VIII.

Law versus Justice?

An Intercultural Approach to the Problem of European Collections of Colonial Provenance

Contested Heritage

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Evelien Campfens

Abstract

A common response to the issue of colonial looting is that no legal rules apply. But is that so? This chapter argues that it is not a lack of legal norms that explains this belated discussion but, rather, the asymmetrical application of norms. Moreover, the proposition is that a human rights law approach to claims, focusing on the heritage value of cultural objects – instead of a focus on exclusive ownership interests and events in the past – offers tools to structure this field.

Cultural objects have a protected status because of their intangible heritage value to people, as symbols of an identity, since the first days of international law. Despite this, throughout history, cultural objects were looted, smuggled and traded on. At some point, their character tends to change from protected heritage to valuable art or commodity in a new setting, subject to the (private) laws in the country where it ended up. This chapter proposes that, irrespective of acquired rights of new possessors, original owners should still be able to rely on a "heritage title" if there is a continuing cultural link. The term aims to capture the legal bond between cultural objects and people, distinct from ownership, and is informed by universally applicable human rights law norms, such as everyone's right to (access one's) culture.

The chapter is built up as follows: Section 1 starts out with a short overview of legal models for claims to lost cultural objects. Section 2 will analyse developments

Evelien Campfens, Contested Heritage. A Human Rights Law Approach to Claims, in: Provenance Research on Collections from Colonial Contexts. Principles, Approaches, Challenges, hrsg. von C. Andratschke et al., Heidelberg: arthistoricum.net-ART-Books, 2023 (Veröffentlichungen des Netzwerks Provenienzforschung in Niedersachsen, Band 5), S. 432–446.
https://doi.org/10.11588/arthistoricum.1270.c18924

in the field of international cultural heritage law, a field of law that increasingly is intertwined with human rights law. Section 3 will further expand on the proposition of a human rights' approach to claims to contested heritage, and on the notion of "heritage title" that is meant as a tool to address the intangible interests at stake.

Patrimoine contesté : une approche des revendications fondée sur les droits humains (Résumé)

Une réponse courante à la question du pillage colonial est qu'aucune règle juridique ne s'applique. Mais est-ce vraiment le cas ? Cet article soutient que ce n'est pas le manque de normes légales qui explique cette discussion (tardive), mais plutôt l'application asymétrique des normes. En outre, la proposition est qu'une approche des revendications fondée sur les droits humains, axée sur la valeur patrimoniale des objets culturels – au lieu de se concentrer sur les intérêts exclusifs de propriété – pourrait offrir des outils pour structurer ce domaine.

Les objets culturels jouissent d'un statut spécial, protégé en raison de leur valeur «patrimoniale» immatérielle pour les personnes, en tant que symboles d'une identité, depuis la naissance du droit international. Malgré cela, tout au long de l'histoire, les objets culturels ont été pillés, passés en contrebande et échangés. À un certain moment, leur statut a tendance à passer de celui de patrimoine protégé à celui d'art ou de marchandise de valeur dans un nouvel environnement, soumis aux lois (privées) du pays dans lequel ils ont atterri. Cet article propose que, indépendamment des droits acquis par les nouveaux propriétaires, les propriétaires ou créateurs d'origine puissent toujours se prévaloir d'un «titre patrimonial» s'il existe un lien culturel permanent. Le concept vise à saisir le lien juridique entre les objets culturels et les personnes, indépendamment de la propriété, et s'appuie sur des normes de droits humains universellement applicables, telles que le droit de tout un chacun à (accéder à) sa culture.

Ce chapitre est construit comme suit. La section 1 commence avec une brève vue d'ensemble des modèles juridiques pour les réclamations concernant les objets culturels perdus. La section 2 analyse ensuite les évolutions dans le domaine des lois internationales sur le patrimoine culturel, un domaine juridique qui est de plus en plus lié aux droits humains. La section 3 développera la proposition d'une approche des droits humains pour les revendications relatives au patrimoine contesté, ainsi que la notion de «titre patrimonial» qui est destinée à servir d'outil pour répondre aux intérêts immatériels spécifiques en jeu.

1. Contested Cultural Objects: Stolen Possession or Lost Heritage?[1]

Cultural objects have a dual nature. They can be seen as possessions, and as such they can be owned and traded and are subject to property law regimes. Yet, it is their intangible (cultural or heritage) value that sets them apart from other goods. That intangible value is an all but static notion: an artefact may be valued by the general public because of its scientific or aesthetic value, but at the same time be of spiritual importance to a community, it may be symbolic of the cultural identity of a people, or it may be a special family heirloom. Whereas, in broad terms, national private law addresses cultural object as possessions, international public law addresses the intangible cultural and heritage interests at stake.

Cultural Objects as Possessions

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

Depending on the adoption by a specific country of international treaties that arrange for the restitution of looted cultural objects, this domestic private law will have been adapted to international standards. Nevertheless, these rules only apply to claims that are based on a loss after both states adopted the convention, and only in as far the country where the object is located implemented these standards in national law and obviously do not cover historical cases such as Nazi looted art or colonial takings.

Cultural Objects as Heritage

From a heritage point of view, cultural objects are valued because of their intangible value to people. Throughout history and in most cultures, objects that are symbolic of a religious or historical identity tend to enjoy legal protection in their original setting. Illustrative in this respect is a 1925 Indian court ruling holding that a contested Hindu family idol "could not be seen as a mere chattel which was owned".[2] This intangible heritage value of cultural objects has been the rationale underlying the protected status of cultural objects in international law since its foundation.[3] In that sense Hugo Grotius (1583–1645) already in 1625 declares cultural objects a protected category – in his turn referring to the writings of Polybius and Cicero – where he argues these are exempt from the righ to pillage in times of war:

> *There are some things of that nature,* […] *which even common reason will have spared during war.* […] *Such are temples, porticos, statues, and the like. Cicero much commends Marcellus, because he took such a particular care to preserve all the buildings of Syracuse both public and private, sacred and prohpane, as he had been sent with an army, rather to defend than take the city.* […]. *Our ancestors used to leave to the conquered, what things were grateful to them, but to us of no great importance.*[4]

With regard to wartime looting, the legal obligation to return cultural objects is well established in international law. The peace treaties after the Napoleonic Wars at the outset of the 19th century are generally considered the turning point in the development of the law in this respect: restitution of dispersed heritage on the basis of territoriality – instead of "winners takers" – was declared a principle of justice "amongst civilised nations".[5] Eventually, the legal obligation to return cultural objects looted in times of war was codified in the First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict Hague Convention.[6]

In spite of the fact that these principles, in the European context, were long recognised, colonial powers generally did not acknowledge legal obligations to return cultural objects to their former colonies. This means that claims that are based on the unlawfulness of the looting at the time are highly complex. In my view, therefore, a human rights' approach offers better prospects to regulate this field. Because it focuses on interests of people today.

2. Human Rights Law Notions

Disputes relating to contested cultural objects do not necessarily have to be approached as issues of property or ownership, but may also be approached as cases that, in their essence, are about lost heritage. This implicates a step back from the model based on absolute and exclusive rights, and towards a model where collective and shared identity values are central to rights with regard to the specific object. The 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (the Faro Convention), for example, very well illustrates such shift in approach. It defines cultural heritage as "a group of resources inherited from the past which people identify, *independently of ownership*, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions".[7] Although the Faro Convention does not aim to create rights – but rather voices policy aims for governments –, it opened the door to a new understanding of cultural objects: away from a focus on property and exclusive rights, and towards a recognition of the collective heritage interests at stake.

Heritage Community

The Faro Convention introduced the concept of "heritage communities": "A heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations".[8] This idea of heritage communites as "right holders" underscores that, apart from owners, more parties may have legitimate interests in the same herirage. In relation to contested cultural objects these may be creators, former and present owners, but also the general public – reflecting the importance of public access to "universal heritage". Such an approach contrasts with the "all-or-nothing" outcome in an ownership approach: under applicaton of ownership law only one party would be seen as the legitimate "right holder", namely the owner. The notion of heritage communities allowes for more flexibility. It also better suits spiritually important objects or archaeological finds, cultural objects that in their original setting often were inalienable communal property and could not be privately owned. Nevertheless, this special legal status did not "stick" to the objects: after entrance into another jurisdiction they may well be privately owned and traded, and are treated as any other commodity.

Equitable Solutions to Competing Claims

In as far as it concerns competing claims, the Faro Convention provides for the rule that states should "encourage reflection on the ethics and methods of presentation of the cultural heritage, as well as respect for diversity of interpretations"; and "establish processes for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities".[9]

This preference for cooperative solutions reflects soft law and (best) practice in the field of contested cultural objects. The 2015 Operational Guidelines to the 1970 UNESCO Convention, for example, suggest in the event of competing claims (to national cultural property) "to realize [...] interests in a compatible way through, inter alia, loans, temporary exchange of objects [...], temporary exhibitions, joint activities of research and restoration".[10] Such creative solutions are, in fact, not uncommon in practice as it is. For example, when France in 2011 returned looted scriptures to (South) Korea on a renewable long-term loan – to circumvent laws prohibiting French museums to deaccession public collections –, it separated ownership rights from rights to access, use and control.[11]

A solution mirrored by the Korean example is the transfer of title of (presumably looted) Nok and Sokoto statuettes by France to Nigeria, whereas they physically remained in France under the terms of a 25-year loan.[12] In the Korean example physical possession, whereas in the Nigerian example rehabilitation and a formal recognition, were probably key. Besides, also in the field of Nazi looted art, the 1998 Washington Principles prescribe "fair and just solutions, depending on the circumstances of the case". This means it does not add up to a right to the return of full ownership rights, but a right to an equitable solution. Solutions in that field not seldom involve a financial settlement, where recognition by addressing the ownership history (e.g. in a plaque in a museum) also may feature as (part of) solutions found.[13]

A Human Right to Access to (one's) Culture

As mentioned, the Faro Convention does not create binding rights. Nevertheless, binding international human rights instruments provide for a number of rights that may be relevant. Of key importance in that respect is the evolution of the right of "access to culture", as it developed from the right to culture in the International Covenant on Economic, Social and Cultural

Rights (ICESCR).[14] According to the 2009 General Comment on that right to culture this has come to include "access to cultural goods", and this implicates that states should adopt "specific measures aimed at achieving respect for the right of everyone [...] to have access to their own cultural [...] heritage and to that of others."[15] The 2011 Report of the independent expert in the field of cultural rights, Farida Shaheed, is furthermore instructive where she concludes that:

> *The right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage.*[16]

Shaheed also observes that "varying degrees of access and enjoyment may be recognised, taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages." Similar to the Faro Convention, she furthermore makes interesting distinctions between:

- (a) originators or "source communities", communities which consider themselves as the custodians/owners of a specific cultural heritage, people who are keeping cultural heritage alive and/or have taken responsibility for it;
- (b) individuals and communities, including local communities, who consider the cultural heritage in question an integral part of the life of the community, but may not be actively involved in its maintenance;
- (c) scientists and artists; and
- (d) general public accessing the cultural heritage of others.[17]

Although this list is of a general nature and not per se aimed at lost cultural objects, it underscores that the specific social function of cultural objects, and their meaning to certain (groups of) people, may define entitlement. Moreover, it signals a trend away from national interests and towards community interests.

This model where entitlement to lost cultural objects is based on a "right" of access to one's cultural heritage, resonates in recent declarations and soft law instruments.[18] The 2019 German Framework Principles, for example, provides as rationale that "all people should have the possibility to access their rich material culture [...] to connect with it and to pass it on to future generations".[19]

UNDRIP

While the right of "access to culture" in the binding ICESCR may seem vague and unspecified, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is clear and specific. The UNDRIP entitles indigenous peoples to rights with regard to their cultural heritage, including their lost cultural property.[20] In Article 11(2), this is defined as a right of "redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs".[21] Article 12 deals with rights to objects of special importance – providing for a right to "use and control" where lost ceremonial objects are concerned and a straightforward right to repatriation for objects containing human remains.[22]

Since these provisions are acknowledged as part of the (binding) right of access to culture insofar as the cultural heritage of indigenous peoples is concerned, this is an important instrument in the field of colonial collections.[23] That it is more than "just" a declaration is illustrated by the fact that the UNDRIP was adopted after 20 years of negotiations, by now is supported almost universally, and – in as far as the cultural rights are concerned – is considered having the status of (binding) customary international law.[24] States, in other words, are under the obligation to assist indigenous peoples in providing "redress through effective mechanisms" and to "enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned".[25]

As to the question of what exactly constitutes an indigenous people, the UNDRIP deliberately abstained from a definition to allow for the flexible evolution of the concept.[26] In general terms the link between people, their land and culture, and self-identification as a distinct community, are considered decisive factors.[27]

3. Heritage Title

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

A second point is that this approach enables the classification of objects, depending on their social function and identity value for the people involved. UNDRIP differentiates for example between ceremonial objects, objects containing human remains and a general category of cultural objects "taken without free, prior and informed consent".[28] In that sense, differences in entitlement follow from the type of object and identity values concerned.

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

As mentioned above, this reflects soft law that promotes creative and more flexible solutions. On the level of human rights law the jurisprudence of the Inter-American Court of Human Rights is noteworthy in this regard. In the 2015 *Kaliña and Lokono Peoples v. Suriname* case the Court acknowledged, first of all, pre-existing rights of the indigenous peoples with respect to their ancestral lands. The court futhermore held that the right of access can be compatible with rights of other title holders.[29] It ruled that "the State must establish, by mutual agreement with the Kaliña and Lokono peoples and the third parties, rules for peaceful and harmonious coexistence in the lands in questions, which respect the uses and customs of these peoples and ensure their access to the Marowijne River".

The notion that thus emerges can be denoted as "heritage title".[30] Entitlement in this respect depends on a continuing cultural link between people and cultural objects, and the rights involved are defined in terms of access and control – not in terms of absolute and exclusive ownership. Although

we are accustomed to defining relations between objects and people by way of exclusive ownership, this exclusivity does not always fit cultural *property*. The reason for that is that the intangible heritage values – especially those of earlier foreign owners – are not sufficiently covered by regular ownership laws. Dependant on the type of object and the values it represents, heritage title gives rise to equitable. The specific circumstances and interests involved should determine what is "equitable". Althought, the intangible heritage value of an object may not be the sole point of reference in disputes regarding contested cultural objects, it is important, to acknowledge it as a legitimate interest.

Access to Justice

A last question that needs to be addressed is how to make heritage title operational. Alternative dispute resolution and cultural diplomacy on the interstate level are often promoted as being best equipped to solve disputes in this field.[31] However valid this may be in specific cases, access to justice eventually is key, not only in the recognition of unequal power relations, but also for the development of norms in a field that is hindered by legal insecurity. The question of whether norms can be made operational obviously depends on their binding force. Here, hurdles still exist as the law is evolving. Nevertheless, heritage title may operate as a "narrative norm".[32] Heritage title should thus instruct judges on the interpretation of open norms that exist in all jurisdictions, for example concepts such as "morality", "general principles of (international) law" or "reasonableness and fairness".[33]

In terms of a straightforward human rights claim, the question is which forum could evaluate a claim based on the argument that the continued deprivation of a specific cultural object is an infringement of the right to "access to culture". The Optional Protocol to the ICESCR offers a complaints procedure. This procedure, however, is limited to nationals or groups in the State responsible for the alleged violation, whereas claimants are not usually nationals of a holding State, and is subject to ratification of the Protocol by that State.[34] Within the European human rights system, while a stumbling block is that the European Convention on Human Rights does not include a right to culture, claims could be addressed through the human right to property and a number of other rights.[35]

An interesting roadmap on how to proceed is given by the Colombian Constitutional Court in a 2017 case concerning the "Quimbaya Treasure".[36] In its ruling, the Court ordered the Colombian government to pursue – on behalf of the indigenous Quimbaya people – the return from Spain of a treasure of 122 golden objects lost at the close of the nineteenth century. The Court argued that under today's standards of international law – referring to human rights law but interestingly also to the 1970 UNESCO Convention –, indigenous peoples are entitled to their lost cultural objects. *How* such a claim is pursued is left to the discretion of the government, but according to the Court *the fact that* governments should work towards this goal is clear.[37] In a first reaction to the subsequent request by the Colombian authorities for the return of the Quimbaya Treasure, the Spanish authorities, however, declined on the grounds that today the Quimbaya Treasure has become Spanish patrimony.

This, of course, has long been a common European reaction to restitution requests by former colonised people. It is also reminiscent of the (initial) position that the Austrian government took in the *Altmann* case concerning Nazi-looted art: due to national patrimony laws the Klimt paintings that were lost during the Nazi era were inalienable Austrian national cultural heritage. In that case, however, after US Supreme Court established a violation of international law, the Austrian government accepted to abide by an arbitral award and the rights of Altmann prevailed.[38] It illustrates the difficulties in this field, but also highlights the potential of the human rights framework as a universal language to further develop this field.

Conclusion

Although the rationale underlying the protected status of cultural objects in international law is their heritage value, claims to contested cultural objects generally are perceived as a matter of ownership. By doing that, the heritage interests of people cannot adequately be addressed. Soft law instruments, on the other hand, increasingly do acknowledge the interests of former owners in their lost cultural objects. An ethical approach and alternative dispute resolution for settling these types of cases that follows from such a soft law approach, may therefore at times be the best way forward. From a legal perspective, however, this raises a fundamental question. If we believe this is a matter of (delayed) justice, the role of law is to provide for a framework where similar cases can be dealt with similarly.

This paper therefore suggests a human rights law approach to structure this field. Human rights law is particularly equipped to address heritage and identity values; they are of a (more or less) universal nature, and may penetrate and shape how private law is being interpreted and adjudicated. The right of "access to culture" as developed in the realm of the right to culture in Article 15 (1) ICESCR can be a point of reference in such an approach.

1 This paper is based on Campfens, Evelien (2021): "Contested cultural objects: property or heritage?", in: Holly O'Farrell; Pieter J. ter Keurs (Eds): *Museums, Collections and Society. Yearbook 2020*, Leiden, pp. 59–75.
2 *Mullick v Mullick* (1925) LR LII Indian Appeals 245, cited in Prott, Lyndel V.; O'Keefe, Patrick J. (1992): "Cultural Heritage or Cultural Property?", in: *International Journal of Cultural Property*, Vol. 1, p. 307. However, when it comes to the protection of *foreign* heritage interests such special treatment is not a given.
3 On the historical development, see: Campfens, Evelien (2019): "The Bangwa Queen: Artifact or Heritage?", in: *International Journal of Cultural Property*, Vol. 26, pp. 75–110.
4 Grotius, Hugo (1625): *De Jure Belli Ac Pacis* (On the Law of War and Peace), Vol. III, chapter 12, V. For this translation see https://oll.libertyfund.org/page/grotius-war-peace#lf1032-03_label_1362, accessed 10 March 2023.
5 Problematic is that international law for long was biased in this respect. A discussion in Campfens, 2021, *Contested cultural objects*.
6 *The Hague Convention*, adopted 14 May 1954. 249 UNTS 358.
7 *Framework Convention on the Value of Cultural Heritage for Society* (adopted 27 October 2005), CETS No. 199 (Faro Convention) (emphasis added), Art. 6.
8 *Faro Convention*, Article 2(b).
9 *Faro Convention*, Article 7 (b).
10 Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted at the UNESCO Meeting of States Parties, 18–20 May 2015 (C70/15/3.MSP/11), para. 19.
11 *Décret No.2011–527 Portant publication de l'accord entre le Gouvernement de la République Française et le Gouvernement de la République de Corée relatif aux manuscrits royaux de la Dynastie Joseon (ensemble une annexe)*, adopted 7 February 2011, see https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000024022738?r=g7YcXLuG3d, accessed 10 March 2023.
12 Cornu, Marie; Renold, Marc-André (2010): "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", in: *International Journal of Cultural Property*, Vol. 17, no. 1, pp. 1–31, here pp. 20–21.
13 Campfens, Evelien (2021): *Cross-border claims to cultural objects*, The Hague, p. 106.
14 Article 15(1)(a) of International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966), 993 UNTS 3 (ICESCR). See also Art. 27 of the UDHR.
15 Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009), UN Doc E/C.12/GC/21, under "Normative content", paras 7, 49(d), 50.
16 Human Rights Council: "Report of the Independent Expert in the Field of Cultural Rights (Farida Shaheed)" submitted pursuant to resolution 10/23 of the Human Rights Council, 22 March 2010 [Doc A/HRC/14/36.
17 Ibid., (62) under "Right Holders", p. 16.
18 Campfens, 2021, *Cross-border claims*, pp. 156–159.
19 Framework Principles for Dealing with Collections from Colonial Contexts (*Erste Eckpunkte Zum Umgang Mit Sammlungsgut Aus Kolonialen Kontexten),* 12 March 2019, https://www.kmk.org/fileadmin/pdf/PresseUndAktuelles/2019/2019-03-25_Erste-Eckpunkte-Sammlungsgut-koloniale-Kontexte_final.pdf, accessed 12 March 2023.
20 See also International Labour Organization (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989) 28 ILM 1382. It requests States to take special measures to "safeguard" the cultures of indigenous peoples (Art. 4). UNDRIP is more specific.
21 UNDRIP, Art. 11(2).
22 UNDRIP, Art. 12(1): "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; […] the right to the use and control

of their ceremonial objects; and the right to the repatriation of their human remains. (2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned".

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

24 It was adopted by a majority of 144 States in favour, 11 abstentions and four votes against. Since then, these objectors all reversed their vote. See also http://ila-brasil.org.br/blog/the-customary-international-status-of-indigenous-peoples-rights/, accessed 13 March 2023.

25 UNDRIP, Art. 12(2).

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

27 See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on Behalf of Endorois Welfare Council) v. Kenya* (2010) ACHPR, Communication No. 276/2003, discussed in Vrdoljak, Ana Filipa (2016): "Standing and collective cultural rights", in: Andrzej Jakubowski (Ed.): *Cultural Rights as Collective Rights. An International Law Perspective*, Leiden, pp. 272–287, p. 281.

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

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

30 See Campfens, Evelien (2020): "Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims", in: *Netherlandish International Law Review*, Vol. 67, pp. 257–295.

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

32 Jayme, Erik (2015): "Narrative Norms in Private International Law, The Example of Art law", in *The Hague Academy of International Law, Recueil des cours, Collected Courses*, Vol. 375, p. 41: "These norms speak, but they are flexible and not very precise. They describe certain policies without giving answers in a single case". As an example, he refers to the 1998 *Washington Principles* that judges should take into account. See https://www.kulturgutverluste.de/Webs/EN/Foundation/Basic-principles/Washington-Principles/Index.html, accessed 13 March 2023.

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

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

35 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR). In its case law, rights that fall under the notion of "cultural rights" have been recognized. See Jakubowski, Andrzej (2016): "Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights", in: Jakubowski, 2016, *Cultural Rights as Collective Rights*, pp. 155–179, p. 158 and pp. 178–179.

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

37 For a discussion, see Mejia-Lemos, Diego (2019): "The 'Quimbaya Treasure' Judgment SU-649/17", in: *American Journal of International Law*, Vol. 113, pp. 122–130.

38 For an overview, see e.g. Renold, Caroline; Chechi, Alessandro; Bandle, Anne Laure; Renold, Marc-André (2012): "Cases Six Klimt Paintings – Maria Altmann and Austria", on: *ArThemis*, https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria, accessed 13 March 2023.