

The repatriation of African heritage: shutting the door on the imperialist narrative

Fiona Batt*

<https://orcid.org/0000-0002-8365-1217>

ABSTRACT: This article is written in recognition of the repatriation movement, which is going through a renaissance in relation to the cultural heritage of African peoples. The collecting of African cultural heritage without free, prior and informed consent was a feature of colonialism. This article highlights the vulnerability of past and present African heritage in the light of the 'imperialist narrative'. The imperialistic narrative accompanied the act of colonialism in Africa and enabled the taking of African heritage to public and private collections in Europe and America where many remain. Much of the heritage was displayed as an African 'curiosity box' which helped to support the now discredited idea of a hierarchy of peoples. This article argues that until there is a steady stream of African heritage returning home to Africa the narrative will continue to impact *in situ* African heritage including natural resources. Until museums repatriate African heritage unreservedly, the 'imperialist narrative' will exclude the corollary narrative of African Renaissance. The article examines potential restitution/repatriation mechanisms for African peoples and states for the return of their cultural heritage, drawing on the UNESCO conventions, the African Union Charter for African Cultural Renaissance, the Sarr and Savoy Report, 'Restitution of African Cultural Heritage. Toward a New Relational Ethics', the Report of the Expert Mechanism on the Rights of Indigenous Peoples Repatriation of ceremonial objects, human remains, and intangible resources under the United Nations Declaration on the Rights of Indigenous Peoples' and the ECOWAS 2019/2023 Action Plan on the return of cultural properties to their countries of origin.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le rapatriement du patrimoine africain: en finir avec le récit impérialiste

RÉSUMÉ: Cet article est écrit en reconnaissance du mouvement de rapatriement des biens culturels africains qui connaît une renaissance fulgurante. Le pillage du patrimoine culturel africain sans consentement préalable, libre et éclairé a été un trait caractéristique majeur du système colonial. Cet article analyse la vulnérabilité du patrimoine africain passé et présent sous le prisme du 'récit impérialiste'. Le récit impérialiste a accompagné l'acte de colonisation en Afrique et a permis de déplacer le patrimoine africain dans des collections publiques et privées en Europe et en Amérique, où il est toujours présent. Une grande partie de ce patrimoine a été présentée comme une boîte à curiosités africaine qui a contribué à soutenir l'idée, aujourd'hui discréditée, d'une hiérarchie entre peuples. Cet article soutient que tant qu'il n'y aura pas un flux régulier de patrimoine africain retournant en Afrique, le récit impérialiste continuera à avoir un impact sur le patrimoine africain *in situ*, y compris sur les ressources naturelles. Tant que les musées ne rapatrieront pas le patrimoine africain sans réserve, le 'récit impérialiste' exclura le récit corollaire de la Renaissance

* LLB (Plymouth), LL.M, PhD (Bristol), Independent human rights lawyer consultant; f.battwalh@gmail.com

africaine. L'article examine les mécanismes de restitution/rapatriement potentiels pour les peuples et les États africains en vue du retour de leur patrimoine culturel, en s'appuyant sur les conventions de l'UNESCO, la Charte de l'Union africaine pour la renaissance culturelle africaine, le rapport Sarr et Savoy, 'Restitution of African Cultural Heritage. Toward a New Relational Ethics', le Rapport du Mécanisme d'experts sur les droits des peuples autochtones sur le rapatriement des objets cérémoniels, des restes humains et des ressources immatérielles en vertu de la Déclaration des Nations Unies sur les droits des peuples autochtones' et le Plan d'action 2019/2023 de la CEDEAO sur le retour des biens culturels dans leur pays d'origine.

KEY WORDS: repatriation, cultural heritage, African renaissance, natural resources, restitution

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1 INTRODUCTION

This article is written in recognition of the repatriation movement, which is going through a renaissance, not only in relation to the repatriation of the cultural heritage of African peoples but equally the cultural heritage of indigenous peoples.¹ The article's focus is the continued retention and non-return by museums and scientists of the cultural heritage of African peoples taken under colonialism.² The collecting of African cultural heritage without free, prior and informed consent was a feature of colonialism.³ One observer has noted that there is more African cultural property outside of the continent than within.⁴ Museums historically have been at the forefront as collectors of African cultural heritage and as such have strongly influenced

1 F Sarr & B Savoy 'The restitution of African cultural heritage toward a new relational ethics, restitution report' (2018) (Sarr & Savoy Report) http://restitutionreport2018.com/sarr_savoy_en.pdf (accessed 12 September 2021); Report of the expert mechanism on the rights of indigenous peoples 'repatriation of ceremonial objects, human remains, and intangible resources under the United Nations Declaration on the rights of indigenous Peoples' UN Doc A/HRC/45/35 (21 July 2020) (Repatriation Report) www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Reportrepatriation.pdf (accessed September 2021).

2 The term 'heritage' is used here rather than the term cultural property as it is a broader term and includes the tangible and intangible the movable and the immovable and includes human remains.

3 E Posner 'The international protection of cultural property: some sceptical observations' (2006) 141 *University of Chicago Public Law & Legal Theory Paper* 1-22 <http://www.law.uchicago.edu/academics/publiclaw/index.html> (accessed 12 June 2021); V Rigg 'Curators of the colonial idea: the museum and the exhibition as agents of bourgeois ideology in nineteenth century NSW' (1994) 4 *Public History Review* 188.

4 F Shyllon 'The recovery of cultural objects by African states through the UNESCO and UNIDROIT conventions and the role of arbitration' (2000-2) *Uniform Law Review* 219-241; Sarr & Savoy Report (n 1).

repatriation policies.⁵ In truth museums remain ‘the moat around the colonial castle’.⁶ Additionally the call for the decolonisation of museums has highlighted some resistance to repatriation.⁷

The call for the restitution of African cultural heritage is not new. The Abuja Proclamation 1993, a declaration of the first Abuja Pan-African Conference on Reparations For African Enslavement, Colonization, and Neo-Colonization, called for financial and psychological reparations as well as restoration of artefacts. The Proclamation included: ‘Convinced that numerous lootings, theft and larceny have been committed on the African People call upon those in possession of their stolen goods artifacts and other traditional treasures to restore them to their traditional owners the African People.’⁸ More recently in 2019, ECOWAS initiated the ECOWAS 2019/2023 Action Plan in relation to cultural heritage.⁹ The Plan called for the return of African cultural heritage, back to the countries of origin. The Plan is a West African specific initiative. Furthermore, the Plan recognises the cultural genocide context of the theft of African cultural property.¹⁰ Significantly, the African Union 2006 Charter for African Cultural Renaissance in article 26 articulates a similar philosophy that ‘African States should take steps to put an end to the pillage and illicit traffic of African cultural property and ensure that such cultural property is returned to their countries of origin’.¹¹ Additionally, a European 2018 initiative supports the restitution of African cultural heritage.¹² Objects designated as cultural heritage have received protection under domestic and international law as they have been linked to the identity of peoples and the identity of the state.¹³

5 C Fforde, C McKeown, & H Keeler *The Routledge companion to indigenous repatriation: return reconcile renew* (2020) 375: ‘Scoping survey of historic human remains in English museums undertaken on behalf of the ministerial working group on human remains (2003) <http://www.honour.org.uk/wp-content/uploads/2014/05/ScopingSurveyWGHR-2.pdf> (accessed 12 September 2021).

6 F Batt *Ancient indigenous human remains and the law* (2021).

7 H Fischer ‘Should museums return their colonial artefacts?’ (20 June 2019) *The Guardian* www.theguardian.com/culture/2019/jun/29/should-museums-return-their-colonial-artefacts (accessed 12 June 2021); N Rea ‘A French Museum director pushes back against a radical report calling on Macron to return looted African art’ *Artnet* (November 2018) <https://news.artnet.com/artworld/quai-branly-president-macron-africa-restitutionreport-1404364> (accessed 12 September 2021).

8 See tabled motion on 10 May 1993 welcoming the Abuja Proclamation UK Parliament Early Day motion <https://edm.parliament.uk/> (accessed 12 September 2021).

9 ECOWAS Community of West African States <https://www.ecowas.int/ecowas-committee-on-the-return-of-cultural-properties-to-their-countries-of-origin-to-meet-in-cotonou/> (accessed 12 September 2021).

10 J Sarkin *Germany’s genocide of the Herero: Kaiser Wilhelm II, his General, his settlers, his soldiers* (2011)

11 24 January 2006.

12 Sarr & Savoy Report (n 1).

13 A Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities ‘The right to self-determination:

The restitution/repatriation of the cultural heritage of African peoples is a pressing cultural and legal issue which needs to be addressed in relation to restitution/repatriation mechanisms. When one nation holds another nation's heritage, it not only has physical possession of that heritage but importantly it has possession of another's voice. However, until museums repatriate African heritage unreservedly, the 'imperialist narrative' will exclude the corollary narrative of African Renaissance. The African Renaissance Institute defines African Renaissance as, 'a shift in the consciousness of the individual to re-establish our diverse traditional African values, to embrace the individual's responsibility to the community and the fact that he, in community with others, together are in charge of their own destiny'.¹⁴ The imperialist narrative is to be understood here to mean a narrative which accompanied and legitimised colonialism. Furthermore, the narrative exists today enabled by the retention of African cultural heritage in museums and universities, in former colonising states such as the UK, Germany and France.¹⁵

2 IMPERIALIST NARRATIVE: AFRICA AS A 'CURIOSITY BOX'

A people's cultural heritage tells a unique story about that people. Objects designated as cultural heritage 'tell us who we are and where we are from'.¹⁶ They encapsulate the history of a nation state or of a particular people.¹⁷ When cultural heritage is displaced and exhibited in the museums of the former colonial powers the narrative can never be culturally neutral. Asante highlights: 'We must tell our own narratives and take charge of our own historical language; there is no other way for us to realise an African renaissance'.¹⁸ In fact only when African cultural heritage is *in situ* will the narrative tell the story of past, present and future renaissance and complete the full right to self-determination imagined by the International Bill of Rights.¹⁹

Felwine Sarr and Bénédicte Savoy highlight the hurdle of exclusive control in the following: 'Not to mention that the very duration,

historical and current development on the basis of United Nations instruments' UN Doc E/CN.4(2)(404) (1981) 641-77; S Stetie 'The Intergovernmental Committee: mechanisms for a new dialogue' (1981) 33 *Museum International* 116-118.

- 14 J Cossa 'African renaissance and globalization: a conceptual analysis and a way forward' (2015) 38(3) *Ufahamu Journal of African Studies* 165.
- 15 There are several themes running through the imperialist narrative – the retention of African cultural property being just one. Non-governmental organisations and aid can also be included.
- 16 A Elsen 'Why do we care about art' (1976) 27 *Hastings Law Journal* 951 at 952.
- 17 F Fechner 'The fundamental aims of cultural property law' (1998) 7 *International Journal of Cultural Property* 376-394.
- 18 M Asante 'Meeting Cheikh Anta Diop on the road to African resurgence' (2018) 13:1 *International Journal of African Renaissance Studies – Multi, Inter and Transdisciplinarity*.
- 19 Cristescu (n 13).

temporality, and meaning of these objects has been under an exclusive control and authority of Western institutional museum structures that decide how long one can have access to these objects.²⁰ Prosecutor Bensouda in the International Criminal Court case of *Prosecutor v Ahmad Al Faqi Al Mahdi* stated in relation to the destruction of Malian cultural heritage the following: ‘Let us be clear: what is at stake is not just walls and stones. The destroyed mausoleums were important, from a religious point of view,²¹ from an historical point of view, and from an identity point of view.’²² All three of these elements raised by Prosecutor Bensouda are relevant to the cultural value of all African cultural heritage.

A number of themes in relation to the imperialist narrative are represented in the following:

First, the removal of African cultural heritage without consent was undoubtedly part of the colonising experience. The collecting of cultural heritage including human remains of African indigenous peoples and the heroes who fought against the colonisers was a realised tool of the colonialists, enabling the theft of land and the subjugation of a people through the removal and erosion of culture. Colonialism was legitimised by the now discredited legal principles of the ‘doctrine of discovery’ and *terra nullius*.²³ These discredited legal doctrines were thought to be quashed by the legal principle of the right to self-determination avowed to colonial African states included in the United Nations Charter and the International Bill of Rights.²⁴ Regrettably, these doctrines continue to permeate the debate around the retention by museums of African cultural heritage today.²⁵

Second, the remnants of the colonial project remain in the guise of paternalism in the arguments for non-return of cultural heritage put forward by museums. Museums argue that the objects are better

20 Sarr & Savoy Report (n 1).

21 *Centre for minority rights development (Kenya) and minority rights group international on behalf of Endorois welfare council v Kenya*, 276/2003, African Commission on Human and Peoples’ Rights 4 February 2010, paras 283 & 173: ‘cultural practices constituted a religion under international law’; 403 Resolution on the Need for a Study on the Situation of Africa’s Sacred Natural Sites and Territories - ACHPR/Res 403 (LXIII) 2018.

22 Statement of the prosecutor of the International Criminal Court Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi, *Prosecutor v Ahmad Al Faqi Al Mahdi* Case ICC-01/12-01/15.

23 *Mabo v Queensland (No 2)* (1992) 175 CLR & Western Sahara case advisory opinion 1975.

24 Charter of the United Nations; UN General Assembly, International Covenant on Civil and Political Rights; UN General Assembly, International Covenant on Economic, Social and Cultural Rights.

25 S Bond ‘What the “Nefertiti Hack” tells us about digital colonialism’ *Hyperallergic* (24 May 2021) <https://hyperallergic.com/647998/what-the-nefertiti-hack-tells-us-about-digital-colonialism/> (accessed 12 September 2021).

protected where they are in Western museums rather than in the source countries.²⁶ Museums offer skill sharing and lending as an alternative to restitution.²⁷ Paternalistic, defined as ‘the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced’,²⁸ has been linked with colonialism.²⁹

Third, linked to the paternalistic argument is a theory of cultural property law, in the form of the internationalist theory. Internationalist theory does not protect all the cultural objects which have cultural significance for the cultural heritage of the state, but cultural objects which have a cultural significance to the whole world or mankind.³⁰ Merryman suggests the theory is ‘shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated or from whatever cultural or geographical source it derives.’³¹ States have drawn on this theory to retain cultural objects. Discussing the cultural heritage of Native American indigenous peoples, Hutt has described as paternalistic this theory of cultural property.³²

Fourth, according to Smith, ‘a situation is discriminatory or unequal if like situations are treated differently or different situations are treated similarly’.³³ Hutt argues that Holocaust cultural property looted and stolen in World War II has been given a different status than stolen Native American cultural property.³⁴ Hutt highlights the difference in the response by museums to the claims of Holocaust victims and Native Americans.³⁵ She suggests that most of the property taken during World War II has been returned due to voluntary efforts on the part of the museums.³⁶ Hutt’s observation in relation to Native American cultural heritage is an observation which can be noted in the retention and non-return of African cultural heritage.

26 C Roehrenbeck ‘Repatriation of cultural property – who owns the past? An introduction to approaches and to selected statutory instruments’ (2010) 38 *International Journal of Legal Information*.

27 Rea (n 7).

28 M Barnett ‘International paternalism and humanitarian governance’ (2012) *Constitutionalism* 485

29 J Murphy ‘Legitimation and paternalism: the colonial state in Kenya’ (1986) 29 *African Studies Review* 55-65.

30 J Merryman ‘Two ways of thinking about cultural property’ (1986) 80 *American Journal of International Law* 833.

31 J Merryman ‘Cultural property international trade and human rights’ (2001) 19 *Cardozo Arts & Entertainment Law Journal*.

32 S Hutt ‘Legal perspectives on cultural resources’ in J Richman, M Forsyth & W Creek (eds) *Cultural property law theory: a comparative assessment of contemporary thought legal perspectives on cultural resources* (2004) 17.

33 R Smith ‘Traditional land and cultural rights’ (2001) 5 *International Journal of Human Rights* 1-18

34 S Hutt ‘If Geronimo was Jewish: equal protection and the cultural property rights of Native Americans’ (2004) 24 *Northern Illinois University Law Review* 527.

35 Hutt (n 34).

36 Hutt (n 34).

Fifth, states do not accept including the term ‘cultural genocide’ within the legal genocide framework. A particular international debate over the destruction of a people’s culture arose in discussions over the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The relationship of colonialism and the active destruction of culture was highlighted by Lemkin in his research about a form of genocide he viewed as cultural genocide articulated in the following: ‘Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population, which is allowed to remain, or upon the territory alone, after removal of the population and the colonisation of the area by the oppressor’s own nationals.’³⁷

Initially in the drafting stages of the Convention, cultural genocide was to be included as a crime under the Convention.³⁸ However, in the final Convention, cultural genocide was excluded and has since been viewed as a controversial term in law.³⁹ The final Convention requires a physical destruction of the group. The term resurfaced in discussions on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. However, states with large indigenous populations such as the United States of America (USA), Australia and Canada objected to the inclusion of the term, and it was removed from the final text of the document.⁴⁰

3 MUSEUMS AND COLLECTING

In this section, the focus is on cultural heritage removed from the African continent illegally. The holders draw on the language of property and legal contracts made at the time of acquisition to justify their retention.⁴¹

37 R Lemkin ‘Genocide – a modern crime’ (1945) 4 *Free World* 39-43, www.preventgenocide.org/lemkin/freeworld1945.htm (accessed 12 June 2021).

38 Convention on the prevention and punishment of the crime of genocide – the secretariat and ad hoc committee drafts secretariat draft first draft of the Genocide Convention, prepared by the UN Secretariat UN Doc. E/447 (May 1947).

39 United Nations Economic and Social Council, Commission on Human Rights, third Session UN Doc E/CN.4/SR.76 (1948); T Musgrave *Self-determination and national minorities* (2000); See debate on Genocide Convention UN Doc E/CN.4/Sub.2/416 para 447; United Nations International Criminal Tribunal for the former Yugoslavia Judgement, *Prosecutor v Radislav Krstic* Case IT-98-33-T, 2001 the Hague: United Nations, para 480.

40 United Nations High Commissioner for human rights, indigenous issues: Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32 UN Doc E/CN.4/2003/92 (2003).

41 Rea (n 7).

The bust of Nefertiti, a queen of the 18th dynasty of Ancient Egypt, was discovered in 1912 by a German team led by archaeologist Ludwig Borchardt in Minya governorate and illegally smuggled out of Egypt in 1913.⁴² The bust of Nefertiti now resides in the Neues Museum in Berlin. Egypt has been making requests to Germany since the 1920s; the most recent was in 2020 by the Tourism and Antiquities Minister Khaled al-Anani.⁴³ The German Museum housing Nefertiti claims the bust was acquired legally.⁴⁴ However, if you draw on the non-return of the Greek Parthenon sculptures alongside the non-return of Nefertiti, Egypt and Greece were under the occupation of the Ottoman Empire, therefore, it can be argued that permission was given by the occupying force. Under international law, today, this brings into question the legitimacy of acquisition.⁴⁵

The British Museum has a collection of 80 objects from Ethiopia particularly Maqdala.⁴⁶ The collection includes ceremonial crosses, chalices, weapons, and other examples from the Ethiopian Orthodox tradition. In 1867, an expedition of 13 000 British soldiers entered Maqdala and stole many cultural objects. According to the British Museum, ‘accompanying the soldiers was an archaeologist Richard Rivington Holmes from the British Museum who bought some of the objects from an auction specifically organised to sell the looted objects. The archaeologist returned with them to the British Museum’.⁴⁷ Presently, the British Museum has entered into agreements on skill sharing and state that they have a cordial relationship with Ethiopian representatives but are yet to return the stolen cultural heritage.⁴⁸ However, in 2018 Ethiopia’s ambassador, Hailemichael Aberra Afework, requested their return.⁴⁹ Additionally AFROMET – the Association for the Return of the Maqdala Ethiopian Treasures – is an international organisation dedicated to retrieving Ethiopian cultural heritage looted during the British invasion of the country in 1867-8.⁵⁰

42 ‘Egypt revives effort to retrieve Nefertiti bust “stolen” by Germany’ *The New Arab* (3 October 2020) alaraby.co.uk (accessed 12 September 2021).

43 J Cohen ‘Egypt’s most wanted: an antiquities wish list’ *history.com* (2011) <https://www.history.com/news/egypts-most-wanted-an-antiquities-wish-list> (accessed 12 September 2021).

44 ‘Germany refuses to return Nefertiti bust to Egypt’ (2009) *BBC News* <http://news.bbc.co.uk/1/hi/world/europe/8427269.stm#:~:text=German%20officials%20have%20ruled%20out,state%20nearly%20a%20century%20ago> (accessed 12 September 2021).

45 E Cunliffe, N Muhesen & M Lostal ‘The destruction of cultural property in the Syrian conflict: legal implications and obligations’ (2016) 23 *International Journal of Cultural Property*.

46 British Museum Maqdala Collection <https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/maqdala-collection> (accessed 12 September 2021).

47 British Museum Maqdala Collection (n 46).

48 British Museum Maqdala Collection (n 46).

49 M Bailey Ethiopia calls on London Museum to repatriate objects looted 150 years ago *The Art Newspaper* (6 April 2018).

50 The Association for the return of the Maqdala Ethiopian treasures http://www.afromet.info/about_us.html (accessed 12 September 2021).

Diaspora organisations are very active in raising awareness of the theft of African cultural heritage.⁵¹

In relation to the human remains of African peoples, European and South African scientists stole the bodies of the San people for the purposes of racial research.⁵² Furthermore, European colonialists removed skulls and human remains of 'African Heroes' who fought against the colonialists. In Tanzania there has been a call for the return of the skull of Mangi Meli a chief from Moshi in Tanzania. He was a symbol of resistance against the German occupation. He was captured and executed in 1900 and his skull was taken to Germany as a trophy. However, his skull cannot be located. There are over 200 Tanzanian remains in German collections which were collected to act as a monument to the colonial troops.⁵³ The Tanzanian government has requested that these human remains should be returned and buried in order to restore dignity.⁵⁴

4 RESTITUTION/REPATRIATION

Enshrined in international human rights law is the right to an effective remedy.⁵⁵ There is a hierarchy of terms in relation to remedies. In relation to the return of cultural heritage the terms of restitution and repatriation are generally used. Restitution is associated with cultural objects and repatriation human remains.⁵⁶

In relation to the term restitution, it is the restoration to its rightful owner of something that was unjustly taken.⁵⁷ As concluded by the Report of the International Law Commission (ILC) 'because restitution most closely conforms to the general principle that the responsible state is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not

51 See the work of the International Association for the Reunification of the Parthenon Sculptures <http://www.parthenoninternational.org/> (accessed 12 September 2021).

52 C Rassool 'Human remains, the disciplines of the dead and the South African memorial complex' in D Peterson (ed) *The politics of heritage in Africa economies, histories, and infrastructures* (2015).

53 'The search in Germany for the lost skull of Tanzania's Mangi Meli' *BBC* (3 November 2018) www.bbc.com/news/world-africa-45916150 accessed (12 September 2021); note the oral tradition of Letti a missing female chief from the Nyaturu tribe in Tanzania who led a rebellion against the German colonisers and whose bones cannot be traced. Webinar Ancient Indigenous Human Remains University of Bristol Human Rights Implementation Centre (8 September 2021).

54 A Cooper 'Reparations for the Herero genocide: defining the limits of international litigation' (2006) 106 *Oxford Journal of African Affairs* 113-126.

55 *Yakye Axa Indigenous Community v Paraguay* Judgment of 17 June 2005.

56 *Native American Graves Protection and Repatriation Act* (25 USC 3001 et seq, 43 CFR part 10) as a model for the repatriation of human remains; The 2001 UNESCO convention on the protection of the underwater cultural heritage article 1(a) and article 1(a)(i) includes the protection of human remains over 100 years old.

57 J Thompson 'Cultural property, restitution and value' (2003) 20 *Journal of Applied Philosophy* 251-262.

been committed, it comes first among the forms of reparation'.⁵⁸ In the discussions on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in relation to cultural heritage and sacred sites, some states argued that the term 'restitution' should be replaced with return as there was a concern that rights of third parties or the state may be infringed.⁵⁹ This reluctance can partially be explained by one commentator's observation that this implies acceptance of claims for the recognition of indigenous rights to the land and resources that they still occupy and use.⁶⁰ Australia, Canada, the United States and New Zealand initially voted against the adoption of UNDRIP. In particular Sweden had a problem with, 'restitution' in relation to cultural, spiritual and intellectual property.⁶¹ Similar objections were raised to a restitutionary provision in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁶² In relation to ancient human remains which were removed from Africa, article 12 UNDRIP is the only international provision which considers repatriation of human remains. The term 'repatriation' is a less contentious term than 'restitution' and has its ordinary meaning and is linked to the repatriation of a body.

In situations of armed conflict, article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) contains a definition of cultural property.⁶³ However, as noted above, the collecting of African cultural heritage was taken under colonialism which although now considered a crime against humanity by some political commentators is not viewed as falling under the laws of war.⁶⁴ The Hague Convention includes the movable and the immovable. The cultural property of peoples and states has been targeted in war time, and if not targeted has been vulnerable to collateral damage.⁶⁵ Furthermore, occupying powers have a special responsibility to safeguard and preserve the cultural

58 Report of the International Law Commission, 53rd sess. (23 April, 1 June and 2 July-10 August 2001) in UNGAOR, 56th sess, Supp No 10 (A/56/10), (Commentary on article 35) 238-239, para (3) 240-241.

59 Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32 indigenous issues 1995/32 UN Doc E/CN.4/2001/85 (2001) para 147.

60 A Eide 'The indigenous peoples, the working group on indigenous populations and the adoption of the UN Declaration on the Rights of Indigenous Peoples' in C Charters & Stavenhagen (eds) *Making the declaration work the United Nations Declaration on the Rights of Indigenous Peoples* (2009).

61 UN Doc E/CN.4/1997/102.

62 A Vrdoljak *International law, museums and the return of cultural objects* (2006).

63 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 14 May 1954, 249 UNTS 249 UNTS p. 240, reproduced in A Roberts & R Guelff (eds) *Documents on the laws of war* (1989).

64 'France to return remains of 24 Algerian resistance fighters following prolonged campaign' (2020) *Daily Sabah* 20 August 2020; President Macron called colonialism 'a crime against humanity' France 24.com 16 February 2017.

65 C Wegener & M Otter 'Cultural property at war: Protecting heritage during armed conflict.' (2008) 23 *The Getty Conservation Institute*; US customs, Immigration and Enforcement (ICE) have intervened and returned stolen artefacts stolen after

property of the occupied state in times of war.⁶⁶ This Convention recognises the importance of cultural property to the state and to the heritage of mankind. The restitutionary provision is included in the Hague Convention first Protocol article 3, as follows:⁶⁷

Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

The 1970 United Nations Educational Scientific and Cultural Organisation (UNESCO) Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property provides the main regulatory framework for the protection of cultural property and a comprehensive definition in peacetime.⁶⁸ Problematically in relation to removed African cultural heritage the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property does not apply to cultural property removed before the Convention came into force in 1972. Almost all African cultural heritage was removed under colonial rule in the 19th and 20th centuries. So the failure of the Convention to address pre-1972 illicitly removed cultural property significantly reduces the effectiveness of the convention in the protection, control and return of African cultural property. Additionally, requests must be made by states.⁶⁹ This was highlighted as a gap in the UN Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations.⁷⁰ The state centric nature of the UNESCO instruments is problematic for indigenous peoples and communities of the African continent.⁷¹

The 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) includes the terms ‘indigenous or other communities’ in its Recital. The UNIDROIT Convention optimistically recognises that indigenous cultural property was taken in

the US invasion in Iraq *ICE News* (5 February 2018) <https://www.ice.gov/news/releases/ice-returns-thousands-ancient-artifacts-seized-hobby-lobby-iraq> (accessed 12 September 2021); ‘Recent examples of successful operations of cultural property restitutions in the world.’ The United Nations Educational, Scientific and Cultural Organization (12 June 2007) www.unesco.org/culture (accessed 12 June 2021); Posner (n 4).

66 Art 5 Hague Convention.

67 249 UNTS 358, entered into force 7 August 1956.

68 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, arts 4, 13(b)-(c), 14 November 1970, 823 UNTS 231.

69 Canada – Jordan, November 2018 and USA – Nepal, April 2018, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-convention/> (accessed 12 September 2021).

70 UN Doc E/CN.4/Sub.2/1993/28 para 124.

71 Batt (n 6).

the colonial era and therefore could include the cultural heritage of African indigenous peoples. The Convention embraces property which may have been removed over 100 years ago. It does provide for a time limit of three years in article 5(5) for a state to bring a claim against a possessor they know holds a cultural object. Problematically there is a non-retroactivity clause contained in article 10 that 'the Convention will apply solely to cultural objects stolen after the Convention entered into force'.⁷²

However, it introduces a caveat for 'a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use' in article 3(8). The caveat is contained in article 3(4) stipulates that a claim 'shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor'. UNIDROIT article 16 sets out the following to facilitate requests for return of cultural objects: (a) directly to the courts or other competent authorities of the declaring state; (b) through an authority or authorities designated by that state to receive such claims or requests and to forward them to the courts or other competent authorities of that state; (c) through diplomatic or consular channels. This provision is particularly valuable in the return of African cultural heritage debate.

In relation to intangible African cultural heritage the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage includes the terms communities and groups. Its recital recognises that communities, in particular indigenous communities, groups and individuals 'play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage'.⁷³ Additionally, the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established to develop a new international instrument protecting the traditional knowledge and genetic resources of indigenous peoples and communities.⁷⁴ However, after many years of work on a draft legal instrument by WIPO, the process has not come to an end.⁷⁵ Furthermore, a new instrument could face challenges concerning ratification. Additionally, the 2020 Repatriation of ceremonial objects, human remains and intangible cultural heritage under the UNDRIP

72 Article 28 United Nations Vienna Convention on the Law of Treaties (1969) United Nations, Treaty Series, vol 1155, p 331; The principle of non-retroactivity provides that the provisions of a treaty 'do not bind a party in relation to 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.

73 2003 UNESCO Convention for the safeguarding of the intangible cultural heritage.

74 World Intellectual Property Organization (WIPO) intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore www.wipo.int/tk/en/igc/ (accessed 12 September 2021).

75 WIPO Doc WIPO/GRTKF/IC/13/5(b); For general information see also Protection of Traditional Cultural Expressions: Draft Gap Analysis WIPO Doc WIPO/GRTKF/IC/13/4(b) Rev. (2008).

suggests that the ‘the Intergovernmental Committee on intellectual property and genetic resources, traditional knowledge and folklore should consider, explicitly addressing repatriation’.⁷⁶

On the African continent positive steps have been taken by the African Regional Intellectual Property Organisation (ARIPO) and states to protect and stop the biopiracy of Traditional Knowledge (TK). ARIPO one of two African regional intellectual property legal fora have been very active in advocating the protection of TK in Africa and recognises that communities are vulnerable to the misappropriation of their TK.⁷⁷ In 2010 ARIPO adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.⁷⁸

Encouragingly many African states have legislated *sui generis* systems for the protection of various forms of communal intellectual property and TK.⁷⁹ In South Africa, the San and Khoi peoples, classed as indigenous peoples, have lost their TK to biopiracy in the past. However, South African legislation has sought to prevent this. Furthermore in 2019 the National Khoi Council and South African San Council, facilitated by Natural Justice an NGO, signed an Access and Benefit Sharing Agreement in respect of the ‘rooibos’ plant.⁸⁰ Additionally, the ‘Endorois Peoples’ Biocultural Protocol: Sustainable Biodiversity Resource Management For Access and Benefit Sharing and Protection from Threats to Culture’ is a comprehensive document which outlines protection of resources and details procedures, principles and access in relation to engagement with their resources.⁸¹

Complementing the UNESCO Conventions is the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation. It is an advisory body set up in 1978.⁸² The Committee in cases of Illicit appropriation has seen mediation and conciliation added to its mandate in 2005, in order to facilitate the return and restitution of

76 UN Doc A/HRC/45/35 para 91 at 18.

77 WIPO Symposium University of the Gambia (14 September 2012), record of meeting with author.

78 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) 2010 and administrative instructions under the regulations for implementing the Swakopmund protocol on the protection of traditional knowledge & expressions of folklore 2019.

79 Nigerian Copyright Act and the Namibian Copyright Act which protect expressions of folklore.

80 D Schroeder, R Chennells, C Louw, L Snyders & T Hodges ‘The Rooibos benefit sharing agreement – breaking new ground with respect, honesty, fairness and care’ (2019) 29 *Cambridge Quarterly of Healthcare Ethics* 1-26.

81 Endorois welfare council: Endorois biocultural protocol sustainable biodiversity resource management for access and benefit sharing and protection from threats to culture (2019) http://archive.abs-biotrade.info/fileadmin/media/Knowledge_Center/Publications/BCPs/Endorois-Peoples-Biocultural-Protocol.pdf (accessed 12 September 2021).

82 http://portal.unesco.org/culture/en/ev.phpURL_ID=35283&URL_DO=DO_TO PIC&URL_SECTION=201.html (accessed 12 September 2021).

cultural property.⁸³ One of its fundamental tasks is to encourage and facilitate the return of cultural objects by colonial powers back to developing countries.⁸⁴ Examples of return include the marble mask of Gorgon, which was stolen from Hippo Regius in Algeria in 1996. The mask was returned to Algeria in April 2014 under an agreement with Tunisia. Furthermore, in the same month three Egyptian cultural objects were returned by Germany to Egypt.⁸⁵

A human rights based approach should be adopted in the call for the return of African cultural heritage, particularly the cultural rights framework. Xanthaki argues that cultural claims should be argued within a cultural rights framework.⁸⁶ Linking cultural rights with the protection of heritage is seen as contentious by some states. However, on 22 March 2018, the United Nations Human Rights Council unanimously adopted resolution A/HRC/RES/37/17 on cultural rights and the protection of cultural heritage.⁸⁷

Internationally UNDRIP is a significant legal instrument in the repatriation and restitution of the cultural heritage of indigenous peoples, although it is only a declaration. Furthermore the language of cultural rights permeates UNDRIP.⁸⁸ Article 11 UNDRIP in relation to cultural, intellectual, religious and spiritual property includes restitution and effective mechanisms and article 12 in relation to indigenous human remains present and past includes repatriation. Article 12 UNDRIP uniquely in an international instrument directly addresses the repatriation of indigenous people's human remains by including the right to repatriation in article 12(1) and a guiding but not explicit explanation on how repatriation may be achieved in article 12(2). Significantly, in 2020, the Report of the Expert Mechanism on the Rights of Indigenous Peoples Repatriation of ceremonial objects, human remains and intangible cultural heritage under the UNDRIP outlined a number of recommendations for the return of indigenous peoples' cultural heritage and human remains.⁸⁹ However, since it is an indigenous peoples' Declaration, the stolen human remains of the San and Khoe peoples would fall under the Declaration, the skull of Mangi Meli, a hero removed from Tanzania to Germany, would not.

83 General assembly resolution 'Return or restitution of cultural property to the countries of origin (11 November 1993) A/RES/50/56.

84 Vrdoljak (n 62).

85 See recent restitution cases of cultural objects using the 1970 Convention. <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-convention/> (accessed 12 September 2021).

86 A Xanthaki *Indigenous rights and United Nations standards: Self-determination, culture and land* (2009).

87 UN Human Rights Council. Resolution 37/17: Cultural rights and the protection of cultural heritage UN Doc A/HRC/RES/37/17 (22 March 2018).

88 J Anaya 'The right of indigenous peoples to self-determination in the post declaration era' in C Charters & R Stavenhagen (eds) *Making the Declaration work* (2009).

89 UN Doc A/HRC/45/35 <https://digitallibrary.un.org/record/3876274?ln=en> (accessed 12 September 2021).

Additionally, the United Nations Human Rights Committee could potentially play a role in the repatriation and restitution of African cultural heritage. In the past it has played a significant role in the interpretation of culture in relation to indigenous peoples right to culture, under article 27 International Convention on Civil and Political Rights.⁹⁰

Equally, the language of cultural rights is evident in the African Charter on Human and Peoples' Rights. Article 17 states that 'every individual may freely take part in the cultural life of his community'. Article 22 highlights the right for people to freely participate in their economic, social and cultural development, and article 29 states that 'the individual shall also have the duty; to preserve and strengthen positive African cultural values in his relations with other members of the society'. The African Commission on Human and Peoples' Rights a body which interprets the African Charter, has been particularly vigilant in protecting the cultural rights of indigenous peoples in Africa.⁹¹ It has established its own working group on indigenous peoples and has produced an extensive study on the indigenous peoples of the African continent.⁹²

International law is increasingly recognising the importance of cultural identity and the link with heritage.⁹³ The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (2003) recognises the importance of cultural heritage to the cultural identity of a group and highlights heritage as a component of cultural identity in its Preamble.⁹⁴ Furthermore the Committee on Economic, Social and Cultural Rights in its General Comment 21 emphasised free access by minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices.⁹⁵ In relation to the return of cultural heritage, the cultural heritage which should be returned is: 'that which is particularly representative of the cultural identity of a specific people. The extent that the absence or withdrawal of a particular item would constitute an irreparable deprivation, and an irreplaceable loss in the chain of actions and interactions which go to make up a living culture'.⁹⁶ The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016, states as follows: 'We declare: African heritage is central to preserving and promoting our cultures thereby uplifting identity and

90 *Länsmän et al v Finland* Communication No 511/1992 UN Doc CCPR/C/52D/511/1992; see General Comment 23 UN Doc CCPR/C/21/Rev.1/Add.5 para 6-7.

91 *Endorois* case (n 21).

92 Report of the African Commission's working group of experts on indigenous populations/communities (2005).

93 Y Athanasios 'Cultural property and identity issues in international law: the inadequate protection of the cultural heritage of indigenous peoples' in C Akrivopoulou & N Garipidis (eds) *Human rights and risks in the digital era: globalization and the effects of information technologies* (2012) 256-277.

94 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage Paris, 17 October 2003.

95 General Comment 21 (2009).

96 UNESCO CLT-85/WS/41 Paris 20 September 1985.

dignity'. Furthermore, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* the African Commission stated that 'the African Charter places a burden on African states to preserve the 'cultural heritage essential to indigenous group identity'.⁹⁷ Additionally the 2013 Briefing Notes on the Charter for African Cultural Renaissance recognises the role of culture in relation to political emancipation, economic and social development, cultural renewal and identity however linked to the state.⁹⁸

The African Union Charter for African Cultural Renaissance can play a significant role in furthering the repatriation objective articulated in the 2019 ECOWAS action plan to facilitate the return of African heritage and furthermore encourage protection of *in situ* cultural heritage. It is a document which reflects the philosophy of and behind repatriation, contextualised in the encouragement of African cultural values. Its Preamble highlights the urgent need to carry out a systematic inventory with a view to preserving and promoting tangible and intangible cultural heritage, in particular in the spheres of history, traditions, history arts and handicrafts, knowledge and know how. Article 31 calls on African states to promote and protect culture and commit to African cultural values and promote a sense of identity among Africans.⁹⁹

In relation to particularly repatriation and protection of *in situ* cultural heritage articles 26, 27, 28, and 29 are important. Article 26 provides that states should take steps to put an end to the pillage and illicit traffic of African cultural property and ensure that such cultural property is returned to their countries of origin. Article 27 stipulates that states should take the necessary measures to ensure that archives and other historical records which have been illicitly removed from Africa are returned to African governments in order that they may have complete archives concerning the history of their country. This was encouraged in the Repatriation Report 2020.¹⁰⁰ Article 28 states that the concerned African states shall commit themselves to provide appropriate physical and environmental conditions to safeguard and protect returned archives and historical records. This would deflect the paternalistic argument articulated by museums. Article 29 provides that African states should ratify the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Convention for the Safeguarding of the Intangible Cultural Heritage.¹⁰¹

Finally, in relation to the legal protection of African cultural heritage, strategic human rights litigation should not be ruled out. The telling of the story, the framing of the narrative in the voice of African communities in relation to the theft of their cultural heritage, can be

97 *Endorois case* (n 21) para 283.

98 *Endorois case* (n 21) para 2.3 and 2.4.

99 Charter for African Cultural Renaissance articles 3, 4, & 10.

100 Sarr & Savoy (n 1) 18.

101 F Shyllon 'Implementation of the 1970 UNESCO: failure to grasp the nettle' UNESCO headquarters 20-21 June 2012.

very powerful in judicial and extra judicial settings. The main strategy behind strategic litigation is to use test cases to achieve change not only for the individual or group seeking justice in a particular case but for similar individuals or groups facing similar challenges, thus affecting broader change.¹⁰²

Furthermore, two cultural heritage theories support the return of African cultural heritage. The moralist theory of cultural property underpins the return of cultural heritage and requires the holders of African cultural heritage to behave honourably.¹⁰³ The moralist theory would explain a museum giving back African cultural heritage without prolonged delays because it would be the 'right thing to do'.¹⁰⁴ The theory recognises the existence of power disparities in disputes. It recognises that there may be an unequal bargaining relationship in cultural heritage disputes.¹⁰⁵ On the other hand, the nationalist theory is not based on 'the right thing to do' but strongly linked with the cultural identity of peoples. It has the potential to protect and return African cultural heritage. Merryman suggests that cultural nationalism 'implies the attribution of national character to objects, independently of their location or ownership, and legitimises national export controls and demands for the repatriation of cultural property'.¹⁰⁶ Cristescu, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated that the legal principle of the return of cultural property recognises that cultural objects were removed to 'mother countries' during the colonial period and should be returned.¹⁰⁷

Restitution and repatriation contribute to restorative justice.¹⁰⁸ Restorative justice 'is a way of healing wounds and moving onto the path of reconstruction and reconciliation' particularly for individuals and communities'.¹⁰⁹ In the Mangi Mali example his relatives are still grieving and in the wider Tanzanian community he was a hero who

- 102 B Schokman, DCP Mohen & D Piper 'Short guide – strategic litigation and its role in promoting and protecting human rights' (2012) *Lawyers eradicating poverty*; H Duffy *Strategic human rights litigation* (2018).
- 103 S Hutt 'Legal perspectives on cultural resources' in J Richman, M Forsyth, & W Creek (eds) *Cultural property law theory: a comparative assessment of contemporary thought legal perspectives on cultural resources* (2004) 17-36.
- 104 Manchester museum has a particularly equitable record in relation to responding to claims and returning indigenous remains. Manchester Museum gave back four tattooed skulls and two limb bones to Australian Aborigines in 2004 <http://www.elginism.com/similar-cases/manchester-museum-to-return-maori-remains-to-new-zealand/20081117/1555/> (accessed 12 September 2021).
- 105 S Harding 'Justifying repatriation of native American cultural property' (1997) 72 *Indian Law Review* 723
- 106 J Merryman *Thinking about the Elgin Marbles* (1985) 83.
- 107 Cristescu (n 13); United Nations Educational, Scientific and Cultural Organization return and restitution of cultural property: a brief resume (Paris 20 September 1985) CLT-85/WS/41.
- 108 C Garbett 'The International Criminal Court and restorative justice: victims, participation and the processes of justice' (2017) 5(2) *Restorative Justice* 198-220.
- 109 L Lixinski 'Cultural heritage law and transitional justice: lessons from South Africa' (2015) 9 *International Journal of Transitional Justice* 278-296.

fought against colonialism.¹¹⁰ It is worth noting the increasing discussions on symbolic reparations, generally contextualised in the building of a memorial, memorialising an event remembering the event.¹¹¹ Symbolic measures ‘are aimed at recognizing the dignity of the victims, expressing a criticism or moral sanction towards the perpetrators, and pointing out the importance of prevention’.¹¹² In the context of the return of African cultural property the event being the removal of cultural heritage by the colonialists and the symbolic reparation being the process of return and actual return. Further many museums are state funded and public bodies, for example the British Museum in London, which houses the Ethiopian stolen cultural heritage mentioned in this article, and the Neues Museum in Berlin housing the Bust of Queen Nefertiti which were removed under disputed circumstances. Return would raise the moral sanction and the language of the perpetrator and the victim for the states concerned. Farida Shaheed’s UN study on the right of access to and enjoyment of cultural heritage, highlighted the importance of knowing one’s culture and the trauma and disconnect caused if access is denied.¹¹³ Recently in Namibia, human remains from the Nama and Herero indigenous peoples collected during colonial rule and studied by scientists have been returned from Germany by the Museum of Medical History.¹¹⁴ Here the repatriation retold the story of the genocide that took place under German colonial rule.¹¹⁵

5 AFRICAN RENAISSANCE

The African Renaissance narrative ebbs and flows.¹¹⁶ Cheikh Anta Diop is considered to be the father of the African Renaissance movement.¹¹⁷ Asante stressed the African peoples’ relentless struggle to tell their own stories and take charge of their own historical languages is a

110 ‘Executed Tanzanian hero’s grandson takes DNA test to find lost skull’ (20 November 2018) *BBC News* <https://www.bbc.co.uk/news/world-africa-46277158> (accessed 12 September 2012).

111 Renaissance Monument Dakar Senegal.

112 R Greeley, M Orwicz, J Falconi, A Reyes & F Rosenberg ‘Repairing symbolic reparations: assessing the effectiveness of memorialization in the Inter-American system of human rights’ (2020) 14 *International Journal of Transitional Justice* 165-192.

113 F Shaheed ‘The right to access to and enjoyment of cultural heritage as a human right’ UN Doc A/HRC/17/38 (2011).

114 D Carvajal ‘Museums confront the skeletons in their closets’ (20 May 2014) *New York Times* <https://www.nytimes.com/2013/05/25/arts/design/museums-move-to-return-human-remains-to-indigenous-peoples.html> (accessed 12 September 2021).

115 Sarkin (n 10)

116 B Ayeleru ‘African cultural rebirth: a literary approach’ (2011) 23(2) *Journal of African Cultural Studies* 165-175.

117 D Turello *Africa past and future: A conversation with Toyin Falola* (14 December 2016) <https://blogs.loc.gov/kluge/2016/12/> (accessed 12 September 2021).

prerequisite for achieving an African Renaissance.¹¹⁸ A reaction against European imperialism has been noted as a catalyst that triggered the call for an African Renaissance in the 20th century.¹¹⁹ Very recently, the African Union (AU) declared the year 2021 as ‘The African Union year of arts, culture and heritage: levers for building the Africa we want’.¹²⁰ Lo argues that African culture should be the central element in any renaissance movement in Africa and contends that music and poetry act as a disabler of the imperialist narrative.¹²¹

The Sarr and Savoy Report highlights that 60 per cent of the population in Africa is under the age of 20 years.¹²² They stress the importance of access to culture for the youth of Africa.¹²³ This is supported by Makoko Tarawia Kihundwa, a young Tanzanian Chagga man, who stated that ‘Mangi Meli’s skull must be found and returned to the museum in Dar es Salaam so the young generation can know their history’.¹²⁴ A question put to an educated young Egyptian man in relation to the iconic figure of Nefertiti still residing in the Neues Museum in Berlin is also illustrative. When I asked him, ‘what do you think about the bust of Nefertiti being in Germany in a German Museum,’ he asked: ‘Who is Nefertiti?’. The bust of the former Egyptian queen internationally is a well-known icon of Egyptian history and culture and has now moved from a national icon to an international icon, moving from the cultural heritage of the nation state to the cultural heritage of ‘mankind’.

The return of African cultural heritage can contribute to African economies particularly in the area of heritage tourism. Ghana’s Year of Return programme in 2019 attracted over one million diaspora visitors and generated \$US 1.8 billion.¹²⁵ Egypt has built a viable tourism economy around its museums and monuments although concerns over acts of terrorism have impacted the tourism industry in recent years. The returning Benin Bronzes to Nigeria have required the building of the Emowaa Pavilion. Governor Obaseki, talking about the new pavilion to house the returning Benin Bronzes said: ‘The integration of Emowaa (the new museum) into the daily life of our people, and its impact on a greatly improved urban fabric, will begin with the opening

118 Asante (n 18); G Kamwendo ‘Denigrating the local glorifying the foreign: Malawian language policies in the era of African renaissance’ (2010) 5(2) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 270-282.

119 M Lo ‘Writing and righting the African renaissance’ (2019) 3 *Research Africa Reviews*.

120 African Union concept note on 2021 as the year of arts, culture and heritage in Africa <https://au.int/en/documents/20210322/concept-note-2021-year-arts-culture-and-heritage-africa> (accessed 12 September 2021).

121 Lo (n 119); D Nabudere ‘The African renaissance in the age of globalization’ (2001) 6 *African Journal of Political Science/Revue Africaine de Science Politique*.

122 Sarr & Savoy (n 1).

123 Sarr & Savoy (n 1).

124 Batt (n 6) 146

125 ‘African diaspora: did Ghana’s year of return attract foreign visitors?’ *BBC* (30 January 2020).

of the Emowaa Pavilion'.¹²⁶ Building a museum, for example in Dar es Salaam, would bring in added revenue on top of the revenue from conservation tourism, and could be classed as sustainable development and contribute to the sustainable development goals.¹²⁷

Furthermore, the African Renaissance has been linked to human rights and the emancipation of women from patriarchal societies.¹²⁸ The ideology of the African Renaissance clearly contributes to the development of second and third generation rights. However, Fidèle Ingiyimbere argues that the language of human rights is not helpful as it 'incarnates an imperialist ideology and is furthermore rooted in Western democracy'.¹²⁹ The inclusion of human rights in the discussion presents the danger of adding to the imperialist narrative unless, as Asamoah Acheampong suggests, human rights are interpreted from an African perspective.¹³⁰

A suggestion to strengthen the African Renaissance narrative and counter the imperialist narrative is that mineral resources should be included under the umbrella term 'cultural heritage'. The African continent is a resource-rich continent. However, as the African Commission on Human and Peoples' Rights has highlighted in its Resolution 236 on Illicit Capital Flight from Africa: 'Africa is embroiled in a vicious circle of poverty, malnutrition, diseases and death because its revenue potential is being drained by multinational companies and individuals through exploitation of the loopholes and weaknesses of laws and of the monitoring system'. Furthermore: 'foreign aid is a short-term, unsustainable and unreliable form of revenue; this requires State Parties to take measures to create a revenue base'.¹³¹ Along with measures such as local content laws which contribute to capital from mineral resources staying in Africa, viewing mineral resources as cultural heritage will further enhance their protection and associated revenue.¹³²

126 'Museums association trustees approve return of Benin bronzes held in Berlin museums' Museum Association (2 July 2021) <https://www.museumassociation.org/museums-journal/news/2021/07/trustees-approve-return-of-benin-bronzes-held-in-berlin-museums/> (accessed 12 September 2021).

127 F Nocca 'The role of cultural heritage in sustainable development: multi-dimensional indicators as decision-making tool' (2017) 9 *Sustainability*.

128 K Acheampong 'Human rights and the African Renaissance' (June 2000) 5 *African Journal of Political Science/Revue Africaine de Science Politique*.

129 F Ingiyimbere 'Human rights as an imperialist ideology' in *Domesticating human rights* (2017).

130 Acheampong (n 128).

131 ACHPR/Res 236(LIII)2013.

132 The natural wealth and resources contracts (review and re-negotiation of unconscionable terms) regulations, 2020 (the unconscionable terms regulations) made under section 8 of the Natural Wealth and Resources Contracts (review and re-negotiation of unconscionable terms) Act, CAP 450 of 2017 (the Unconscionable Terms Act); the Natural Wealth and Resources (Permanent Sovereignty) (Code of Conduct for Investors in Natural Wealth and Resources) Regulations, 2020 (the code of conduct) made under section 13(2)(a) of the Natural Wealth and Resources (Permanent Sovereignty) Act, CAP 449 of 2017 (the Permanent Sovereignty Act).

The African Diaspora, which has traditionally contributed to the improvement of per capita income in Africa, is now playing an important role in the call for the return of African cultural heritage. In August 2021 the British Museum closed a gallery housing the Benin Bronzes in response to a protest tour urging the institution to return the colonial looted artifacts.¹³³ In 2020, the Congolese activist Mwazulu Diyabanza, who has been calling for reparations for colonialism, slavery and cultural appropriation, was arrested on a number of occasions for the attempted theft of African cultural heritage from European Museums.¹³⁴ Mr Diyabanza drew attention to the imperialist narrative in relation to retained African cultural heritage.

6 RECOMMENDATIONS

The most recent report in the area of repatriation is the 2020 United Nations Expert Mechanism on the Rights of Indigenous Peoples, 'Repatriation of ceremonial objects, human remains, and intangible resources under the United Nations Declaration on the Rights of Indigenous Peoples Report' (Repatriation Report).¹³⁵ The Repatriation Report has been referred to in this article, firstly, because there are many African peoples recognised as indigenous peoples on the continent.¹³⁶ Secondly, the recommendations in their entirety are worthy of consideration. In relation to all indigenous peoples the Repatriation Report envisages an International Indigenous Repatriation Review Committee comprised of indigenous peoples, museum professionals, human rights experts and others.¹³⁷ The Repatriation Report places the onus of responsibility for the establishment of a repatriation committee on UNESCO in its capacity as facilitator of repatriation and provider of advice.¹³⁸ My recommendation is that in both cases (the return of indigenous peoples' cultural heritage and the return of African cultural heritage) UNESCO should not be the lead in relation to drawing up a committee due to the politically charged nature of restitution. Reflecting on the call for return of illicitly removed cultural heritage in article 27 of the Charter for African Cultural Renaissance, an African based commission working on the restitution of African cultural heritage would be better suited to the task. It is possible for such committee to be established under the auspices of the African Union or the African Commission on Human and Peoples' Rights.

133 B Reilly 'British Museum closes gallery in response to protestors' (August 2021) <https://morningstaronline.co.uk/article/b/british-museum-closes-gallery-in-response-to-protesters>

134 A Marshall 'To protest colonialism, this Congolese activist takes artifacts from Paris museums' *New York Times* (nytimes.com) (accessed 12 June 2021).

135 Repatriation Report (n 1).

136 Report on indigenous peoples in Africa (n 1).

137 Repatriation Report (n 1) para 90.

138 Repatriation Report (n 1) para 90.

The Repatriation Report encourages partnerships between all stake holders, UNESCO, WIPO, states and indigenous peoples.¹³⁹ This is happening already particularly in relation to the Benin Bronzes which have received much publicity. Germany has reached an agreement with Nigeria to return a share of stolen Benin Bronzes looted by the British. Furthermore, many British museums are returning Benin Bronzes unconditionally.¹⁴⁰

Furthermore, the Repatriation Report encourages bilateral agreements between states. There are several bilateral agreements between states which have facilitated the repatriation of indigenous human remains. Such agreements include those between the UK and Australia concluded in 2000 and between France and Australia agreed in 2004.¹⁴¹

The Sarr and Savoy Report an African-specific restitution Report recommends online inventories and databases as a way of protecting and contributing to the return of African cultural heritage. This approach is similar to the WIPO's initiative, set up to protect traditional knowledge. Further, the Report introduces the sharing of digital content through a plan for the systematic digitisation of documents that have yet to be digitised concerning Africa.¹⁴² In relation to the views of indigenous peoples, databases and digitalisation have been viewed with some concern due to loss of control of custodianship.¹⁴³ Furthermore the ECOWAS 2019/2023 Action Plan on the return of cultural properties to their countries of origin envisages a Regional Committee in charge of the monitoring of the action plan.¹⁴⁴

The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation is another avenue to consider. However, it appears to be underutilised by states possibly because of the political nature of a demand for restitution by one state to another and the non-retroactive nature of the conventions.¹⁴⁵ Optimistically, the text of the UNIDROIT convention a private law convention could accommodate

139 Repatriation Report (n 1) para 85.

140 G Adams 'Museums Association Trustees approve return of Benin bronzes held in Berlin museums' 2 July 2021 Museum Association News accessed 12 July 2021 <https://www.museumsassociation.org/museums-journal/news/2021/07/trustees-approve-return-of-benin-bronzes-held-in-berlin-museums/#> (accessed 12 June 2021).

141 H Keeler 'Repatriation symposium: indigenous international repatriation' (2012) 44 *Arizona St Law Journal*.

142 Sarr & Savoy (n 1) 67.

143 Keynote address by the UN Special Rapporteur on the Rights of Indigenous Peoples, Professor S James 26th session of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Indigenous Panel: Intellectual property and genetic resources: What is at stake for indigenous peoples? (3 February 2014).

144 ECOWAS (n 9).

145 E Campfens 'Whose cultural objects? Introducing heritage title for cross-border cultural property claims' (2020) 67 *Netherlands International Law Review* 257.

the claims of African peoples for the restitution of African cultural heritage.

7 CONCLUSION

The AU 2021 vision of embracing culture and heritage as a lever for change in combination with the support for the return of African cultural heritage from within Africa and outside of Africa, draws an optimistic picture for the future. However, it is clear that there is a continuing struggle between the imperialist narrative and the African Renaissance narrative. Museums are removing themselves from a call for the partial or total decolonisation of museums and have been said to be ‘burying their head in the sand.’¹⁴⁶ Furthermore, museums are stating ‘not every collection is tainted with the ‘impurity of a colonial crime’.¹⁴⁷ In relation to a repatriation mechanism for the return of African cultural heritage, the question is: Will the continent accept the probable solution foisted on it that UNESCO remains the powerhouse in relation to the repatriation and restitution of African cultural heritage? Or will it find its own solution of a restitution commission under the auspices of the African Union?

146 L Bakare ‘British museum “has head in sand” over return of artefacts’ 21 June 2019 *Guardian*.

147 Rea (n 7).