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American Museums and Colonial-Era Provenance: A Proposal

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Abstract

As European nations address their legacy of colonialism, many museums in France, Germany, Great Britain, and elsewhere in Western Europe are examining the provenance of objects in their collections that were removed during periods of colonial occupation and, in some cases, have developed plans for their restitution. As of 2022, few museums in the United States have announced similar objectives. This article offers specific suggestions for American art museums to proceed proactively and transparently with colonial-era provenance research projects. I propose that museums identify objects in their collections that were displaced in one of two ways: either looted during a post-Napoleonic military conflict or stolen or traded by force under a period of colonial occupation. These works of art should be prioritized for provenance research and listed or otherwise made discoverable online. By listing these objects on their websites, museums will acknowledge the contentious histories of works of art in their collections and signal an openness to engaging with source communities, whether about the return of an object, loans, storage, display, educational initiatives, or other matters of care.

Keywords: Provenance research; Restitution; Colonial-era provenance; Museums; Repatriation

As European nations address their legacy of colonialism, museums in France, Germany, Great Britain, and elsewhere in Western Europe are examining the provenance of objects in their collections that were removed during periods of colonial occupation and, in some cases, have developed plans for their restitution.¹ As of 2022, few museums in the United

¹ The French guidelines, discussed below, were commissioned by President Emmanuel Macron and issued in 2018 (Sarr and Savoy 2018). The German Museum Association issued guidelines in 2018 and revised them in 2019 and 2021 (Deutscher Museums Bund 2021). In 2020, a recommendation was made to the minister of education, culture, and science urging a Dutch national policy. *Summary of Report to the Advisory Committee on the National Policy Framework for Colonial Contexts*, 2020, <https://www.raadvoorcultuur.nl/documenten/adviezen/2020/10/07/summary-of-report-advisory-committee-on-the-national-policy-framework-for-colonial-collections>. In 2021, a group of independent scholars and experts issued a report with recommendations for the Belgian government. *Ethical Principles for the Management and Restitution of Colonial Collections in Belgium*, 2021, <https://restitutionbelgium.be>. Austria has also established a panel to consider colonial-era restitution. See Catherine Hickley, “Austria Sets Up Expert Panel to Develop Guidelines for Repatriating Colonial Loot,” *The Art Newspaper*, 21 January 2022. In November 2021, France repatriated 26 works of art to the Republic of Benin. In July 2022, Germany and Nigeria signed an agreement finalizing plans to reconstitute art of the Benin Kingdom from German museums to Nigeria; Germany physically returned two objects and transferred ownership of over 1,000 more. In February 2022, two Benin bronzes from the University of Aberdeen (Scotland) and Jesus College (Cambridge, England) were formally restituted to Nigeria. Oxford and Cambridge universities have both pledged to return the Benin bronzes from their collections. In September 2022, it was reported that Tristram Hunt, director of the Victoria and Albert Museum in London, visited Ghana to create a partnership allowing the museum’s Asante gold “to be on display in Ghana in the coming years.”

States have announced similar objectives.² Neither the American Alliance of Museums (AAM) nor the Association of Art Museum Directors (AAMD)—the non-profit organizations that establish best practices for North American museums—has yet issued guidelines for colonial-era provenance research.³ Colonialism in this context may be defined as the occupation by one power (usually a government) over a group of independent people, which often leads to exploitative conditions.⁴ Under such conditions, particularly in the nineteenth and early twentieth centuries, military troops, officials of the occupying government, missionaries, scientists, and private collectors acquired and removed works of art from colonized areas. Many of these works of art went into museums that were owned and operated by the occupying power. The possession and display of these objects is thus inextricable from the very act of colonization, and the retention of them by museums today is seen by many as an ongoing injustice that needs to be redressed.⁵

In the United States, where state-owned museums are rare, the situation is different.⁶ Though there are some exceptions, American art museums were founded with privately owned collections and not through government-sponsored expeditions.⁷ Much of the artwork in American museums was purchased on the market, either directly by the museum or indirectly through its donors. Taking a more circuitous path, objects from colonized areas that are today in US museums may not be well documented, and, in some cases, their provenance has been forgotten or erased completely. The link between the display of these works of art and the act of colonization is less readily apparent than it is at many European institutions. Despite these differences, however, it has become clear that, if American museums are prepared to acknowledge and rectify historical losses from Europe (for example, Holocaust-era thefts and the trafficking of Classical antiquities), they need to also consider historical losses from other parts of the world. If museums have policies that

Martin Bailey, “V&A Likely to Return Looted Asante Gold Treasures to Ghana,” *The Art Newspaper*, 12 September 2022.

² In March 2022, the Smithsonian Institution announced that it would be repatriating its collection of Benin bronzes to Nigeria and, in May 2022, that it had adopted a policy authorizing “ethical returns” from the collection. See Peggy McGlone, “Smithsonian to Give Back Its Collection of Benin Bronzes,” *Washington Post*, 9 March 2022; Matt Stevens, “In a Nod to Changing Norms, Smithsonian Adopts Policy on Ethical Returns,” *New York Times*, 3 May 2022. In a ceremony held on 11 October 2022, the Smithsonian, National Gallery of Art, and Rhode Island School of Design Museum transferred ownership of a total of 31 Benin bronzes to Nigeria. Hannah McGivern, “Trove of Benin Bronzes in US Museum Collections Repatriated to Nigeria,” *The Art Newspaper*, 11 October 2022.

³ AAMD did, however, issue *Guidance on Art from Colonized Areas* to little fanfare in October 2022, <https://aamd.org/sites/default/files/document/AAMD%20Guidance%20on%20Art%20from%20Colonized%20Areas%20%281%29.pdf>. This document specifies that it is “not a policy or a set of guidelines” but “a method to evaluate these issues and possible course of action.”

⁴ Margaret Kohn and Kavita Reddy (2017) call colonialism “a practice of domination, which involves the subjugation of one people to another” that usually involves the settlement of a group of people who maintain allegiance to their home country.

⁵ This is the premise, for example, of Hicks 2020. The foundational study of colonial-era collecting and restitution is Van Beurden 2017.

⁶ It has been estimated that more than 70 percent of museums in the United States are private nonprofits, according to a survey conducted by the Institute of Museum and Library Services in 2008. This figure is cited by Nash 2010, 21. On the funding of American museums, see Clotfelder 1991, 247–48; Ford W. Bell, “How Are Museums Supported Financially in the U.S.?” *US Department of State, Bureau of International Information Programs*, https://static.america.gov/uploads/sites/8/2016/03/You-Asked-Series_How-Are-Museums-Supported-Financially-in-the-US_English_Lo-Res_508.pdf.

⁷ One obvious exception to this is the active collecting of Indigenous artifacts by the Bureau of Ethnology (as well as by private individuals) on behalf of the United States National Museum, now the Smithsonian Institution. The restitution of Native North American cultural property is governed in the United States by federal law, namely the Native American Graves Protection and Repatriation Act (NAGPRA), 16 November 1990, 104 Stat. 3048.

preclude collecting works of art known to have been stolen, they must reconcile those policies with colonial-era thefts.

This article offers specific suggestions for art museums in the United States to proceed proactively and transparently with colonial-era provenance research projects. I propose that museums identify objects in their collections that were displaced in one of two ways: either looted during a post-Napoleonic military conflict or stolen or traded by force under a period of colonial occupation. These works of art should be prioritized for provenance research and listed or otherwise made discoverable online. These suggestions reflect the practices that were developed in 2021 and are presently being implemented at the Museum of Fine Arts, Boston (MFA). It is hoped that an explanation of the reasoning behind the MFA's procedures will be useful to other American collecting institutions seeking to begin similar projects.

The Sarr-Savoy report and African art

The conversation about colonialism and restitution is not new, but it was galvanized in 2018 when scholars Felwine Sarr and Bénédicte Savoy issued the report *The Restitution of African Cultural Heritage: Toward a New Relational Ethics*, which had been commissioned by French President Emmanuel Macron.⁸ The Sarr-Savoy report focuses on works of art from sub-Saharan African countries in French public collections, of which the authors estimate there are at least 90,000.⁹ The report recommends the return of those African works of art that were removed from their place of origin during armed conflicts as well as under colonial rule, presuming that nearly all such transactions were made under duress.¹⁰ It also recommends the restitution of anything trafficked after a former colony achieved independence. The report immediately garnered international attention. It was published the same year that the movie *Black Panther* came out, in which the character Erik Killmonger famously asks the curator of African Art at the (fictional) Museum of Great Britain: "How do you think your ancestors got these [artifacts]? Do you think they paid a fair price? Or did they take it, like they took everything else?" The year 2018 also saw protests at American art museums calling to decolonize and "repatriate imperial plunder."¹¹ All of these events in the span of one year quickly heightened public consciousness about the presence of looted African art in museums throughout Europe and North America.

The publication of the Sarr-Savoy report raised the question of how best to examine the provenance of African art and whether to reconstitute some or even all of it from museum

⁸ Sarr and Savoy 2018. Earlier discussions of colonial-era restitution include Merryman 2006; Jenkins 2016 (who espouses a retentionist viewpoint); and Van Beurden 2017 (who actively seeks solutions to claims for objects removed under colonialism); Savoy 2022 (who provides a comprehensive history of the attempts of African nations to recover their cultural heritage).

⁹ On the use of the term "sub-Saharan," see Sarr and Savoy 2018, 3, n. 4. Generally speaking, art from North African countries has been studied and scrutinized to a different standard than art from the rest of the African continent. I use "sub-Saharan" here to acknowledge the approximate geographic boundary that delineates these differences.

¹⁰ Duress is defined as coercion that causes someone to perform an action they would not otherwise perform. Sarr and Savoy (2018) give the examples of removal by members of the military, scientific and missionary expeditions, occupying forces, and collectors unless the consent of seller can be ascertained. Examples of demonstrable consent would be the commissioning of a copy and a purchase at a craft market.

¹¹ Sarah Cascone, "The Museum Heist Scene in 'Black Panther' Adds Fuel to the Debate About African Art Restitution," *Artnet*, 5 March 2018; Alex Greenberger, "'Brooklyn Is Not for Sale': Decolonize This Place Leads Protest at Brooklyn Museum," *ARTnews*, 30 April 2018; Dana Heng, "Protesters Request RISD Museum Return Bronze Sculpture to Nigeria," *Hyperallergic*, 30 November 2018; Jasmine Weber, "Decolonize This Place Demands Repatriation of 'Imperial Plunder' at the Brooklyn Museum," *Hyperallergic*, 30 November 2018.

collections. Since that time, the media has probed the topic of the looting of African art, sometimes eliding the boundaries between ethical issues, such as colonial-era plunder, and legal problems, like recent theft and trafficking from African nations.¹² The AAMD established an African Art Working Group to consider issues of provenance research and potential repatriation to African countries.¹³ American museum colleagues have also been gathering formally and informally to discuss best practices for African collections.¹⁴ For most museums seeking to address colonial-era provenance, however, a focus on Africa will be too narrow. African nations were not the only areas of the world subject to colonization and related art theft. Moreover, asking whether and how to restitute African art—and only African art—suggests that it is somehow separate from the global art canon, so much so that it merits its own set of collecting rules and guidelines.

To be sure, there are inequities in the art world that have led to the disproportionate displacement of African art. The market already treats sub-Saharan African art differently than art from Europe, North America, Asia, and even North African countries like Egypt, particularly where due diligence is concerned. In 2020, for example, two Nigerian Igbo statues that were alleged to have been pillaged during the Biafran War (1967–70) were auctioned at Christie's, which otherwise coordinates the settlement of claims for objects taken during twentieth-century periods of conflict.¹⁵ The sale of allegedly stolen sculptures was almost certainly not an isolated incident; I have been informed (if anecdotally) by colleagues that stolen African art has been sold in the past through major auction houses without protest. This sale, however, received international press attention and proceeded in the face of great outcry, particularly on social media.¹⁶

Indeed, unlike most artwork of European origin, illicit African art may change hands publicly and with few attempts to conceal its origins. In 2012, the MFA received a large bequest that included eight works of art stolen, illicitly excavated, or illegally exported from Nigeria and two Djenné terracottas trafficked from Mali. They had all been purchased by museum benefactor William Teel from established dealers in Europe and the United States.

¹² See, e.g., Robin Scher, "Better Safe Than Sorry: American Museums Take Measures Mindful of Repatriation of African Art," *ARTnews*, Summer 2019, 86–91. In June 2021, the Metropolitan Museum of Art announced it would be returning two Benin plaques that had gone missing (and were probably stolen) from the National Museum in Lagos in the 1950s, but press accounts suggested that the museum was restituting the pieces because of colonial-era provenance concerns. For instance, the *New York Times* reported that "[t]he Metropolitan Museum of Art announced on Wednesday that it planned to return two brass plaques from its collection, part of the group of West African artifacts known as the Benin Bronzes, to Nigeria, making it the latest institution to pursue repatriation of the looted works." Sarah Bahr, "Met Museum Announces Return of Two Benin Bronzes to Nigeria," *New York Times*, 9 June 2021. In response, see Barnaby Phillips, "The Met Ought to Have Returned Two Stolen Benin Bronzes Years Ago," *Apollo*, 17 June 2021.

¹³ The Working Group is acknowledged in the preface to the AAMD's *Guidance on Art from Colonized Areas*.

¹⁴ In 2021, a Steering Committee was formed to meet and discuss best practices for North American museums holding historic African objects. A virtual symposium planned by the North Carolina Museum of Art for December 2021 was postponed; for this announcement, see the museum's website, <https://ncartmuseum.org/events/virtual-symposium-collections-and-restitutions-best-practices-for-north-american-museums-holding-historic-african-objects/>. In May 2022, the AAMD hosted a provenance workshop on African art at the Yale University Art Gallery.

¹⁵ Arts d'Afrique, d'Océanie et d'Amérique du nord, Christie's, Paris, 29 June 2020 (live auction 18647), lot 47. Offered with the provenance: "Collection Jacques Kerchache, Paris; Ana et Antonio Vasanos & Bernard de Grunne, Madrid / Bruxelles, 2010; Importante collection privée européenne, acquise auprès de ces derniers" and sold for 212,500 euros.

¹⁶ Professor Chika Okeke Ogulu of Princeton University wrote and spoke at length about the sale of these figures. An interview with him on the subject is available at <https://soundcloud.com/imodara/chika-okeke-agulu-on-the-looting-market-and-restitution-of-igbo-alusi-figures>. See also Maximilian Duron, "Art Historian Calls Out Christie's for Selling Objects Taken from Nigeria: 'Public Sales of These Objects Should Stop,'" *ARTnews*, 10 June 2020; Taylor Dafoe, "Christie's Paris Sells Two 'Sacred Sculptures' from Nigeria, Despite Protests from Scholars and Nigerian Heritage Authorities," *ARTnews*, 29 June 2020.

Some were accompanied by obviously falsified paperwork, while others came with information stating precisely when and by whom they had been removed from their original location. This information was presumably offered by the dealers to attest to the objects' authenticity but without any regard for their legality. The MFA restituted the objects to Nigeria and Mali in 2014 and 2022, respectively.¹⁷ Nevertheless, repatriations to sub-Saharan Africa remain rare in the United States; the museum even faced criticism for returning stolen art to Nigeria in 2014.¹⁸ The publicity surrounding these returns only highlighted their relative rarity.¹⁹

The language used to discuss African art also differs from what is used for so-called "fine art" or "antiquities," terms that usually describe artwork from North America, Europe, the ancient Near East, and parts of East Asia. Many auction houses and galleries continue to market material from Africa, Central and South America, and Indigenous North America as "ethnographic" or even "tribal" rather than fine art, regardless of its function or age.²⁰ Stolen art may slip through the cracks of these so-called ethnographic sales not just because they tend to command relatively less prestige and visibility, which often prompt due diligence, but also because of the belief, still held by many, that certain communities of origin cannot properly care for their own cultural property; therefore, it is better that even stolen art is "saved" to be appreciated in Western collections.²¹ A term often used in the provenance of African and Oceanic art, conveying that it was removed from its place of origin at a particular point in time, is "collected *in situ*." This term is otherwise used for the collecting of biological, botanical, and natural specimens.²² Its continued use in the provenance of African art not only does little to inform an object's collecting history, but it also subtly implies that certain kinds of cultural property may be taken, like ethnographic or scientific data, to enhance the body of knowledge of European and American scholarship and, therefore, ostensibly for the greater good.²³

It is important that African art not continue to be singled out and assigned its own set of collecting ethics, due diligence standards, or vocabulary, either by the art trade through its comparative lack of vigilance or by the American museum community when considering provenance research and restitution. Rather than view African art as a monolith in light of the Sarr-Savoy report, museums and the market should begin by increasing awareness of the imbalances that already exist in the art world and correcting them. Art market participants

¹⁷ On the Teel collection and the Nigerian antiquities, see Reed 2021, 235–37. On the return to Mali, see Malcolm Gay, "MFA Returns Pair of Disputed Artifacts to Mali," *Boston Globe*, 11 February 2022.

¹⁸ The dealer who sold several of the objects, Charles Davis, commented: "I think the MFA has made a mistake. To see American institutions return a lot of the material in this political atmosphere ... is going to be disastrous for the objects." Jason Felch, "Boston MFA's Provenance Research Reveals the Illicit Trade in African Antiquities," *Chasing Aphrodite*, 20 July 2014. In addition to remarks that I received personally, social media posts and comments on related news stories have likewise questioned the wisdom of returning cultural property to Nigeria.

¹⁹ Another likely reason for the relative lack of due diligence for African art is that legal claims from African countries are comparatively rare. The International Foundation for Art Research (<http://www.ifar.org>), for example, lists 68 case studies of known disputes over non-US cultural property, only one of which involves a sub-Saharan nation (Mali).

²⁰ This is particularly true at small- to medium-sized auction houses, including Skinner, Heritage, Thomaston Place Auction Galleries, Quinns, and others. On its blog, Quinns Auction House defines "ethnographic art" as art by "Native Americans, Africans, Pre-Columbians, and Oceanic Islanders. In short, they are the items many call 'tribal art,'" <http://www.quinnsauction.com/index.php/2016/11/30/just-what-is-an-ethnographic-art-auction/>.

²¹ For an examination of this attitude, see Kersel 2016.

²² An Internet search for the term "collected *in situ*" yields results from scientific organizations and studies almost exclusively. See, for example, the definitions given by the Biotechnology Industry Organization, https://www.bio.org/sites/default/files/legacy/bioorg/docs/Guidelines%20for%20BIO%20Members%20Engaging%20in%20Bioprospecting_0.pdf.

²³ On the history of ethnographic collecting, see O'Hanlon 2000; King 2009; Paterson 2014.

must ensure that they apply the same standards of due diligence to African objects that they do to works of art from elsewhere, refusing to buy or sell anything known to be illegally excavated, stolen, or exported in contravention of the law. There is no separate body of stolen property legislation or universal set of museum collecting ethics that applies to art from the African continent. If buyers are wary of triggering the National Stolen Property Act when acquiring antiquities from Italy, they must be equally conscious of their exposure under the law when accepting treasures from African nations.²⁴ The widely accepted use of the 1970 UNESCO Convention as a provenance threshold for archaeological objects (promulgated for American museums in the AAMD's Guidelines of 2008 and 2013) naturally extends to Nok and Djenné terracottas, Ife heads, and other excavated African material.²⁵

Just as art museums must apply uniform legal and ethical standards to new acquisitions regardless of culture and source country, so too must they take a holistic approach to colonial-era provenance. Any museum-wide plan for provenance research and potential restitution will necessarily apply to each curatorial department. The staff in an African art department cannot uphold one set of practices, while curators of Asian and Near Eastern art uphold another. Such behavior would be in flagrant disregard of any museum policy that seeks to establish a consistent, professional standard in collecting. Not only does a focus on the provenance of sub-Saharan African art uphold—rather than correct—long-standing inequities in the art world (that is, African art is different, and so different rules apply), it will also present uncomfortable challenges for any museum trying to reconcile these new practices with their institutional collection policy.

German museum guidelines

Not all European countries addressing colonial-era provenance have focused on Africa. The same year that the Sarr-Savoy report was published, in 2018, the German Museum Association issued a seminal set of museum guidelines for colonial-era provenance research—the *Guidelines on Dealing with Collections from Colonial Contexts*—which were revised in 2019 and 2021. These recommendations, the first and most comprehensive of their kind, urge heightened awareness and scrutiny for objects that changed hands during all formal (that is, governmental) periods of colonization as well as under other inequitable power structures and for works of art that reflect colonialist thinking or stereotypes.²⁶ The German guidelines address a much broader set of criteria than the Sarr-Savoy report does and encourage museums to study and rethink how they discuss colonial-era object histories.

Are the German guidelines a useful roadmap for encyclopedic American museums? The parameters of formal colonization are made clear; the guidelines provide an exhaustive chart of colonized areas and dates of their occupation by foreign entities. Not all periods of colonial occupation are equally controversial, however; objects excavated in Egypt under sixteenth-century Ottoman rule are surely not meant to be the priority today when considering historical wrongs. It is also difficult to define which power structures are inequitable and how far back the guidelines are intended to reach. “Oppression and exploitation” may, as the guidelines state, describe an imbalance of power, but without further clarification or a timeframe, this subjective category could be understood to extend

²⁴ For a clear explanation of how the National Stolen Property Act, 1934, 18 USC §§ 2314, may be invoked in US courts, see Church 1993; Lufkin 2002; Gerstenblith 2015.

²⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231; AAMD, *New Report on Acquisition of Archaeological Materials and Ancient Art*, 2008; AAMD, *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, 2013, both can accessed at <https://aamd.org/standards-and-practices>.

²⁶ Deutscher Museums Bund 2021, 29–44.

back centuries and apply to any number of situations. The guidelines address restitution, regarding it appropriate “when the circumstances of acquisition appear wrong from today’s point of view.”²⁷ Thus, not all transactions are presumed to have been made under duress, but the guidelines stop short of defining “wrong.” The German guidelines serve as a useful reference, but they are, I would argue, overly broad in scope and open to too much interpretation to serve as a standalone document. Such latitude runs the risk of vastly divergent interpretations and uneven results, particularly at American museums, which already vary widely in size, governance, mission, and collecting strategy.

Defining colonial-era provenance

The critical question for American museums is what, exactly, is meant by colonial-era provenance. Should museums prioritize their research by geography (African nations), time period (the parameters of formal colonial rule), or circumstance (inequitable power structures, regardless of geography or time period)? I propose that the answer lies in a combination of all three. The Sarr-Savoy report and the German museum guidelines both discuss a spectrum of coercive conditions in colonial-era transactions. It can be presumed that wartime plunder is at one end of that spectrum since it is self-evident that in such circumstances there was no agency on the part of the owners in disposing of their property. Objects made for trade or sale may be placed at the other end of that spectrum as full agency on the part of the sellers can be presupposed. The ethics of these two situations are fairly clear; in fact, the presence of a colonial power is probably immaterial in both instances.

It is the events that fall in between these two extremes for which the presence of an occupying power undoubtedly makes the greatest difference. With this power in place, those who are colonized may have a very limited ability to regulate the trade in, or, indeed, exert control over, their own cultural property. An egregious act like the stripping of an actively used temple by colonial officials, for example, may have been considered fully permissible under the rule of the occupiers. But if it was technically a legal act, the property was not freely given. To take another example, thousands of archaeological objects in American museums were scientifically excavated and exported with the permission of colonial governments.²⁸ It would be difficult to define these excavations as thefts. Nevertheless, many would undoubtedly recognize the power imbalances that led to the removal of these objects from their source countries. The stripping of a temple and the excavation of an archaeological site, arguably, are situated at different ends of the spectrum of duress conditions, but, in both situations, power inequities led to the dispersal of works of art from their original communities. When examining colonial-era provenance, museums will therefore need to consider to what extent they wish to acknowledge the legitimacy of an occupying force—from an ethical, rather than a strictly legal, viewpoint—and how to interpret those laws and authorizations that permitted the displacement of the cultural heritage of those who were colonized.

With these issues in mind, I propose that American museums identify objects in their collections that were stolen, plundered, or otherwise sold or given under duress during nineteenth- and twentieth-century armed conflicts and periods of colonial occupation. I propose that museums prioritize and identify those objects that may be considered wrongfully taken or traded, using ethical rather than legal parameters. Most museums would say, and perhaps even specify in their collection policies, that they do not collect or keep stolen

²⁷ Deutscher Museums Bund 2021, 83.

²⁸ The Museum of Fine Arts, Boston (MFA) has extensive collections of material excavated in Egypt and Nubia at a time when both countries were under British colonial control. The museum discussed the complications inherent in these acquisitions in its exhibition *Ancient Nubia Now* in 2019–20.

or forcibly sold property.²⁹ But how museums define “stolen” can be elusive, and restitutions from American collecting institutions have been predicated, to date, on factors like the ratification of international conventions (particularly the 1970 UNESCO Convention), precedents in US case law, and the implementation of foreign legislation in the twentieth century.³⁰ Generally, nineteenth-century thefts and questionable transactions that took place under colonial governments have not been addressed because they often fall into a gray zone, occupying a space outside the present legal framework governing American institutions.

Of the two categories mentioned above, the first—pillage—is relatively easy to define as the theft of property during armed conflict and will be discussed further below. The more difficult category to define is that of artwork wrongfully taken or coercively traded under colonialism. The Sarr-Savoy report raises the question: if a government official, missionary, or dealer obtained a work of art during a period of colonial occupation, can we presume duress to such an extent that their acquisition should be considered invalid? In other words, should everything removed under colonial rule be returned, regardless of where it falls on the spectrum of duress? The answer cannot be an unequivocal yes; it will inevitably depend on the object and the circumstances of its removal. Responsible resolutions to ownership claims—regardless of country of origin and time period—can only be based on available information and not on the lack thereof. The question of duress, which frequently comes up in Holocaust-era claims, is difficult to answer even when there is a paper trail, a record of the price paid, and an understanding of the seller’s life circumstances.³¹ For colonial-era transactions, museums are unlikely to have all of these data points, making the research even more challenging.

Some initial questions can be formulated to guide the process of researching colonial-era provenance. The most obvious one is whether the object can be shown to have left its place of origin during a period of colonial or occupation rule. European museums may have records of exactly when and where colonial collectors obtained their artifacts. Many, if not most, American museums are frequently going to lack that information, and the question of duress may not be able to proceed further. It should be kept in mind, too, that enterprising dealers have long told buyers that their wares could be traced to a colonial collector, when in fact such statements were aspirational and given in order to enhance prestige or otherwise assure the object’s authenticity or legality. By necessity, museums will need to prioritize those works of art whose dates and means of removal can be credibly established.

If an object’s removal can be traced to a period of colonization, then the next consideration is the likelihood that it was given or sold freely, without coercion or exploitation. Ultimately, this may not be answerable, and there is no single rule or set of criteria that can apply in order to make this determination. In certain cases, it may be known precisely where a work of art came from—for example, sculptures were removed from documented architectural ensembles, sold, and taken to collections in Europe, the United States, and elsewhere. In such cases, it may be possible to identify the owner of the building, consider whether that person (or anyone else) was authorized to remove and sell parts of it, and

²⁹ The MFA’s collection policy states “[t]he Museum will not acquire any work of art known to have been stolen or illegally appropriated (without subsequent restitution).” “Acquisition and Provenance Policy,” *MFA Boston*, <https://www.mfa.org/collections/provenance/acquisitions-and-provenance-policy>.

³⁰ As, for example, the patrimony laws discussed by Church 1993; Lufkin 2002; Gerstenblith 2015.

³¹ Over the past 20 years, disputes over works of art that are alleged to have been sold under duress during the Holocaust have proven among the most challenging to resolve. Opinions often differ over what constitute the reasons for a sale, the free use of sale proceeds, and even fair market value. For a survey of some of the most high-profile legal claims in recent years, see O’Donnell 2017.

determine where and how other pieces traveled, keeping in mind that some monuments were dismantled or dispersed, at least in part, before the advent of colonization.³²

Additional questions to consider are whether there have already been studies of colonial collecting in the area and, if so, what those studies have shown. In what is now Papua New Guinea, for instance, a market with European travelers flourished by the second half of the nineteenth century, when the removal and acquisition of many museum objects can be documented.³³ Firsthand accounts by foreign collectors have given some indications of which types of objects were frequently and enthusiastically offered for sale or trade there and which were not.³⁴ Some ethnographers and missionaries left diaries or papers revealing instances of deliberate destruction and looting (of religious buildings, for example) or collecting by force.³⁵ Just as there may be “red flag” names when studying Nazi-era provenance and the antiquities trade, so too will there be red-flag collectors in the former colonies.

An understanding of the condition, function, and life cycle of the object itself will also be critical to assessing colonial-era transactions. How was the object intended to be used? Was it utilitarian, or did it have spiritual or ritual significance? If it had a ritual function, how likely is it that it was disposed of willingly? Many areas were converted *en masse* by Christian missionaries; might the object have been abandoned or traded after conversion, or was it more likely taken away (or fell into disuse) in order to enforce a new belief system? Could the object be freely disposed of by an individual, or was it inalienable and therefore unable to be traded at all?³⁶ Was it meant to be preserved in perpetuity—for example, on a grave or memorial—or was it typically destroyed or discarded when no longer needed? Some masks from the Pacific Islands, for instance, were made of natural materials and were left to decay after the conclusion of their ritual use.³⁷ An object’s condition can also help the researcher understand when and why it may have left its community of origin. Some objects endured extensive wear and even damage during use, but, if the condition is pristine, it could signal that the object was not used at all and was instead commissioned or produced specifically for the market.³⁸

Questions like those posed above are not intended to be comprehensive, nor do I mean to suggest that the answer to any one of them is an indication of duress or lack thereof. There is no single set of facts that can, in every case, establish whether or not an object was forcibly traded. Nevertheless, the above questions suggest how, in many instances, evaluating the validity of colonial-era acquisitions will hinge on an understanding of the age, function, and ongoing significance of the objects themselves just as much as their collecting history. It will

³² Today, it seems unthinkable to remove anything from a culturally significant building, but not all historical disassembly is tantamount to vandalism or theft; owners and custodians of architectural ensembles have, throughout history, made deliberate decisions to sell their property. Even as late as the twentieth century, clerics sold façades, frescoes, and sculptural elements from churches in order to raise funds. The MFA has the apse frescoes from Santa Maria de Mur, Lérida, Spain (sold by the church rector in 1919) and the portal of the church of San Miguel de Uncastillo (sold by the Bishop of Jaca in 1915). Other American museums have similar collections—for example, the Metropolitan Museum of Art has numerous architectural portals, architectural elements, and cloister arcades acquired in Europe by George Grey Barnard.

³³ On colonial-era collecting in New Guinea, see Grueb 1992; Schindlbeck 1993; Hermkens 2007; Webb 2011.

³⁴ See Schindlbeck 1993, 62–64.

³⁵ For examples, Hermkens 2007, 9–10.

³⁶ For a discussion of inalienable possession, see Coleman 2010.

³⁷ The MFA has in its collection several headdresses that were almost certainly intended to be discarded or destroyed after use, including a mask (*keponog* or *ges*) from New Ireland (MFA Accession no. 1991.1072), a helmet mask from the Witu Islands (MFA Accession no. 2014.317), and a Sulka Headdress (*susiu*) (MFA Accession no. 1994.410).

³⁸ See the example of an Elema helmet mask from the Papuan Gulf (MFA accession no. 1996.400), discussed by Geary 2006, 25–27.

be up to museums to research each case study individually and begin to identify those objects that are the highest priority for further scrutiny.

Looting during conflict

Among the highest-profile art restitution claims are those for objects whose provenance is clear and can be situated at the far end of the spectrum of duress conditions—namely, those objects looted during conflict. Regardless of the presence of a colonial power, there can be no question of consent in parting with property that was pillaged. The quintessential example of this category, and the one that has received the most press attention in recent years, are the ivory and brass sculptures that British troops plundered from the Royal Palace at Benin City (present-day Nigeria) in 1897.³⁹ The 1860 looting of the Yuanmingyuan, or Summer Palace, in Beijing has also resulted in long-standing, high-profile claims for objects at auction and in museum collections.⁴⁰ The British plunder of Maqdala, Ethiopia, in 1868 and of Kumasi, present-day Ghana, in 1873–74 likewise remain contentious, although the objects that were taken have not been dispersed as widely and remain, primarily, in the United Kingdom.⁴¹

Even if the provenance of these works of art is not disputed, at the time they were looted there were no formal international frameworks to protect cultural property or prohibit art plunder during times of war. Today, there may be no legal way to redress these instances of pillage, and the current country of origin may not even have existed at the time of the conflict. If American museums begin to consider the restitution of these objects, will they be grafting a twenty-first-century mindset, which abhors and prohibits wartime looting, onto earlier sensibilities? Some are quick to claim that plunder during wartime has always been the norm, and, for that reason, there is no need to address war loot in museum collections. Nevertheless, European attitudes regarding pillage changed dramatically over the course of the nineteenth century.⁴² It is worth reviewing these changes in light of current conversations about museums, colonialism, armed conflict, and restitution.

France expropriated foreign artwork broadly during the Revolutionary Wars and most notoriously under Napoleon, yet this activity was controversial even at the time. The looting of another sovereign nation's cultural property was increasingly viewed as barbaric during the age of Enlightenment. As early as 1796, art theorist Antoine Quatremère de Quincy argued that removing artwork from Italy was detrimental to civilization.⁴³ Many in Britain decried the “robbery and plunder” that enhanced the collections of the Louvre under Napoleon.⁴⁴ Following the fall of the French Empire in 1815, artwork taken from Italy, Belgium, and elsewhere was restituted, albeit unevenly.⁴⁵ Yet this large-scale restitution effort set a new precedent in Europe, making clear that art plunder during conflict would no longer be the norm. Following the fall of France, the Allies did not raid French collections in retaliation.⁴⁶

As European jurists codified the rules of war over the course of the nineteenth century, they specifically sought to prohibit the looting of artwork. This effort was largely in

³⁹ Brodie 2018; Hicks 2020; Phillips 2021.

⁴⁰ Kraus 2009; Gillman 2019.

⁴¹ Also spelled “Magdala.” See Pankhurst 1985. On the looting at Kumasi, see Chamberlin 1983, 69–97.

⁴² See, in particular, Sandholtz 2007, 71–100; Gilks 2013. For a concise overview of the development of rules of war to protect cultural property, see Gerstenblith 2005–6, 2010.

⁴³ As he laid out in his “Letters on the Plan to Abduct the Monuments of Italy,” cited in Gilks 2013, 127–28.

⁴⁴ Gilks 2013, 136.

⁴⁵ On Napoleonic looting and restitution, see Quynn 1945; Treue 1957, 159–99; McClellan 1994; Sandholtz 2007, 47–70.

⁴⁶ As pointed out by Sandholtz 2007, 69–70.

response to Napoleonic plunder.⁴⁷ English military laws of 1868 and 1884, though somewhat contradictory on this point, prohibited pillage and sanctioned the taking of artwork only in cases of military retaliation.⁴⁸ In 1874, the Brussels Declaration (signed but not ratified by Great Britain, France, Germany, The Netherlands, and Italy, among other nations), specified that

an army of occupation can only take possession of ... movable property belonging to the State which may be used for the operations of the war. ... The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities. ... Pillage is formally forbidden.⁴⁹

This prohibition of the taking of enemy property not needed for military purposes and the specific protection of artwork was based on Francis Lieber's 1863 Instructions for the Government of Armies of the United States in the Field, which had governed Union soldiers during the American Civil War.⁵⁰ The Brussels Declaration, however, was international, and it served as the model for the 1899 Convention with Respect to the Laws and Customs of War on Land or first Hague Convention.⁵¹ This was one of several treaties that came out of the international peace conference held in The Hague that year, with 26 signatories, including the United States, the major powers of Europe, Japan, Persia, and the Ottoman Empire. The Hague Convention formally codified the rules of warfare on an international level. Regarding cultural property, it repeated the Brussels Declaration almost verbatim: "Private property cannot be confiscated. ... The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings. ... Pillage is formally prohibited."⁵² The second Hague Convention of 1907 expanded upon the treaties of 1899 but left unchanged the passages on pillage and the protection of cultural heritage.⁵³

By the second half of the nineteenth century, the United States and most European countries had agreed either formally or informally to protect works of art and cultural property during armed conflict and to prohibit pillage in any event. Even if, in certain cases, it was still defensible for the victorious party to take spoils of war on behalf of their nation, by the second half of the nineteenth century, indiscriminate looting by soldiers was not.⁵⁴ Nevertheless, these rules "between civilized nations" were not practiced or enforced

⁴⁷ Sandholtz 2007, 73–75.

⁴⁸ Hevia 2007, 109, n. 18.

⁴⁹ Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874, reprinted in Simpson 1997, 274–77, Appendix 2.

⁵⁰ Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863; Simpson 1997, 272–73, Appendix 1; Sandholtz 2007, 88–89, who offers a side-by-side comparison of the Lieber Code and Brussels Declaration.

⁵¹ Hague Regulations Concerning the Laws and Customs of War on Land 1899, 187 CTS 227.

⁵² See Sandholtz 2007, 93–100.

⁵³ Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, 187 CTS 227; Simpson 1997, 278–79, Appendix 3.

⁵⁴ Hevia 2007, who discusses the distinction in 1860 between "legitimate war booty" and "theft, which was outlawed under military code."

consistently, particularly when fighting took place outside of Europe—that is to say, on the soil of nations that many Europeans did not consider “civilized.”⁵⁵

For the sake of argument, the definition of “works of art” may be debated. Were the items taken from heritage sites at Beijing, Maqdala, Kumasi, Benin City, and elsewhere considered artistic property by the looters—and therefore taken in contravention of the norms of the time—or were they seen as legitimate spoils of war?⁵⁶ There is no straightforward answer. European troops did take luxury goods and other works of art for the state, whether for the government or to be auctioned off to benefit the troops.⁵⁷ Nevertheless, the boundary between war prize and collectible was fluid. During the two Opium Wars in China (1839–42 and 1856–60), soldiers removed clothing from dead bodies not out of any military necessity but, rather, because they personally valued Chinese textiles.⁵⁸ The looting of the Yuanmingyuan may have been motivated by a desire to demonstrate French and British power over China, but there can be no doubt that Chinese textiles, ceramics, and enamels were considered art objects once they were taken to England and France. They were sold by fine arts auctioneers like Christie, Manson and Woods and Hôtel Drouot, they were the focus of museum exhibitions, and they exerted demonstrable influence over European design.⁵⁹ Indeed, a provenance of “from the Summer Palace” was considered prestigious, a mark of authenticity, and a signifier of so-called “imperial taste.”⁶⁰

A comparable blurring of the lines between war prize and art object followed the British attacks on Maqdala and even Benin City. At Maqdala, troops plundered manuscripts as enemy property, describing them as “royally illuminated.”⁶¹ They took treasury objects, several of which were sold by a plundering soldier to Richard Holmes of the British Museum, the archaeologist of the expedition. Holmes bought extensively at the subsequent auction of the Maqdala loot, and, as a result, the British Museum received some 350 Ethiopian manuscripts.⁶² The pillage of thousands of brass plaques and ivories from Benin is well known, documented, and even photographed. Reginald Bacon, whose firsthand account, *Benin: The City of Blood*, published in 1897, helped to establish Benin’s notoriety in England as a supposedly violent and savage place, nevertheless wrote: “Buried in the dirt of ages were several hundred brass plaques, suggestive of almost Egyptian design, but of really superb casting. Castings of wonderful delicacy of detail, and some magnificently carved tusks ... bracelets suggestive of Chinese work and two magnificent bronze leopards.”⁶³

Like items from the Yuanmingyuan, the bronzes and ivories were auctioned in England and featured in several museum exhibitions, much to the astonishment of critics, who did not believe that the people of Benin could have developed such technical skills on their

⁵⁵ See Treue 1957, 200; Phillips 2021, 102.

⁵⁶ Treue 1957, 200–1, who argues that in the nineteenth century, Europeans considered Oceanic and Indigenous North and South American art “curiosities or perhaps rarities,” while art from China, Japan, India, and Persia was valued as being of “the highest artistic perfection.” A societal or aesthetic assessment of “work of art” *per se* was, however, not key in defining war booty; its utility in combat was.

⁵⁷ A firsthand account of the looting from Maurice d’Hérisson, a French interpreter, is provided in Treue 1957, 202–8. He concluded: “[W]e were the victors and therefore all objects of value belonged to our nation.... The principle is incontrovertible. We can be reproached with the destruction, but not the looting” (208).

⁵⁸ Hill 2013, 227–52, who explores the distinctions Europeans drew between art object and war prize: “Trophies and prize served their traditional function, but men often expanded these concepts to accommodate their appetite for Chinese things” (232).

⁵⁹ See the essays in Tythacott 2018.

⁶⁰ See Pearce 2018.

⁶¹ Pankhurst 1985, 235.

⁶² Pankhurst 1985, 235, 237.

⁶³ Bacon 1897, 91–92.

own.⁶⁴ These objects taken from conflicts in Asia and Africa were not burned along with buildings as soldiers fled, nor did troops take a small selection of items. Rather, collections were removed on a vast scale, then exhibited and sold through traditional fine art venues. In this way, these foreign-made objects entered the European canon of art history. Troops justified the rampant taking of enemy artwork at a time when such activity was otherwise censured by pointing, either implicitly or explicitly, to their own relative enlightenment and cultural superiority. During the Opium Wars, the British looted Chinese temples, rationalizing their behavior by mocking the religion and casting doubt on the piety of the worshipers. In the words of Reverend MacGhee, an army chaplain, “John Chinaman is not at all of a religious turn of mind, he very seldom goes to ‘Chin-chin’ or pays his respects to his peculiar divinity. ... We have constantly occupied their temples, and they never seem to care much about it, and only in some cases took the trouble to remove their deities; not that we generally disturbed their very ugly images, although I have seen a statue of Confucius at Canton forced to smoke a very short clay pipe, which he did not seem to like.”⁶⁵ British accounts of the sacking of Benin City—including Bacon’s *City of Blood* and Alan Boisragon’s *The Benin Massacre* (1897)—sensationally described cannibalism, human sacrifice, and infanticide in a society that, they both specifically noted, was isolated from white men.⁶⁶ Such narratives painted a picture so gruesome that the plundering of Benin’s artwork (admired by Bacon but “hideous” according to Boisragon) became an inextricable part of the colonialist narrative—that is to say, rescuing the natives from their own violent and uncivilized culture.⁶⁷

Works of art from Beijing and Benin were called “ugly” and “hideous” spoils of war, yet, at the same time, they clearly had aesthetic value and were considered suitable for museums and galleries. An obvious contradiction exists between the characterization of these objects as symbols of military victory and subjugation and their commodification, admiration, and public display as works of art. In 1903, Henry Ling Roth devoted no fewer than two chapters to the art of Benin in his copiously illustrated *Great Benin*, commenting that the bronzes “hold their own among some of the best specimens of antiquity or modern times.”⁶⁸ He admired them so greatly that, in an appendix, he lamented Britain’s loss of some of the most valuable and interesting examples to German buyers. Despite its large collection, he wrote, the British Museum was “deprived of its lawful acquisitions. ... It is especially annoying to Englishmen to think that such articles, which for every reason should be retained in this country, have been allowed to go abroad.”⁶⁹ While he elevated Benin bronzes and ivories to the level of fine art, if not masterworks, he simultaneously classified them as spoils, their plunder entirely justifiable for the greater good of England.⁷⁰

The response to the pillaging that took place in China during the Boxer Rebellion (1899–1901) marked a change in norms. Looting by European, American, and Japanese troops,

⁶⁴ Hicks 2020, 142–51; Phillips 2021, 121–53. Neil Brodie (2018, 68) argues that “a more positive assessment of the aesthetic qualities of the Benin bronzes and ivories was only possible after their placement in European museums ... their encapsulation within museum vitrines situated them firmly within the cultural domain.”

⁶⁵ MacGhee 1862, 47; also cited in Hill 2013, 234.

⁶⁶ Bacon 1897, especially chapter 7; on human sacrifice (86–98); on “isolation from white men” (14–15); Boisragon (1897, 31–34) reports cannibalism and infanticide in the area of the Niger Coast Protectorate; on human sacrifice (185–89); on the Protectorate putting an end to these practices (29–30); and on seclusion from “white men” (14).

⁶⁷ Both authors are unequivocal that the actions of the British were for the greater moral good. See Bacon 1897, 108; Boisragon 1897, 188–89.

⁶⁸ Ling Roth 1903, 217.

⁶⁹ Ling Roth 1903, xix, Appendix IV on the British Loss of Antique Works of Art from Benin.

⁷⁰ Ling Roth 1903. Henry Ling Roth felt that the Germans were ahead of the English in developing the fields of anthropology and ethnology; England’s retention of even more Benin material would have afforded “adequate records of the native races of our times.” He also felt it was important politically for England to “have a thorough knowledge of the native races subject to them.”

missionaries, and others lasted for months. While objects taken from the Yuanmingyuan in 1860 were immediately exhibited and sold publicly, comparable exhibitions and auctions did not take place in the early twentieth century.⁷¹ Nor did the provenance “from the Boxer Rebellion” achieve the same level of prestige as “from the Summer Palace.” Some captains ordered the return of personal property that was looted, and troops were dishonorably discharged for their plundering activities.⁷² By this date, the 1899 Hague Convention had been signed. Pillage was viewed to a greater degree than ever before as unenlightened. If it had been rationalized earlier because of the perceived “savagery” of the victims, then it was becoming more and more difficult to defend such blatantly savage behavior on the part of European forces.⁷³

The Boxer Rebellion concluded just four years after the violent looting of Benin City. There is little evidence that Europeans generally considered the sack of Benin unenlightened, and it is only in recent years that a truly global debate has ensued about the objects’ return to Africa.⁷⁴ The difference in response to these two events within the span of just a few years underscores the disconnect in European attitudes regarding art looting during conflict. These attitudes seemed to vary depending entirely on whose property was being taken and how “civilized” they were perceived to be. The unwritten rules of warfare were that artwork should be safeguarded and not pillaged, unless and until the enemy was considered culturally or racially inferior and, therefore, unworthy of their own artistic production.

The restitution of artwork that took place after the Napoleonic Wars in 1815 may be taken as the chronological starting point for changing ethical norms, particularly in Europe, regarding art plunder during conflict. As these norms evolved, the rules applied differently based on where imperialist forces were fighting and whose property they wished to take. It would be difficult to claim that the objects pillaged during these conflicts were truly war prizes in the traditional sense of the term. Once removed from their place of origin, they were treated as works of fine art. In recognition of these imbalances and unaddressed instances of pillage, works of art taken during conflict that are now in museum collections should be identified as high priority for provenance research.

Museum transparency

Once the process of provenance research has reached a state of completion, the challenge for museums will be sharing the results of that research in a way that is clear to the public and helpful to potential claimants. American museums already have a template for redressing historical wrongs while upholding a high standard of transparency and accountability. Beginning in 1998, many museums launched pages on their websites dedicated to Nazi-era provenance research. Directed by the AAM and the AAMD, a number of institutions shared lists of objects that could have changed hands in Europe

⁷¹ This change in norms is explored by Hevia 2007.

⁷² Hevia 2007, 99.

⁷³ Hevia 2007, 101: “How could the ‘victims’ of Chinese ‘barbarism’ retain the moral high ground if they slavishly copied the behavior of savages?”

⁷⁴ See Phillips 2021, 101; and for a rare contemporaneous condemnation of the looting (95). Even in the modern era, the opposition to repatriating material to Nigeria appears rooted in moral indignation. Russell Chamberlin (1983, 192, 201) speaks of the “humiliation to every Briton that the vile custom of human sacrifice as practiced by the King of Benin should not have ceased as a result of the treaty signed in 1892” and describes “the last days of Benin” as an “orgasm of slaughter” before dismissing Nigeria’s repatriation claims as merely political. Others cite Benin’s historic role in the slave trade as a reason not to return the bronzes. See, e.g., Jenkins 2016, 287–88; Kieran Gair, “Benin Bronzes: Return to Nigeria Would Reward Slavery, Say Activists,” *The Times*, 16 August 2022. For a history of African nations’ attempts to reclaim cultural property, see Savoy 2022.

between 1933 and 1945.⁷⁵ Other museums posted shorter lists of objects with “red flags”—that is, showing evidence of possible looting or otherwise requiring scrutiny. At the MFA, those selected object records (usually about five at any given time) are annotated with a brief explanation of the museum’s ongoing research; the rest of the collection is searchable online.⁷⁶ No matter the format, however, it is critical to make the results of provenance investigations publicly available.⁷⁷ By their very nature, lists and inventories of high-priority objects invite additional information from scholars, members of the public, and previous owners. This information can assist in curatorial research and, in the event of a successful restitution claim, ensure that museums are holding their collections legally and ethically.⁷⁸

Looking to the model for Nazi-era provenance as a guide, it is proposed that American museums seek to identify objects that were (1) looted or otherwise taken in armed conflict from the end of the Napoleonic Wars in 1815 until the Hague Conventions formally prohibited art plunder in 1899/1907, or later if the museum has not already addressed instances of twentieth-century pillage, and (2) stolen or forcibly removed during a period of colonial rule.⁷⁹ There need not necessarily be chronological parameters for the latter category of colonial thefts and coerced sales, although it seems unlikely for an American museum to be able to trace the removal of objects in its collection earlier than the nineteenth century. These two categories comprise those works of art that can be defined as stolen or forcibly traded. It is not proposed to include objects demonstrably made for trade or sale or objects whose colonial-era provenance is completely unknown.⁸⁰

Museums have the capacity to create sections or pages of their websites dedicated to colonial-era provenance. Depending on the size and scope of the collection, they can develop either a long list of all works of art removed under colonial rule or a shorter list of high-priority objects. By listing them, American museums would accomplish two aims. First, they would acknowledge and draw attention to the contentious histories of objects in their collections in a way that is comparable to how they have addressed other historical periods in other parts of the world. This step is important not just for public accountability but also to ensure museums are being consistent in how they document

⁷⁵ AAMD, *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era, 1933–1945*, <https://aamd.org/standards-and-practices>; American Alliance of Museums (AAM), *Guidelines on Unlawful Appropriation of Objects During the Nazi Era*, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/>.

⁷⁶ This list can be found on the webpage “Nazi-Era Provenance Research,” <https://www.mfa.org/collections/provenance/nazi-era-provenance-research>. In 2022, the MFA added a short list of recently acquired antiquities that have unverified collecting histories. See “Antiquities and Cultural Property,” <https://www.mfa.org/collections/provenance/antiquities-and-cultural-property>.

⁷⁷ The AAMD hosts a portal for member museums to register new acquisitions of archaeological materials that cannot be securely traced to 1970. This system likewise helps museums uphold a high standard of transparency and accountability. “Object Registry,” <https://aamd.org/object-registry>.

⁷⁸ The MFA has had its collections database, including provenance information, online since 2000. A number of restitution claims have been resolved as a result—for example, a painting by Salomon van Ruysdael was located and returned to the heirs of Ferenc Chorin. See Malcolm Gay, “MFA to Return Looted Artwork,” *Boston Globe*, 25 January 2022. A list of resolved claims can be found at “Ownership Resolutions,” <https://www.mfa.org/collections/provenance/ownership-resolutions>.

⁷⁹ The texts of 1899 and 1907 are identical in their language regarding the protection of art. Nevertheless, art looting continued after 1899 (for example, during the Boxer Rebellion) and, in general, early twentieth-century instances of pillage have not been redressed by American museums.

⁸⁰ It is of course possible that objects whose provenance is unknown could have been stolen or trafficked, whether during the colonial period or at any other time. They are, however, going to be difficult to situate specifically within the scope of a colonial-era research project.

and share their collections. This consistency in turn reflects how successfully a museum is upholding its collection policy. Second, museums would signal openness to engaging with source communities, whether about a physical return of an object, loans, storage, display, educational initiatives, or other matters of care. Indeed, these communities may be in the best position to offer information about the works of art themselves, advising on which, in fact, are the objects most likely to have been traded or sold under duress.

Resolving ownership disputes

Whether faced with a formal restitution claim or having uncovered evidence of a theft on their own, American museums will need to decide whether to reconstitute colonial-era looted art and, if so, on what grounds. Whenever a museum votes to deaccession a work of art and remove it from public view, or utilizes its funds to resolve an ownership dispute, it must have a clearly articulated reason for doing so. Every decision about restitution sets an internal precedent. The board (or other governing body) must ensure that these decisions are in keeping with the museum's collection policy and their own fiduciary responsibilities.⁸¹ Declaring that works of art that are deaccessioned and restituted are "gifts" to previous owners, for example, suggests that any work of art from the museum collection may be handed over as a gesture of goodwill and magnanimity rather than because of an acknowledged break in the chain of ownership.⁸² Providing no reason at all suggests a chaotic approach to collections management and sends an equally confusing message to the public about how museums care for their holdings.⁸³ It is therefore important for each museum to set a clear framework for considering colonial-era claims in order to ensure that its collection is indeed held in the public trust and not broken up haphazardly.

To date, restitutions from American museums have been generally rooted in legal precedent rather than in purely ethical principles. Works of art looted during the Nazi era have never been lawful to trade; indeed, the Department of State worked for years following World War II to ensure the restitution of plundered art that ended up within US borders. There were a number of postwar restitution laws in Europe, but the Department of State turned to the 1907 Hague Convention (among other instruments) to justify seizing and returning war loot.⁸⁴ Legislation in many archaeologically rich countries determines whether objects excavated from their soil may be licitly exported and sold in the United States.⁸⁵ The art world may have turned a blind eye to such laws and regulations for years, but the recent restitution of Nazi-looted art and illicit antiquities is not the result so much of a sudden application of new standards as it is of enforcing existing ones.⁸⁶ Works of art like the Benin bronzes, on the other hand, have been openly

⁸¹ On collections management policies, see Malaro 1998, 45–57.

⁸² David Ng, "Norton Simon Museum to Return Contested Ancient Statue to Cambodia," *Los Angeles Times*, 7 May 2014, who reported that "Museum officials said Tuesday that the 10th century sandstone statue known variously as the 'Temple Wrestler' or 'Bhima' will be returned to Cambodia as 'a gift.'"

⁸³ No precise reason was given for the Smithsonian Institution deaccessioning and returning a Pre-Columbian gold disc to Peru. See Hakim Bishara, "Smithsonian Returns a Pre-Incan Gold Ornament to Peru," *Hyperallergic*, 15 June 2021. A subsequent correction to the article states that it was a "not a formal repatriation, but a return" without explaining the difference. Malaro (1998, 220–21) discusses deaccessioning and museums' responsibilities to the public.

⁸⁴ On the efforts of the Department of State in restituting art looted during World War II, see Maurer 1997. On the immediate postwar efforts coordinated by Ardelia Hall, see Reed 2022, 324–26.

⁸⁵ See Church 1993; Gerstenblith 2015.

⁸⁶ It is, however, true that in the United States most Nazi-era restitution claims have not been decided in the courts. On litigation, see O'Donnell 2017. For a comparison of Nazi-era claims with colonial-era claims, see Van Beurden 2022.

bought and sold for more than 100 years without any known litigation over their colonial-era provenance. In fact, for much of the twentieth century, being able to trace an object to the time of its colonial-era removal was considered reassuring to a buyer as there was little chance that the object had been recently stolen or trafficked. Any restitution of such material today will need to be based upon ethical principles rather than a strict interpretation of the law.

It is not possible retroactively to prohibit a group or category of objects from trade, and not many paradigms exist in the United States for the restitution of materials that, like colonial-era looted art, may be on the market legally. There is one notable exception that applies to many American museums. For years, Native American tangible heritage—including human remains, burial goods, sacred objects, and items of cultural patrimony—changed hands freely in the United States and ended up in museum collections. Native American cultural heritage is, generally speaking, legal to buy and sell today.⁸⁷ In 1990, however, the United States passed the Native American Graves Protection and Repatriation Act (NAGPRA), which applies to federal agencies, museums, and other institutions receiving federal funds.⁸⁸ These agencies and museums must supply inventories of their holdings of Native American human remains and associated funerary goods and summaries of unassociated funerary goods, sacred objects, and inalienable cultural patrimony to federally recognized tribes and Native Hawaiian organizations.⁸⁹ Under NAGPRA, there is a clear procedure laying out how tribes can make claims for this property.⁹⁰

The framework for NAGPRA will differ from any framework that can be considered for colonial-era claims for several reasons. First, modern governments (such as the Republic of Benin, Nigeria, and China) have sought the recovery of, and, in some cases, received, property taken during nineteenth-century periods of war and colonization, with the aim of preserving those objects in national museum collections.⁹¹ Indigenous tangible heritage, on the other hand, which has been displaced under both colonial rule and settler colonialism, has ongoing significance to the living culture from which it originated—and its return is considered by

⁸⁷ Trade in non-Native human remains is regulated at the state level. NAGPRA, however, federally prohibits trafficking in Native American human remains for profit unless it is with the full consent of the next of kin or appropriate governing body. Trope 2013, 42.

⁸⁸ NAGPRA.

⁸⁹ Associated funerary objects are those that can be connected to human remains in the possession of a museum or federal agency. Unassociated funerary objects, on the other hand, are not known to be connected to remains in the possession of a museum or agency.

⁹⁰ The repatriation of unassociated funerary objects, sacred objects, and cultural patrimony depends upon the claimant demonstrating, first, that the object in question falls into one of those three categories; second, that they can establish cultural or tribal affiliation; and, third, that there is evidence that the possessing museum does not have rightful ownership. It is then up to the museum to prove right of possession. Trope 2013, 36–38.

⁹¹ In 2021, France restituted to the Republic of Benin 26 works of art, which are intended for a museum, still to be completed, in Abomey. Farah Nayeri and Norimitsu Onishi, “Looted Treasures Begin a Long Journey Home from France,” *New York Times*, 28 October 2021. As of 2022, the Nigerian government is seeking to receive the Benin Kingdom bronzes and ivories on behalf of Oba Ewuare II and has announced plans to construct a Royal Palace Museum for restituted artifacts. See Otuya Daniel, “Oba of Benin Takes Physical Possession of Returned Artefacts,” *The Street Journal*, 19 February 2022, <https://thestreetjournal.org/oba-of-benin-takes-physical-possession-of-returned-artefacts/>; “FG to Construct Royal Palace Museum for Repatriated Artefacts, Says NCMM DG,” *This Nigeria*, <https://thisnigeria.com/fg-to-construct-royal-palace-museum-for-repatriated-artefacts-says-ncmm-dg/>. The Chinese government has tried (unsuccessfully) to halt the public sale of zodiacal waterspouts taken from the Yuanmingyuan. Two spouts were purchased and then given to the government in 2013; they are kept at the National Museum. See Gilman 2019.

many to be a matter of human rights rather than property rights *per se*.⁹² While it is not possible to neatly separate Indigenous repatriations from colonial-era returns, American museums may wish to consider whether Indigenous cultural property calls for its own framework for restitution beyond what is governed by NAGPRA.⁹³ Second, it is not reasonable to expect new legislation comparable to NAGPRA to regulate art from colonial contexts, which, unlike Native American cultural property, originated outside the United States. Unless there is a clear violation of existing American law, the federal government is not likely to dictate the deaccessioning decisions of private museums, nor is it likely to pass legislation regarding the disposition of foreign-made works of art within its borders.⁹⁴

Despite these differences, NAGPRA is a useful model because it shows how claimants can recover objects that are otherwise legal to buy and sell, while museums prioritize the sharing of information and the building of relationships. Many Native American objects have been successfully repatriated under NAGPRA, but others have remained in museums and are cared for and curated with the cooperation of tribal representatives.⁹⁵ Regardless of whether repatriation is the end result, the input of tribal communities is key. The aim is to restore to them some agency over their own cultural heritage and preclude museums from making unilateral decisions about their Indigenous collections.

The success of any colonial-era provenance initiative will likewise depend on the transparency of American museums and their willingness to engage in a dialogue with source communities. Sharing information is easier today than ever before; many, if not most, museums have the capacity to make their collections globally accessible through their websites. To that end, there should be nothing to prevent museums from documenting the provenance of objects removed under colonialism—fully, from the time of their removal (if known) to the present—and making that information available online. Source countries and communities can more easily locate these objects and, if they wish to make a claim, are able to do so. Deaccessioning and restitution may be the result in some cases, but they need not be the primary objective. Some countries may have requests beyond a physical return, wanting instead to collaborate on issues of care, display, and interpretation of the objects, advise on cultural sensitivity, or collaborate on educational initiatives and professional training opportunities. As an ethical matter, colonial-era claims can be resolved by the parties creatively and according to the circumstances of the case.

No matter what the model for resolving disputes over the ownership of works of art, thorough research, transparency with the research results, and a willingness to enter into a conversation with potential claimants must guide the process. Restitution claims should

⁹² As articulated by Trope 2013, 28–30.

⁹³ Many Indigenous artifacts were taken during periods of colonial occupation. The Kingdom of Denmark, for example, removed Inuit artifacts from Greenland and kept them for years before returning them. See Grønnow and Jensen 2008. Van Beurden (2022, 365–72) discusses the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st Sess., Supp no. 49, UN Doc. A/61/49, 13 September 2007, in the context of colonial returns.

⁹⁴ Though it is rare for the government to become involved in matters of collections care, there are exceptions. State attorneys general often oversee charitable institutions and may challenge museums' deaccessioning decisions, particularly if the museum appears out of compliance with its fiduciary and legal duties. In August 2022, New York State passed a law requiring all museums to place labels identifying Nazi-looted works of art in their galleries. Law no. A.3719A/S.117A, 2022.

⁹⁵ For example, the website of the Burke Museum in Seattle, Washington (<http://www.burkemuseum.org>) features stories of collaborations with Indigenous artists. For general discussions of museums working with tribal communities, see Archambault 2011; Meredith Schweitzer, "Building True, Lasting Collaborations with Source Communities," *American Alliance of Museums*, <https://www.aam-us.org/2020/09/30/building-true-lasting-collaborations-with-source-communities/>.

always be assessed on a case-by-case basis, and resolutions sought in a just and fair manner. The last 30 years have witnessed dramatic shifts in the ethics of acquiring, curating, and restituting art. This is because the highest standards in collecting inevitably and continually change: there is no beginning or end to the process. These ethical standards are shifting again. American museums have an opportunity to take an active role in researching, documenting, and openly discussing the sometimes uncomfortable histories of their works of art that changed hands during the colonial era and redressing these historical wrongs with their communities of origin.

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