstentions, it proved difficult to enforce on a global scale.<sup>116</sup> However, these intergovernmental and international debates increased the pressure on European countries to co-operate with the restitution process.<sup>117</sup> Ultimately, this attention came to disrupt the art market.

## 9. Restitution, Gifts, or Co-operation in the Art Market

Many questions about restitution turn on linguistic subtleties. When one state claims restitution, the other often offers to structure the transaction as a gift rather than as a repatriation.<sup>118</sup> The gifts that Belgium made to Zaire in the 1970s and 1980s, which followed decades of demands for restitution from the formerly colonised state, were gestures of diplomatic co-operation.<sup>119</sup>

However, out of the 1,042 artefacts that were donated in this fashion, only 114 had actually belonged to the Royal Museum of Africa in Belgium. The rest had been taken in the 1960s from the Museum of Indigenous Life in the former capital of the Congo, Leopoldville.<sup>120</sup> These objects had been sent to Belgium for safekeeping during the independence conflict.<sup>121</sup> Therefore, legally,

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<sup>111</sup> The Republic of Zaire (*République du Zaïre*) was a Congolese state that operated from 1971 to 1997. It had previously been known as the Democratic Republic of the Congo and currently uses the same name.

<sup>112</sup> *Ibid.*

<sup>113</sup> See Section II, Part B, Paragraph 2.

<sup>114</sup> Van Beuren (n 104).

<sup>115</sup> United Nations General Assembly, 2140th Plenary Meeting (1973).

<sup>116</sup> *Ibid.*

<sup>117</sup> Van Beuren (n 104).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

those objects had always belonged to the Congo – ownership of the Museum of Indigenous Life had been transferred to the Congolese government in 1961, after independence. It can be argued that countries such as Belgium, France, and the UK had legitimate causes for scepticism at the end of the 20<sup>th</sup> century due to the perilous political equilibria in the newly independent African countries. Indeed, a large number of items that had been gifted to African countries such as the Congo were discovered on the illegal art market only a few years after their return, a consequence of the chaos that engulfed African cultural institutions at the time.<sup>122</sup>

### 10. Implications for the Art Market

In the past, the art market has been described as comprising a “*myriad, often over-lapping, subspecialties that may be limited by region, by date, by medium, or by form... and archaeological and ethnographic materials... which their countries of origin consider cultural heritage*”.<sup>123</sup> The post-colonial African demands for restitution and the 21<sup>st</sup>-century legal instruments that were discussed on the preceding pages have had significant implications for that market. Post-colonial and African art are traded across the globe, sometimes lawfully and sometimes illicitly. In light of the evolution of the law of cultural property and heritage and of international law, the past decades have witnessed “*adjudications of trans-national and international legal repatriation claims, choice-of-law status quos and rules, and statutory law overriding*”.<sup>124</sup>

Predictably, this tendency has affected commerce. In addition, the development of concepts such as *lex culturalis*<sup>125</sup> and the corresponding principles, which revolve around alternative dispute resolution mechanisms, choice-of-law rules other than the application of the *lex situs*,<sup>126</sup> and the “*non-application of private international law rules*”,<sup>127</sup> has also disrupted the market.<sup>128</sup> The same is true of the concept of *lex originis*, which calls for the application of the law of the jurisdiction

<sup>122</sup> Elif Hamutcu, ‘Illicit Trade of Cultural Property: Who Owns African Art?’ (2019) Columbia Undergraduate Law Review.

<sup>123</sup> Clemency Chase Coggins, ‘A Licit International Traffic in Ancient Art: Let There Be Light’ (1995) International Journal of Cultural Property.

<sup>124</sup> Christa Roodt, ‘Restitution of Art and Cultural Objects and its Limits’ (2013) The Comparative and International Law Journal of Southern Africa: Institute of Foreign and Comparative Law.

<sup>125</sup> *Lex culturalis* refers to a set of culturally sensitive principles integrated within international law tools.

<sup>126</sup> *Lex situs* refers to the law of position, meaning that the law of the jurisdiction in which the object is located applies.

<sup>127</sup> Alessandro Chechi, ‘The Settlement of International Cultural Heritage Disputes: Towards a Lex Culturalis?’ (European University Institute Law Department 2011) <<https://cadmus.eui.eu/handle/1814/16056>> last accessed 16 August 2023.

<sup>128</sup> Christa Roodt, ‘Restitution of Art and Cultural Objects and its Limits’ (2013) The Comparative and International Law Journal of Southern Africa: Institute of Foreign and Comparative Law.

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from which an artefact originates.<sup>129</sup> States can draw on these doctrines to make cross-border claims for cultural heritage and property. *Lex culturalis* dovetails into the international system of restitution because it “*reconciles all moral, historical, cultural, financial and legal interests*”.<sup>130</sup> However, at present, international cultural-heritage law and its instruments still lack uniformity due to an assortment of political, legal, social, and cultural factors.<sup>131</sup>

As noted previously, provenance and mode of acquisition are seldom ascertained by auction houses, private collectors, and art institutions. For example, *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts Inc*<sup>132</sup> highlighted issues with statutes of limitations and choice-of-law rules<sup>133</sup> as well as with the unfortunate similarities between the legitimate and the underground art market.<sup>134</sup> As Patty Gerstenblith wrote, antiquities are “*looted directly from the ground in ancient habitation areas and burial sites in order to supply the art market*”.<sup>135</sup> In the light of the recent development of soft and hard law, limitation periods no longer supply an adequate legal basis for refusals to repatriate.

Consequently, the art market is becoming embroiled in cross-border restitution disputes.<sup>136</sup> The art market is not exempt from questions of morality. For example, if a sale is forced or occurs as a consequence of looting during occupation, there is a strong ethical claim for repatriation. Furthermore, the participants in the market are now subject to a stricter duty of diligence as a consequence of the emergence of new legal instruments, including the special rules that apply to “*stolen objects that fit within the categories set out in Article 3(4)*”.<sup>137</sup> Article 3(5) of the 1995 UNIDROIT Convention provides that states can impose a 75-year limitation period on the recovery of stolen objects.<sup>138</sup>

## 11. Conclusion

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<sup>129</sup> Aaron Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009).

<sup>130</sup> Chechi (n 127).

<sup>131</sup> Roodt (n 128).

<sup>132</sup> *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc*. 717 F 67 Supp 1374 (SD Ind 1989), affirmed 917 F2d 278 (US Court of Appeals 7<sup>th</sup> Circuit, 1990; no 89–2809) *cert denied* 112 S Ct 377 (1992).

<sup>133</sup> *Ibid.*

<sup>134</sup> Roodt (n 128).

<sup>135</sup> Patty Gerstenblith, ‘Identity and Cultural Property: The Protection of Cultural Property in the United States’ (1995) 75 Boston University Law Review 559.

<sup>136</sup> Roodt (n 128).

<sup>137</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.

<sup>138</sup> *Ibid.*

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In conclusion, the influence of post-colonial demands for restitution and regulation on the European art market is evident from the content of the modern law, both soft and hard, as well as from the nature of the contemporary art trade. Whatever the law, ethical and cultural considerations are of the essence. States must choose between internationalist and nationalist stances on cultural property.<sup>139</sup> Internationalism reflects the common interest in the “*preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives*”, while nationalism has to do with the notion of a “*national cultural patrimony*”.<sup>140</sup> The multi-billion-dollar art trade “*readily crosses borders*”. Despite being highly organised, is still largely unregulated.<sup>141</sup> Private collectors, dealers, museums, and auction houses have historically tended to be indifferent to matters of provenance. Consequently, disputes about restitution are inevitable.<sup>142</sup> The European art market was estimated to be worth \$19 billion as of 2017,<sup>143</sup> a figure that does not account for the illegal market, which is also highly developed in Europe and in the United States. This said, international databases of cultural heritage and looted art have facilitated the identification and return of artefacts and artworks in the past decades. Furthermore, instruments such as the Code of Ethics for Museums now guide museums when they must address provenance questions.<sup>144</sup>

In view of the proliferation of international and domestic regulation, the market is bound to change. Databases such as the Lost Art Register and the Lost Art Database, as well as institutions such as Interpol, facilitate tracking. The socio-political demand for the repatriation and restitution of objects from formerly colonised states also increases pressure on auction houses, collectors, dealers, and museums. Since European governments are increasingly reviewing African demands for restitution, the coming years will see substantial changes in the market. Given the large amounts of money that are involved, talk of restitution makes buyers and dealers nervous.<sup>145</sup> This anxiety is likely to persist until the global art trade changes profoundly.

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<sup>139</sup> John Henry Merryman, ‘Cultural Property Internationalism’ (2005) 12(1) *International Journal of Cultural Property* 11.

<sup>140</sup> Giorgallis (n 81).

<sup>141</sup> Roodt (n 128).

<sup>142</sup> *Ibid.*

<sup>143</sup> Christian Salm, ‘Cross-Border Restitution Claims of Looted Works of Art and Cultural Goods’ (European Parliament, November 2017) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS\\_STU\(2017\)610988\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU(2017)610988_EN.pdf)> last accessed 30 August 2023.

<sup>144</sup> International Council of Museums, ‘Code of Ethics for Museums’ (Paris: ICOM, 2004).

<sup>145</sup> Scott Reyburn, ‘Restitution Fears Unsettle The Trade In African Art’ (New York Times, 29 January 2019).