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Law versus Justice?
An Intercultural Approach to the Problem of European Collections of Colonial Provenance

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Christoph-Eric Mecke

Abstract

The article examines the question of how objects in European museums and collections that were part of the colonial-era cultural heritage of formerly colonised peoples should be dealt with legally. It highlights four different legal options for the repatriation of cultural heritage of colonial provenance against the background of current legal policy developments, i.e. private law standards in German law (1), national and international standards of cultural heritage protection law (2), the international human rights law approach (3), and self-regulation by collective public self-commitment in terms of soft law (4). On the basis of the "Nothing about us without us" principle, which is often invoked by descendants of colonised peoples, the article concludes by formulating its own proposal on how to deal with objects of colonial origin in European museums and collections in the future.

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Droit vs. justice ? Patrimoine culturel de l›époque coloniale en Allemagne (Résumé)

Cet article se penche sur la question de la gestion juridique des objets dans les musées européens et des collections faisant partie du patrimoine culturel de l'époque coloniale des peuples anciennement colonisés. Il met en lumière quatre options juridiques différentes pour le rapatriement de patrimoine culturel de provenance coloniale dans le contexte de l'évolution actuelle de la politique juridique, à savoir les normes de droit privé en droit allemand (1), les normes nationales et internationales du droit de la protection du patrimoine culturel (2), l'approche du droit international des droits humains (3) et l'autorégulation par l'engagement public collectif en termes de droit souple (soft law) (4). Sur la base du principe « Rien sur nous sans nous », souvent invoqué par les descendants des peuples colonisés, l'article conclut en formulant sa propre proposition sur comment gérer les objets d'origine coloniale dans les musées européens et les collections à l'avenir.

The Problem

Cultural heritage objects which originated from colonised areas in Africa, Asia and the Pacific region, but which are kept in European, and in this case German, museums and collections, are only *one* consequence of decades-long colonial repression and exploitation. But it is a long-term consequence that continues to be there for all to see, visible evidence of this historical injustice. The first public statements in the German literature on the issue of the return of cultural heritage date from just after the end of the German colonial era[1] when, in the Treaty of Versailles of 16 July 1919,[2] the German Reich "waived in favour of the Allied and Associated Powers all its rights in respect of its overseas possessions". However, at the time there was no awareness whatsoever of the injustice which manifested itself in the unintended loss and lack of repatriation of cultural assets and which has continued even since the end of the colonial era.[3] Awareness of the right to cultural repatriation to ethnic victim groups was thus completely lacking even where the question of returns in the civil law sense was raised.[4] Moreover, the fact that the issue is not just a question of ownership in the legal sense was articulated publicly in 1978, not by an official representative of the descendants of the former colonial masters,

but by Amadou-Mahtar M'Bow, General Director of UNESCO at the time: "The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better".[5]

In their 2018 "Report on the Restitution of African Cultural Heritage", commissioned by French President Emmanuel Macron, Felwine Sarr and Bénédicte Savoy echoed the appeal made by M'Bow forty years earlier and called for the restitution "in a swift and thorough manner without any supplementary research regarding their provenance or origins, of any objects taken by force or presumed to be acquired through inequitable conditions" including acquisitions by "active [colonial] administrators on the [African] continent during the colonial period (1885–1960) or by their descendants" and by private parties "through scientific expeditions prior to 1960".[6] Since the report was published, European museums and collections outside of France have also been facing much more pressure from the public discourse to justify their actions. In November 2017, a year prior to the report's publication, Emmanuel Macron gave a speech in Ouagadougou, Burkina Faso's capital city, which attracted much international attention, in particular the lines: "I belong to a generation of French people for whom the crimes of European colonisation are undeniable and part of our history".[7]

Is it justifiable, considering this, for the descendants of past European colonial powers to hold on to cultural heritage of colonial provenance in their museums and collections? Are they not in fact morally and even legally obliged to offer to return these objects? And if so, to whom exactly should they be returned and under what circumstances should the repatriation occur? Or is it perhaps the case that, more than one hundred years after the end of the German colonial era, current law in fact contravenes any potential moral duty to repatriate the objects, because there are no legal rights to repatriation that could be enforced by the courts? Do perhaps museums lack the legal authorisation to relinquish cultural heritage because there is no state permission to export cultural assets, or because the recipients of such repatriations would not be in a position to legitimise their claim in a way that would stand up in court as complying with the German Code of Civil Procedure? Today's *law versus justice* is a direct continuation of a historical *crime versus justice*, at least in the eyes of many descendants of colonised peoples.

The contradictions within the *external* perspective of law are mirrored by *internal* contradictions within law. This can be seen, for instance, in the fact

that, even in the 20th century, "international law" or "the law of nations" continued to be a reflection of the interests of modern European nations.[8] On the one hand, European occupations outside of the European continent were legitimised on the basis of customary international law by claiming that the occupied Indigenous territories were allegedly "ownerless". The criteria, however, used to describe the alleged lack of ownership were defined unilaterally following the categories of contemporary European public law.[9] What was completely ignored, on the other hand, either wilfully or out of sheer blindness, was the fact that, even by the standards of the time, which were exclusively based on European conditions, thought patterns and political interests, the prerequisites for lawful occupation by the then prevailing law of nations, i.e. the lack of ownership of the colonised regions as defined by European theories of statehood, did not in fact apply and that, as a consequence, the occupations were indeed unlawful under international law at the time.[10]

Moreover, customary international law first introduced the notion of protecting sacred artefacts at an early stage, albeit notwithstanding the traditional right of plunder, under which any goods looted from the enemy during armed conflicts could be declared "ownerless property" (*res nullius*), which legally justified their permanent appropriation.[11] As early as 1815, the European Alliance of Victorious Nations at the Congress of Vienna in fact ordered the restitution of all cultural assets that had been taken by Napoleon.[12] The Hague Convention of 1899 and its slightly modified "Regulations concerning the Laws and Customs of War on Land" of 1907 marked the end of the legitimisation of the traditional right of plunder during a war on land in Europe, which had already effectively been abolished by customary international law.[13] However, these contemporaneous limitations by international law of the right of plunder were never actually applied to the African colonies.[14] This was mainly due to the fact that the colonial-era European nations almost unanimously drew a distinct line between "civilised" peoples and "cultural states" (in German "*Kulturstaaten*"[15]) on the one hand and peoples outside the sphere of western Christian civilisation and culture on the other,[16] even among the proponents of emancipation movements such as the early women's rights movement in Europe.[17]

Those outside the "civilised" realm could not lay claim to the protection and recognition of the "civilised" law (of nations) that governed the European states and were thus effectively at the mercy of European powers. This applied not just to incidences of the state occupation of land and the seizure of movable objects but also to a vast array of so-called "contracts", which in fact provided the legal basis for the acquisition of land and for the awarding of conces-

sions to private German organisations such as the German Colonial Society for Southwest Africa ("*Deutsche Kolonialgesellschaft für Südwestafrika*") in the early days of German colonialism. These contracts between the tribal leaders and German private colonial societies, which sealed the transfer of huge tracts of land, made a mockery of any modern European notion of contractual justice, even by the standards of the time, alone on the basis of the disparity between the mutually agreed "contractual services". Had German civil law, which was in force at the time, been consistently applied,[18] such "contracts" would have had to have been considered unethical and therefore declared void, which some people in Germany were forced to admit even back then.[19]

Furthermore, the colonial masters and their intellectual precursors and defenders in Germany considered their own legal culture to be of such superiority from the point of view of civilisation that they assumed a "cultural duty to introduce our legal concepts to the Hottentots."[20] On the other hand, the same "legal concepts" that could have protected the colonised peoples and ensured their *de jure* recognition were deliberately withheld from them and instead employed purely for the benefit of their "masters". What went on in the so-called protectorates was considered a matter of internal German interest[21] and the relationship between the protectorates and the German Reich was not governed by the standards of international law but the former were *de facto* under the command of the latter.[22] At the same time, however, the protectorates were not actually part of the territory of the German Reich, precisely in order to avoid the German imperial constitution being applicable to the German colonies.[23] While the German Reich, founded in 1871, had on the basis of its constitution made an important step towards becoming a state formally governed by the rule of law,[24] the German colonies were left completely exposed to the arbitrariness of German officialdom and often also to the brute force of German soldiers and colonial "masters".

The legal inconsistencies, however, were not limited to the colonial era itself but continue to plague any present-day political or legal attempts to reflect on the historical injustices committed in the name of the German state. A case in point were the injustices committed during the Nazi period, where the "Washington Conference Principles on Nazi-Confiscated Art" of 1998[25] led to a self-commitment on the part of the German "Federal Government, the Federal States and the municipal governments to locate and return cultural assets confiscated during the period of Nazi persecution"[26], while a similar agreement on an international or national level for cultural heritage confiscated during the colonial era is still lacking.

Furthermore, there is an almost unbearable disparity between the claims for restitution made by the peoples in the former colonies who had their cultural heritage stolen, and the refusal, up to just twenty years ago, by the German authorities, pointing to the alleged duty on the part of the state to permanently preserve the global, and therefore the African, cultural heritage in – notably German – museums.[27] The "Declaration on the Importance and Value of Universal Museums", signed and published by eighteen directors of world-renowned museums as recently as 2004, argued along the same lines. Not only did it downplay the historical injustice committed out of a sense of cultural superiority on the part of the European nations; the signatories even went as far as making their *own* counterclaims to those made by Indigenous peoples. Objects of colonial provenance were turned into national or European cultural assets by the assertion that many of the artefacts had "become part of the museums that [...] cared for them, and by extension part of the heritage of the nations which house them."[28]

Can we expect a law and a legal practice clearly still rooted in this thinking to provide universal protection and justice? The problem is and has always been that double standards were and are applied, particularly in dealings between Europe and Africa. Further, there is a lack of political will to take the appropriate measures in response to the centuries-long discriminatory treatment of the legal culture in Africa as compared to the legal culture in modern-day Europe. In Prussia, for instance, state seizures of property effectively ceased with the introduction of the General State Laws of the Prussian States in 1794, and in the exceptional circumstances where such might still occur, compensation was automatically due.[29] In Germany this is still lauded as an important step towards ensuring the protection of private property. In the eyes of the colonial masters, Indigenous African forms of legal association and the power to dispose of property,[30] on the other hand, counted for nothing.

Thankfully, the legal protection of cultural heritage, both nationally and internationally, takes a completely different approach today[31] in that European and African artefacts are no longer treated differently; they are all considered equally worthy of protection and their legitimate ownership is legally recognised in the same way. However, this does not necessarily mean that the protection of cultural heritage automatically extends to cultural assets originating from the colonial era.

Is the law, therefore, only part of the problem, or could it also become key to finding a solution? The next section outlines the existing legal options as well as current legal policy developments. It will then attempt to formulate a

proposal for a solution that is more firmly based on normative standards. As is always the case in law, what ultimately counts even if a solution based on normative standards can be found, is a comprehensive assessment of each individual case. Nevertheless, normative standards ensure transparency of the propositions for all parties involved, which form the consistent basis upon which each individual case must be assessed. Transparency, in turn, is one of the conditions which must be met for decisions and critical comments to remain foreseeable, while consistency in the propositions upon which these decisions are based is a structural precondition for more justice and social acceptance.

Possible Legal Basis for the Repatriation of Cultural Heritage of Colonial Provenance

While the repatriation of cultural heritage of colonial provenance from European museums to their places of origin is not the only way of dealing with these assets, other options such as permanent loan agreements and similar forms of curatorial cooperation can only be successful if it is clear from the point of view of the heirs of the colonised peoples that the colonial principle "All about us without us" is consistently replaced by the principle "Nothing about us without us".[32] Law, on the other hand, comes into play mainly in cases where repatriation claims are denied. This raises the question of whether prevailing national and international law can form the legal basis for repatriation claims that are enforceable by the courts. Four different legal regimes can potentially be used in dealing with colonial-era cultural heritage: a) private law standards, b) national and international standards of cultural heritage protection law, c) collective international human rights for the protection of cultural identities, and – not enforceable by the courts, but under certain circumstances nevertheless even more effective than a judicially enforceable right – d) self-regulation by collective public self-commitment (soft law).

Private Law Standards

Based on private law standards, which apply transnationally, a judicial enforcement of the repatriation of cultural assets would mainly be governed by the owners' claim against the natural or legal person who, according to private law, is *de facto* in possession of the object but not legally entitled to it (wrongful ownership). The claim for the return of property is one of the oldest forms of complaint originating from Roman Law (*rei vindicatio*) and is still at the core of all European legal systems. The claimants and respondents are either natural persons (human beings) or legal persons or entities, i.e., the state or local governments as the authorities which carry legal responsibility for museums, or, depending on the legal structure, these are sometimes the museums themselves.

At first glance and from a postcolonial perspective, European claims for the return of property appear to be the least appropriate legal means by which to fight the battle against the enduring consequences of colonial injustice. However, in terms of the cultural assets which were illegally transferred to Europe in the colonial era – a small part of a much larger whole of colonial injustice – the claims for their return all specifically point to the law that was in force at the site of the seizure (*lex rei sitae*) when it comes to the question of the lawfulness of the acquisition.[33] In the racist dualism of the colonial-era legal order, which was characterised by separate rights for the colonial masters and the Indigenous communities, the legality of the acquisition was generally based on contemporary Indigenous customary law.[34]

German prevailing law could only be applied to the Indigenous peoples of the so-called protectorates by special legal order of the German emperor ("*Kaiser*"). This, however, only occurred in isolated cases and, with the exception of certain areas of public law, the Indigenous populations were still governed by their own laws even under the legal rules of the German colonial power.[35] A contemporary legal commentary on German colonial law specifically stated that "the German laws must not be applied, neither in legal relations between natives, nor in legal relations between natives and whites [...]".[36] This meant that, even from a colonial perspective, Indigenous legal orders, which were largely uncodified, were applicable.[37] As the colonialists were well aware,[38] the local legal systems, though some details differed from one tribe to another, all included the right of protection for objects, whereby these rights were usually held by a family or by the whole community, rarely an individual.[39]

Admittedly, all private, official and legal anthropological[40] records of the uncodified Indigenous tribal laws in force at the time must be treated with circumspection, on the one hand because they regularly include contemporary colonial thinking, be it intentionally or unintentionally, and on the other because they clearly often represent inappropriate attempts at finding parallel structures in European legal thought.[41] While this means that it is no longer possible to reconstruct the different orally transmitted tribal laws in detail and with a high degree of legal and historical accuracy, it can nevertheless be determined that the theft of property committed by a private party, for instance, would have no more resulted in the lawful acquisition of title under Indigenous tribal law than it would under European law.[42] The same can be said for the transfer of the right of disposal of cultic objects, which would clearly have been void according to European law on the basis of the right of special protection for "*res sacrae*" (sacred objects).[43]

Since the claims for repatriation of cultural objects of colonial provenance refer to artefacts located in Germany at the time the actions are filed, any further conditions for the claims fall under German law.[44] According to the latter, it is not possible for any of the parties in the subsequent chain of ownership to claim to have acquired these objects in good faith if they derived from theft or if the original rightful owner or owners were forced to relinquish them against their will and under so-called massive duress or threat of harm.[45] The acquisition of property by possession of a movable object under German law also directly depends on the new owner or owners acting in good faith and is therefore precluded in cases where they know that they are not the rightful owners, or where their ignorance can be shown to be due to reckless conduct.[46]

However, even in the rare cases where all the necessary proof has been provided, a repatriation by court injunction would often be made impossible by a statute of limitations. This does not mean that the claims for repatriation would be rendered void, but it does mean that any such claim would depend on the objects being returned voluntarily and that their repatriation could no longer be enforced by the court.[47] While it is possible, in theory, to introduce legislation under which colonial assets are exempt from a statute of limitations, there has been little political will, to date, to do so. Attempts made by some members of the German Parliament (*Bundestag*) to introduce legislation precluding German museums and other institutions from using a statute of limitations with regard to cultural heritage of colonial provenance failed as recently as 2021.[48]

Moreover, any claims for restitution based on private law are doomed to fail from the outset in cases of appropriation by the sovereign or confiscation by the state, which was consistently sanctioned as lawful under colonial law in force at the time.[49] In this case, as in the cases of claims on the basis of international law dealt with below, the question arises whether there should be any exceptions to the principle of intertemporality. According to this principle of continental European law, which harks back to Roman law and has since the 20th century also been recognised in international law,[50] any legal assessment of the facts of a case may only be based on the law that was in force at the time the events occurred and not on the law that is in force at the time of the legal dispute,[51] even if the laws that were in force at the time of the alleged offence would now be considered morally and historically unjust.[52] Although the principle itself implements a fundamental element of justice (making it unlawful to adapt legal standards retrospectively protects those who obey them from adverse effects later), doubts have been raised on occasion as to whether it should be applied without exception. According to Naazima Kamerdeen, however, it is "difficult to reconcile these two views" in cases of colonial injustice "as there appears to be a conflict". [53] For this reason, transfers of certain assets in GDR times, which are now considered to have been unjust, have in recent years been restricted, at least with regard to future transactions, or even completely denied. However, this has not yet resulted in any practical changes to the legal assessment of cases pertaining to German colonial history.[54]

According to Matthias Goldmann and Beatriz von Loebenstein, many "emancipatory gains" could already be made if the principle of intertemporality were applied strictly and without exception in a truly "critical assessment of the law of the past" by applying "the legal and factual standards of the past", and if "the reconstruction of the law of the past" was thus carried out on the basis of the "concrete standards which were already used to full effect in the past."[55] Using this principle as a basis for their assessment, Goldmann and von Loebenstein have recently come to the conclusion that even just the "colonial presence [in Southwest Africa]" was "probably in violation of international law"[56] by the standards of international law at the time, which then automatically calls into question the lawfulness of all subsequent sovereign acts even if the principle of intertemporality is applied.

National and International Standards of Cultural Heritage Protection

Repatriations of colonial cultural heritage by German institutions[57] have so far been characterised by the fact that neither national nor international legal standards of cultural heritage protection nor the courts have played any significant role,[58] and that, "to date, no generally accepted procedures" have existed.[59] Paradoxically, the most spectacular case in the context of the repatriation of cultural assets of colonial provenance that has so far come before the courts in Germany did not aim to enforce restitution as quickly as possible, but rather to *prevent* repatriation. Following a six-year process of verifying the merits of the claim, the state government of Baden-Württemberg, in recognition of the colonial injustice that had occurred, decided in 2019 to return to the Namibian government the personal effects (a Bible and a whip) of Hendrik Witbooi (c. 1830–1905), a Nama leader ("Kaptein") who was killed in battle by German colonial forces and is a national hero of Namibia today. In 2013, the Namibian government had made a formal claim to the German state of Baden-Württemberg, where the Linden-Museum in Stuttgart had held Witbooi's personal Bible and whip since 1902. A group of Nama tribal elders, however, went before the courts in an attempt to prevent the restitution to the Namibian state authorities and instead to have the objects returned to the Witbooi family.[60] However, the state constitutional court, which heard the case brought by the Nama Traditional Leaders Association shortly before the repatriation was due to take place, declared that it did not have jurisdiction because the dispute was "not covered by state constitutional law but should probably be dealt with in Namibia".[61] The case has drawn attention to an issue that goes beyond the actual matter of repatriation and raises the additional question as to who is in fact the rightful recipient of such objects within their country of origin, if the descendants of the former victims of colonialism do not feel that their interests are represented by the government of the day[62] or where groups of victims are in conflict with each other.[63]

Present-day cultural heritage legislation is not equipped to deal with either of these cases, since both national cultural heritage law and traditional international law focus on the state as the relevant holder of rights and legitimate representative of the communities of origin.[64] There are a number of additional legal obstacles which cause both German and international cultural heritage protection law in its current form not only to fail to contribute anything

towards a resolution of the issue of the persistent consequences of colonial injustice, but to actually become part of the problem. This is due, firstly, to the principle of intertemporality mentioned above being applied when identifying illegal acquisitions and transfers of cultural assets[65]; secondly, to the explicit refusal to apply international law contracts, which regulate the repatriation of illegally imported cultural heritage objects that were removed from the countries of origin during the colonial era[66]; thirdly, to the lack of ratification of relevant international law contracts by Germany[67], and finally, to the limitation of international law to the removal of cultural assets during armed conflicts.[68] together with the legal opinion that "the period of colonial occupation overall" cannot be viewed "as a form of permanent armed conflict".[69] Moreover, standards of national and international cultural heritage protection do not aim to protect the creators of colonial cultural objects and their heirs, but rather the holdings of today's museums, including their collections of colonial provenance.[70] Many existing regulations would actually compound the historical injustice associated with colonialism rather than alleviating it if they were applied to cultural heritage of colonial provenance.[71]

It took almost forty years, until 2007, for the UNESCO Convention of 14 November 1970 to be ratified by the Federal Republic of Germany and for its provisions to be signed into national law. However, both the German Transformation Act of 2007 and the Cultural Heritage Protection Act of 2016 which followed on from it[72] are in fact irrelevant regarding stolen art, if only because they have no retrospective effect. Unlike France and England, Germany does not yet have any special laws pertaining to colonial cultural assets or human remains of colonial provenance which would legally authorise museums and colonial collections to return such objects.[73] Issues such as these remain wholly in the domain of political decision-makers and local governments as the legal entities behind these institutions. As recently as 2018, an official statement by the Federal Government on the question of the repatriation of cultural heritage of colonial provenance read:

> *The overwhelming majority of institutions that maintain cultural assets are operated and controlled by the individual* [Federal] *States and municipal authorities. The conditions of a possible repatriation are governed by Federal, State and Organisational Laws, and especially the Budgetary Regulations [*sic!*] of the Federal, State and Municipal Governments concerned.*[74]

The citing of budgetary regulations designed to protect the German public assets as a framework under which the restitution of cultural heritage of colonial provenance should be governed is, sadly, still a true reflection of the current legal and political mood in Germany.

International Human Rights for the Protection of Cultural Identities

In light of these shortfalls in the national and international laws for the protection of cultural heritage of colonial provenance, the debate on how such assets should be dealt with has in recent years increasingly shifted its focus onto international human rights for the protection of cultural identities.[75] The human rights approach takes a categorically different view to that of the national and international legal provisions, which are solely aimed at the national or transnational protection of cultural heritage. According to Evelien Campfens, the human rights approach moves the "focus on the unlawfulness of the acquisition at the time", which has dominated cultural heritage protection law up to now, to a present-day perspective, where the "continuing human rights violation of remaining separated from certain objects (and therefore being denied access to participate in one's own cultural life)" takes centre stage.[76] The legal importance of the question of the "proven illegality of the acquisition at the [colonial] time" is replaced by recognition of the immaterial "heritage interests of communities" in "cultural objects taken without the 'free, prior and informed consent' of Indigenous peoples".[77]

Moreover, the purely binary principle of agreeing to the repatriation or refusing to do so is extended by other legal options which "may vary from a right to 'access and control'"[78] to "varying degrees of access"[79] to "a straightforward right to repatriation".[80] The question of whether the occurrence was just *or* unjust in the *past* is replaced by a "*weighing of interests* that different right holders may have in the same object" which focuses on the *present day*.[81] While this rather pragmatic approach has the potential to result in developments in the law at some point in the future,[82] it does not provide a guarantee that a solution will be found that will be acceptable to the colonised peoples. The *historical* injustice, however, which in this volume is impressively denounced by Chief Taku from the Bangwa people,[83] is not remedied by pragmatic solutions for the future but must be recognised in the form of a moral assessment of the past and a legal acceptance of the injustices that occurred

then, by committing to restitution and compensation and by officially naming both the victims and the perpetrators of the injustices.

In the international human rights approach, Indigenous individuals and communities are recognised for the first time as legal subjects that have the same rights as states. However, when it comes to enforcing their rights, individuals and Indigenous communities still depend on the political and legal support of the states they are part of.[84] The prevailing cultural rights of Indigenous peoples today are aimed first and foremost at their states of origin rather than third parties such as the former colonial powers.[85] Incidentally, the same applies to the European institutions that retain cultural objects of colonial provenance, in that they themselves depend on the decision-makers in *their own* states of origin to grant the legal authorisation and export permits required for the repatriation of the objects in question.

Apart from the issue of whether and to what extent human rights conventions and declarations are legally binding,[86] which of course does not just affect the human rights approach, and the difficulties involved in precisely pinpointing the right holders in disputes between several claimants, there is one fundamental problem that pertains specifically to the human rights approach. While the "weighing of interests that different right holders may have in the same object"[87] corresponds exactly with today's pragmatic view of the function of law in western societies, it by no means provides the legal recognition of historical injustice, which has been outstanding for more than a century. On the contrary, the human rights approach may in fact even call for the willingness on the part of the descendants of the colonised communities to permanently recognise the rights of "different right holders", *including* those of the descendants of the European colonisers. Unless the human rights approach results in an immediate repatriation of cultural assets of colonial provenance, it can therefore only be a viable solution for the future if and as far as there is in fact a willingness on the part of the descendants of the colonised communities to develop nuanced solutions that go beyond the simple binary paradigm of restitution *or* refusal. This willingness, of course, cannot be forced – neither from a legal nor from a moral standpoint.

Self-regulation by Collective Public Self-Commitment (Soft Law)

By default, the lack of a possible enforcement by the courts is an element that all collective self-commitments made by cultural institutions and associations have in common. Reference texts that set the standards of practice for museum professionals, including, at international level, the "ICOM Code of Ethics for Museums" published by the International Council of Museums[88] or, in Germany, the "Guidelines for German Museums" issued by the German Museums Association[89] are classified in legal theoretical terms as "soft law", as are all forms of self-regulation. However, this is misleading, at least from the perspective of those who are not trained in the legal profession. The term "soft" does not refer to the social effectiveness of self-commitments, which in some cases – depending, of course, on how aware the public in question are of their colonial past – can be even greater than in cases of state legislation. Impressive examples of the effectiveness of soft law in the area of cultural heritage protection were the restitutions made, irrespective of the fact that the limitation period had long since expired, under the "Washington Conference Principles on Nazi-Confiscated Art", ratified by many states and non-governmental organisations on 3 December 1998. The principles were put into practice by the German authorities under the watchful eyes of a global public sensitised to Nazi crimes and injustices.[90]

The crucial elements in the case of cultural assets of colonial provenance, therefore, are the contents of today's self-commitments as well as the awareness of colonial injustice among the general public in Europe. However, the current picture in this respect is inconsistent. While the "ICOM Code of Ethics for Museums", which follows the UNESCO Convention of 1970, really just reflects and confirms the current legal position,[91] the "Guidelines for German Museums" follow a trajectory which, on the one hand, goes beyond the current legal situation by taking "ethical lines of approach to the politics of restitution" while on the other leaving the final decision on cultural objects to the discretion of one side only, i.e. the current custodians of cultural heritage in Germany, ignoring any and all calls for dialogue.

This means that the structural inequalities which theoretically date back to the colonial era continue to have an effect in negotiations between non-European claimants and European respondents.[92] Even in those rare cases where the enforcement by the courts would be defeated only by a statute

of limitations, the "Guidelines" offer only a personal recommendation from its authors that museums and the authorities legally responsible for them should refrain from raising objections on the basis of a statute of limitations. At the same time, however, the Guidelines contain an explicit reference to the fact that, in "the rarest of cases" where a claimant may have a "legal right to enforce [restitution] by the courts", museums can, as a last resort, raise an objection based on the statute of limitations, thereby blocking the repatriation for ever.[93]

In all other cases, where claimants can no longer provide sufficient proof to enforce their repatriation request for reasons other than the limitation period having elapsed, the Guidelines *do not* recommend that museums voluntarily agree to reverse the burden of proof in favour of the claimants. In another case of historical injustice perpetrated by Germany, i.e. "the loss of assets due to Nazi persecution", on the other hand, the reversal of the burden of proof was specifically provided for, because according to the "Washington Principles" of 1998, "consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era".[94] This reversal of the burden of proof from the claimant to the respondent, who would then have to prove that the acquisition of the cultural assets was lawful, would also be appropriate in the case of colonial injustice. Admittedly, this recently so-called "maximum demand" has been controversially discussed,[95] but as the passage of time since the colonial era is even greater than since the Nazi period, it is even more difficult to provide proof that would stand up in court.

Instead, the German Guidelines for Museums take "two ethical lines of approach to the politics of restitution", according to which the cultural object must *either* be of "special importance" *or* the circumstances surrounding the acquisition of the object at the time must constitute "an unacceptable 'injustice' by our own [*sic!*] standards today".[96] However, the question of who has the power to ascertain whether the object is of "special significance" or whether an "injustice" occurred that is unacceptable by "our own" standards, remains unanswered, as the "Guidelines" themselves admit.[97] This, however, leaves a lot of space for intentionally or unintentionally Eurocentric interpretations to enter into the process of negotiating restitutions.

However, even in cases where these restitution-political "Guidelines" recommend that an object should be returned, the official restitution requires additional proof of a "legal power on the part of the authority responsible for the museum, to hand over property [even] without legal obligation and

purely on the basis of ethical or moral considerations".[98] In 2019 both the German federal government and the state governments expressed a joint political will to create the legal basis to award such powers in cases where there is a "legal need for action" to "facilitate the repatriation of artefacts from colonial contexts".[99] This means that institutions that wish to return cultural assets of colonial provenance will at least no longer be legally prevented from doing so. Nevertheless, very little has been done with regard to legal policy since 2019. A motion brought before the German Parliament in 2021, which would not only have authorised but legally obligated museums, at least those under federal authority, to "work together with the claimants towards a practical solution in line with the Washington Principles for objects which, from today's perspective, can be shown to have been unlawfully acquired",[100] was defeated. Another motion to appoint "an ethics committee with representatives from communities of origin, museums and the sciences" in disputes regarding the repatriation of cultural heritage of colonial provenance,[101] was also rejected by the German parliament in February 2021,[102] as were other motions to preclude the citing of the statute of limitations with regard to claims of restitution of cultural assets of colonial provenance[103] and to reverse the burden of proof in cases of "collections from colonial contexts whose lawful acquisition cannot be proven [...]".[104]

Admittedly, there has been a clear shift in recent years in how cultural heritage of Indigenous provenance is dealt with today towards an approach that "is focused on the present and looks to the future".[105] This not only concerns the international human rights approach to cultural identity but also collective self-commitments with regard to how colonial injustice is dealt with (soft law) in Germany and even more so in the Netherlands,[106] and has recently even gone as far as the introduction of legal bills in Germany, which can be seen at least as a precursor to hard law, i.e. to a statutory provision for the repatriation of cultural heritage. One such approach that is focused on the present has been part of US state legislation for over thirty years: the Native American Graves Protection and Repatriation Act 1990 (NAGPRA), which obligated "museums with federal funding to repatriate Native American cultural items even if there is no proof of claim, if a cultural affiliation with an Indian or Native Hawaiian tribe can be established".[107] In comparison, Germany still has a long way to go with regard to its cultural heritage of colonial provenance.

Furthermore, in early 2021 the German parliament voted on draft legislation governing the restitution of cultural heritage of colonial provenance in German collections, which shed light on yet another aspect of the issue:

not all collections concerned are under federal, state or municipal authority. The circle of potential respondents in restitution claims in Germany also includes private individuals and institutions. The latter, however, cannot be forced to return objects by law or by means of guidelines, even if these objects originated from actual contexts of colonial violence. The draft legislation therefore intended to prepare the ground by setting up a fund for the "repatriation by private parties of stolen cultural objects from colonial contexts". In cases where private institutions would have to be forced by state seizure to repatriate cultural objects to their communities of origin, the fund could then be used to compensate the institutions, as would be their right under the German constitution.[108] This draft legislation was also rejected by the German Parliament.[109]

How to proceed in the future?

As with the repatriation of Nazi plunder, dealing with cultural heritage of colonial provenance and the historical dimension of colonial injustice requires cross-party political will not to hide behind legal regulations created for the protection of property and cultural assets within a state that is governed by the *rule of law*, and not for the purpose of legally (and morally) processing state crimes committed in the past. Such regulations have been known in Germany as "*juristische Vergangenheitsbewältigung*" since the Second World War. Indeed, the German colonial territories were never governed by the rule of law, which at the time applied exclusively to the territory of the German Empire in Europe. It is doubtful that the cross-party will to deal with the consequences of historical colonial injustice, which can be quite painful for the descendants of the colonial masters, is strong enough in Germany even today. In the last legislative period, in 2021, for instance, different parliamentary motions to "unequivocally identify German colonialism as a crime"[110] and to create a central place of remembrance for the victims of colonialism similar to the Holocaust memorial in Berlin,[111] were rejected. This means that "both German colonialism and the European colonisation of Africa, which was associated with the West Africa Conference convened in Berlin by Otto von Bismarck in 1884/1885 [...], continue to remain invisible [...]" in the centre of Berlin.[112] Legislative initiatives by individual states, which are also

responsible for the education system, have pointed to the failure to raise awareness of colonial history in recent decades; according to these initiatives, this should begin with schools,[113] where future generations inside and outside of the German Parliament should be made taught more about colonial injustice than has been the case up to now. What has changed recently is that the coalition government in office since December 2021 has explicitly declared a willingness to seek a "dialogue with the communities of origin [in respect of] repatriations" and to develop "a concept for a place of learning and remembrance of colonialism".[114]

Any solution to the problem of how to deal with cultural heritage of colonial provenance in state, municipal or private institutions should in future be based on two fundamental principles. Firstly, any open or concealed form of unilateral power of interpretation and identification on the part of European states must be relinquished. Secondly, the practice of citing the fact that the provenance or circumstances of acquisition of an object can no longer be fully established as a reason for denying a restitution claim brought by representatives of the community of origin must cease. The Municipal Museum of Brunswick (*Städtisches Museum Braunschweig*), for instance, which is part of the PAESE project, has agreed to return an ammunition belt which probably belonged to the Namibian national hero Kahimemua Nguvauva, the leader of the Ovambanderu tribe, even though its provenance has not been ascertained beyond doubt.[115] The most important issue, however, is the necessity of ensuring global transparency with regard to the objects in Germany. Work on this has already begun following the establishment of a central "German Contact Point for Collections from Colonial Contexts"[116] in 2019 and a "Three-way strategy for the recording and digital publication of German collections from colonial contexts" devised by a conference of German Ministers of Education and Cultural Affairs in 2021; the five museums and institutions involved in the PAESE project of Lower Saxony are also members of a pilot group associated with the strategy.[117] Lower Saxony, specifically, has overseen the creation of the PAESE database, where the cultural heritage that is currently kept in its museums and collections can be accessed online.[118] Against this background, the following tasks should be carried out:

1. All cultural assets of colonial provenance should be made available for researchers worldwide through digital databases as soon as possible.
2. Proactive steps should be taken to offer to return all cultural assets which can be proven to have originated from a concrete context of injustice, especially objects that were acquired without the consent of their

owners or under duress, or objects that were acquired from an owner who was not culturally authorised to dispose of the object in question,[119] and if the offer is accepted, the objects should be returned forthwith to the descendants of the victims of colonial injustice.

3. All other cultural objects of colonial provenance where the states or communities of origin make non-competing[120] claims of repatriation by showing their cultural affiliation with the objects should also be returned, unless
   a. the new owners can prove that the original acquisition was legal, for instance in cases where objects were produced specifically for the purpose of being sold to the colonisers or where objects were part of a free and fair exchange of goods, *or*
   b. the claimants specifically agree to a solution other than physical restitution, for instance a permanent loan or a restitution by digital means only.

1 Valentiner, Wilhelm R. (1919): "Nationales oder internationales Museum?, in: Kristina Kratz-Kessemeier, Andrea Meyer, Bénédicte Savoy (Eds): *Museumsgeschichte. Kommentierte Quellentexte, 1750–1950*, Berlin 2010, pp. 247–251, pp. 247 f.; Heidt, Sheila (2021): "Koloniales Unrecht, Rückgabeforderungen", in: Thomas Sandkühler, Angelika Epple, Jürgen Zimmerer (Eds): *Geschichtskultur durch Restitution? Ein Kunst-Historikerstreit*, Köln, pp. 321–345, pp. 334ff..
2 Gesetz über den Friedensschluss zwischen Deutschland und den alliierten und assoziierten Mächten (Versailler Vertrag), 1919, in: Reichgesetzblatt (RGBl.) 1919, No. 140, pp. 687–1349 (Art. 119, p. 895).
3 Heidt, 2021, *Koloniales Unrecht*, p. 334.
4 On the terms "return" and "repatriation" see Müller, Lars (2021): *Returns of Cultural Artefacts and Human Remains in a (Post)colonial Context: Mapping Claims between the Mid-19th Century and the 1970s*, Working Paper Deutsches Zentrum Kulturgutverluste 1/2021, Magdeburg, p. 10, https://perspectivia.net/receive/pnet_mods_00004508, accessed 15 May 2023.
5 M'Bow, Amadou-Mahtar (1978): "A Plea for the Return of an Irreplaceable Cultural Heritage to Those who Created it, kommentiert von Clemens Wildt", in: *Translocations. Anthologie: Eine Sammlung kommentierter Quellentexte zu Kulturgutverlagerungen seit der Antike*, https://translanth.hypotheses.org/ueber/mbow, accessed 23 March 2023.
6 Sarr, Felwine; Savoy, Bénédicte (2018): *The Restitution of African Cultural Heritage: Toward a New Relational Ethics*: http://restitutionreport2018.com/sarr_savoy_en.pdf, p. 61, accessed 23 March 2023.
7 "Je suis d'une génération de Français pour qui les crimes de la colonisation européenne sont incontestables et font partie de notre histoire." https://www.elysee.fr/emmanuel-macron/2017/11/28/discours-demmanuel-macron-a-luniversite-de-ouagadougou, accessed 23 March 2023.
8 Kaleck, Wolfgang (2018): "Das Recht der Mächtigen. Die kolonialen Wurzeln des Völkerrechts", in: *Blätter für deutsche und internationale Politik*, Vol. 8, pp. 115–120; Hackmack, Judith; Kaleck, Wolfgang (2021): "Warum restituieren? Eine rechtliche Begründung", in: Sandkühler et. al., 2021, *Geschichtskultur durch Restitution?*, pp. 385–410, p. 399.
9 Goldmann, Matthias; von Loebenstein, Beatriz (2020): "Alles nur geklaut? Zur Rolle juristischer Provenienzforschung bei der Restitution kolonialer Kulturgüter (Thieves in the Temple? The Role of Law for the Restitution of Cultural Artefacts)" (May 13, 2020), in: *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-19*, p. 10, 21.
10 This aspect, which has not yet been fully highlighted even in postcolonial legal theory, is pointed out in ibid., pp. 3–6.
11 Taşdelen, Alper (2015): "Das völkerrechtliche Regime der Kulturgüterrückführung", in: Stefan Groth, Regina F. Bendix, Achim Spiller (Eds): *Kultur als Eigentum. Instrumente, Querschnitte und Fallstudien* (Göttinger Studien zu Cultural Property. Vol. 9), Göttingen, pp. 225–243, p. 225.
12 Campfens, Evelien (2020): "The Bangwa Queen: Artifact or Heritage?", in: Matthias Weller; Nicolai B. Kemle; Thomas Dreier; Karolina Kuprecht (Eds), *Raubkunst und Restitution – Zwischen Kolonialzeit und Washington Principles*, Baden-Baden, pp. 167–209, pp. 181–189; Taşdelen, 2015, *Kulturgüterrückführung*, pp. 225f.
13 Ibid., p. 226; Nietzel, Benno (2021): "Kulturgutschutz in Europa seit dem 19. Jahrhundert zwischen Verrechtlichung und Kolonialpraxis", in: Sandkühler et al., 2021, *Geschichtskultur durch Restitution?*, pp. 147–162, pp. 150–155.
14 Nietzel, 2021, *Kulturgutschutz*, pp. 154–158; Hackmack; Kaleck, 2021, *Warum restituieren?*, p. 388.
15 See note 17 below.
16 Campfens, 2020, *Bangwa Queen*, p. 182.
17 Internationaler Frauenbund (1912): *Die Stellung der Frau im Recht der Kulturstaaten. Eine Sammlung von Gesetzen verschiedener Länder bearbeitet durch die ständige Kommission des Internationalen Frauenbundes die Rechtsstellung der Frau betreffend*, Karlsruhe.
18 Today § 138 of the German Civil Code.

19 Herbert Jäckel, in 1909 a junior lawyer with a doctorate in jurisprudence and philosophy, for instance, felt obliged to refute contemporaneous doubts about the lawfulness of the contractual acquisition of land by the "Deutsche Kolonialgesellschaft in Südwestafrika", by publishing a written defence of the colonial policies peppered with legal embellishments: *Die Landgesellschaften in den deutschen Schutzgebieten. Denkschrift zur Kolonialen Landfrage*, Jena 1909, p. 31. Any doubts which might have been voiced concerning the legal validity of a contract with a partner who is not familiar with either the German language or the German Civil Code, is brushed aside by Jäckel with this rather remarkable statement: "It serves no purpose to return to this question time and time again [*sic!*], because after 25 years [of German colonialism], it is no longer possible to provide any proper proof, either for or against."
20 Jäckel (1909): *Landgesellschaften*, p. 36.
21 Goldmann; von Loebenstein, 2020), *Alles nur geklaut?*, pp. 20f.
22 Meyer, Georg (1888): *Die staatsrechtliche Stellung der deutschen Schutzgebiete*, Leipzig, p. 41, 49f.
23 Hammen, Horst (1999): "Kolonialrecht und Kolonialgerichtsbarkeit in den ehemaligen deutschen Schutzgebieten – Ein Überblick", in: *Verfassung und Recht in Übersee*, Vol. 32, pp. 191–209, pp. 195–197.
24 Mecke, Christoph-Eric (2019): "The 'Rule of Law' and the 'Rechtsstaat': A Historical and Theoretical Approach from a German Perspective", in: *Studia Iuridica*, Vol. 79, pp. 29–47, pp. 34f., https://www.wuw.pl/data/include/cms/Studia_Iuridica_79_2019.pdf, accessed 23 March 2023.
25 Washington Conference Principles on Nazi-Confiscated Art, December 3, 1998, on: https://web.archive.org/web/20170426113213/https://www.state.gov/p/eur/rt/hlcst/270431.htm, accessed 23 March 2023.
26 Sekretariat der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland (Eds): *Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes insbesondere aus jüdischem Besitz vom 9. Dezember 1999*, https://www.kmk.org/fileadmin/veroeffentlichungen_beschluesse/1999/1999_12_09-Auffindung-Rueckgabe-Kulturgutes.pdf, accessed 23 March 2023.
27 This was the reasoning, as late as 1999, when a restitution claim submitted to the State Museum for Ethnology (*Staatliches Museum für Völkerkunde*) in Munich was denied. See Splettstößer, Anne (2015): "Ein Kameruner Kulturerbe? 130 Jahre geteilte Agency: Das Netzwerk Tange/Schiffschnabel", in: Stefan Groth; Regina F. Bendix; Achim Spiller (Eds): *Kultur als Eigentum. Instrumente, Querschnitte und Fallstudien* (Göttinger Studien zu Cultural Property. Vol. 9), Göttingen, pp. 199–223, p. 215, 217.
28 *Declaration on the Importance and Value of Universal Museums*, published by eighteen museums in the western World and Russia, https://www.hermitagemuseum.org/wps/portal/hermitage/news/news-item/news/1999_2013/hm11_1_93/, accessed 23 March 2023. Regarding the question of how the objects should be dealt with in the future, the declaration demands "that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era".
29 §§ 74, 75 Introduction to the "Allgemeines Landrecht für die Preußischen Staaten" [= *General State Laws for the Prussian States*] of 1794.
30 Cf. Hauser-Schäublin, Brigitta (2018): "Ethnologische Provenienzforschung – warum heute?", in: Larissa Förster, Iris Edenheiser; Sarah Fründt; Heike Hartmann (Eds): *Provenienzforschung zu ethnografischen Sammlungen der Kolonialzeit. Positionen in der aktuellen Debatte*, Berlin, pp. 327–333, p. 331.
31 See, for instance, Spettstößer, Anne; Taşdelen, Alper (2015): "Der Schutz beweglicher materieller Kulturgüter auf internationaler und nationaler Ebene", in: Stefan Groth; Regina F. Bendix; Achim Spiller (Eds): *Kultur als Eigentum. Instrumente, Querschnitte und Fallstudien*, Göttingen, pp. 83–96.
32 Melter, Claus (2017): "'Nichts über uns ohne uns!' – Herero und Nama im Streit um Selbst- und Mitbestimmung gegenüber dem von Deutschen verübten Völkermord", in: *PoliTeknik*, www.politeknik.de/p7762/, accessed 23 March 2023.

33 Siehr, Kurt (2005): "Internationaler Rechtsschutz von Kulturgütern: Schutz der bildenden Kunst in Vergangenheit, Gegenwart und Zukunft", in: *Revue suisse de droit international et droit européen*, Vol. 15, pp. 53–77.

34 According to § 2 of the "Gesetz betreffend die Rechtsverhältnisse der deutschen Schutzgebiete" [= German Protectorate Law] of 17 April 1886, Deutsches Reichsgesetzblatt, 1886, pp. 75f., German private law was to be applied only according to the rules set out in the Consular Jurisdiction Law of 10 July 1879. Under the latter, citizens' rights could only be applied to those persons who were resident in the regions that fell under the General State Laws of the Prussian States of 1794 and to citizens of "other civilised states" [Meyer (1888): *Die staatsrechtliche Stellung*, p. 107]. An extension of German jurisdiction to the Indigenous peoples by executive order of the Emperor would have been possible according to § 3 No. 1 of the German Protectorate Law of 1886, but this never took place. §§ 3 and 4 of the new Protectorate Law of 10 September 1900 (Deutsches Reichsgesetzblatt 1900, no. 40, pp. 812–817), in conjunction with § 19 of the Consular Jurisdiction Law of 7 April 1900 (Deutsches Reichsgesetzblatt 1900, no. 15, pp. 213–228) only confirmed this legal situation for movable property.

35 Thielecke, Carola; Geißdorf, Michael (2019): "Sammlungsgut aus kolonialen Kontexten. Rechtliche Aspekte", in: German Museum Association (Ed.): *Leitfaden. Umgang mit Sammlungsgut aus kolonialen Kontexten*, second edition, Berlin, pp. 105–118, pp. 108–109. The same applied to the British colonies, where the Indigenous laws were seldom completely replaced by English law. See ibid., p. 111.

36 Gerstmeyer, Johannes (1910): *Das Schutzgebietsgesetz nebst der Verordnung betr[effend] die Rechtsverhältnisse in den Schutzgebieten und dem Gesetz über die Konsulargerichtsbarkeit in Anwendung auf die Schutzgebiete sowie den Ausführungsbestimmungen und ergänzenden Vorschriften*, Berlin, p. 26.

37 Kuprecht, Karolina (2020): "Kulturgüter aus der Kolonialzeit und Restitution: Änderungen ohne Änderungen", in: Matthias Weller; Nicolai B. Kemle; Thomas Dreier; Karolina Kuprecht (Eds): *Raubkunst und Restitution – Zwischen Kolonialzeit und Washington Principles*, Baden-Baden, pp. 153–165, p. 154.

38 See Schultz-Ewerth, Erich; Leonhard, Adam (1929): *Das Eingeborenenrecht. Sitten und Gewohnheitsrechte der Eingeborenen der ehemaligen deutschen Kolonien in Afrika und in der Südsee,* Vol. 1, Stuttgart, pp. V–IX, on numerous, initially private initiatives taken since 1893 to identify and present overviews of the laws of the Indigenous peoples. A 1907 Reichstag decree effectively made the recording of the different Indigenous legal orders an official task. The concrete political interests of the German colonialists to make the "best-possible economic use of the colonies" (ibid. p. VII) coincided with the interests of the academic subject of legal anthropology, which at the time was in its infancy, with the works of law professors Albert Hermann Post (1839–1895) preparing the ground and those of Joseph Kohler (1849–1919) breathing life into the new discipline. See also Sippel, Harald (2001): "Der Deutsche Reichstag und das ‚Eingeborenenrecht'. Die Erforschung der Rechtsverhältnisse der autochthonen Völker in den deutschen Kolonien", in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 61, no. 4, pp. 714–738.

39 Schultz-Ewerth; Leonhard, 1929/1930, *Das Eingeborenenrecht*, Vol. 1, pp. 241, 236, 320–324 (East Africa), Vol. 2, pp. 192–195 (Cameroon), pp. 259–263, 356f. (Southwest Africa).

40 The record of "customs and customary laws" cited in the previous note, for instance, was based in part on a study commissioned by the International Society of Comparative Law and Economy in 1893 which used questionnaires to instruct colonial officials and missionaries on the ground to collect legal anthropological source materials. See ibid., pp. Vf.

41 Zollmann, Jakob (2010): *Koloniale Herrschaft und ihre Grenzen. Die Kolonialpolizei in Deutsch-Südwestafrika 1894–1915*, Göttingen, pp. 26f.

42 Thielecke; Geißdorf, 2019, *Sammlungsgut*, p. 110.

43 Ibid., pp. 112–114.

44 Art. 43 par. 1 Introduction to the civil code of Germany [= Einführung in das Bürgerliche Gesetzbuch (EBGB)], §§ 985 ff. German civil code [= Bügerliches Gesetzbuch (BGB)].
45 §§ 929 sentence 1, 932, 935 par. 1 sentence 1 BGB, according to which the acquisition in good faith does not apply if the goods were stolen, lost or taken against the will of the person or persons that held the right of ownership.
46 § 937 par. 1 BGB.
47 Thielecke; Geißdorf, 2019, *Sammlungsgut*, pp. 113f.
48 https://www.bundestag.de/dokumente/textarchiv/2019/kw14-pa-kultur-medien-631622, accessed 23 March 2023, and note 101 below.
49 Thielecke; Geißdorf, 2019, *Sammlungsgut*, p. 110.
50 Ibid., p. 112.
51 Kamardeen, Naazima (2017): "The Protection of Cultural Property: Post-Colonial and Post-Conflict Perspectives from Sri Lanka", in: *International Journal of Cultural Property*, Vol. 24, pp. 429–450, pp. 436f.
52 European Center for Constitutional and Human Rights, Glossary, Entry "Prinzip der Intertemporalität", https://www.ecchr.eu/glossar/prinzip-der-intertemporalitaet/, accessed 23 March 2023.
53 Kamardeen, 2017, *Protection*, p. 437.
54 Thielecke; Geißdorf, 2019, *Sammlungsgut*, p. 113.
55 Goldmann; von Loebenstein, 2020, *Alles nur geklaut?,* p. 4.
56 Ibid., p. 22.
57 See the information provided by the German Federal Government on current repatriation projects (Benin Bronzes, Stone Cross from Cape Cross) and repatriations that have already occurred (Hendrik Witbooi's Bible and whip) https://www.bundesregierung.de/breg-de/bundesregierung/bundeskanzleramt/staatsministerin-fuer-kultur-und-medien/sammlungsgut-aus-kolonialen-kontexten-1851438, accessed 23 March 2023.
58 Thielecke; Geißdorf, 2019, *Sammlungsgut*, p. 114.
59 Heidt, 2021, *Koloniales Unrecht*, p. 337.
60 Cf. Bernstorff, Jochen von; Jakob Schuler, "Restitution und Kolonialismus. Wem gehört die Witbooi-Bibel", on: https://verfassungsblog.de/restitution-und-kolonialismus-wem-gehoert-die-witbooi-bibel/, accessed 23 March 2023; Goldmann; von Loebenstein, 2020, *Alles nur geklaut?,* p. 25, claim that the government of Baden-Württemberg fulfilled "not just a moral duty but most likely also a legal obligation", despite the fact that the Hague Convention, which explicitly abolished the right of plunder in times of war that had existed in customary European law for centuries, did not come into force until 1910.
61 Order of the Baden-Württemberg Constitutional Court of 21 February 2019, Az. 1 VB 14/19, at: https://verfgh.baden-wuerttemberg.de/fileadmin/redaktion/m-verfgh/dateien/190221_1VB14-19_Beschluss.pdf, accessed 23 March 2023.
62 In the case of Namibia, the government predominantly consists of members of the Ovambo. The Herero and Nama only make up a little over 12% of the population.
63 See also Bernstorff, Jochen von; Schuler, Jakob (2019): "Wer spricht für die Kolonisierten? Eine völkerrechtliche Analyse der Passivlegitimation in Restitutionsverhandlungen", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 79, pp. 553–577, https://www.zaoerv.de/79_2019/79_2019_3_a_553_577.pdf, accessed 23 March 2023, which addresses the difficult legal issue as to which actors in the countries of origin are entitled under international law to speak on behalf of colonised peoples.
64 Krajewski, Markus (2020): *Völkerrecht*, second edition, Baden-Baden, § 1, p. 21.
65 Thielecke; Geißdorf, 2019, *Sammlungsgut*, p. 114.
66 Cf. 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Art. 7 b) i): "cultural property imported after the entry into force of this Convention in both States concerned".

67 The *Unidroit Convention on Stolen or Illegally Exported Cultural Objects* awarded actionable rights, not only to states but also for the first time to private parties, and emphasised that there is a particular interest in the restitution of "an illegally exported cultural object" for its "traditional or ritual use [...] by a tribal or indigenous community" (Art. 5 par. 3 lit. d). Apart from the fact that, here too, the possibility of backdating these rights to before 1995 is precluded, the convention is not actually legally binding in Germany because it has not yet been ratified by the Federal Republic of Germany.
68 See Taşdelen, 2015, *Kulturgüterrückführung*, pp. 227–229 on 20th century international law during times of war. However, in order to avoid the possibility that certain states would withdraw their overall support for the Hague Conventions of 1899, 1907 and 1954, the condemnation of the looting of cultural heritage did not for a long time result in a right to the restitution of cultural assets.
69 According to a legal opinion published in 2018 by the Research and Documentation Services of the German Bundestag: "Ausarbeitung von Kulturgütern aus Kolonialgebieten. Rechtsgrundlagen für Ansprüche auf Restitution", *WD 10 – 3000 – 023/18*, https://www.bundestag.de/resource/blob/561162/d41c5c7c2312cbd82286e01677c187e8/wd-10-023-18-pdf-data.pdf, accessed 23 March 2023.
70 Cf. 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Art. 7 b i) prohibiting "the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States".
71 Cf. 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Art. 7 b ii) according to which "the requesting State [!] shall pay just compensation to an innocent purchaser or to a person who has valid title to that property".
72 Act for the Protection of Cultural Property (= *Gesetz zum Schutz von Kulturgut*) of 31 July 2016, in: Federal Law Gazette [= *Bundesgesetzblatt* (BGBl.)], Part I, p. 1914 (No. 39).
73 Kuprecht, 2020, *Kulturgüter*, p. 157.
74 Deutscher Bundestag, 19. Wahlperiode, Drucksache 19/5130 (18 October 2018), *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Kirsten Kappert-Gonther, Erhard Grundl, Margit Stumpp, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 19/4177*, p. 19, https://dserver.bundestag.de/btd/19/051/1905130.pdf, accessed 23 March 2023.
75 See the contribution by Evelien Campfens in this volume.
76 Campfens, 2020, *Bangwa Queen*, p. 208.
77 Ibid., pp. 207f.
78 Ibid., p. 208.
79 Human Rights Council (2010): "Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed", Document A/HRC/17/38, p. 16 (§ 62), p. 19 (§ 76).
80 Campfens, 2020, *Bangwa Queen*, p. 208.
81 Ibid., p. 199.
82 Kuprecht, 2020, *Kulturgüter*, p. 161; Campfens, 2020, *Bangwa Queen*, p. 199.
83 See the contribution by Chief Charles A. Taku in this volume.
84 Manase, Flower (2021): "Restitution and Repatriation of Objects of Colonial Context: The Status of Debates in Tanzania, Uganda and Kenya National Museums", in: Sandkühler et. al., *Geschichtskultur durch Restitution?*, pp. 181–189, p. 186: "[…] communities […] often fail to connect with government and associated institutions like national museums to foster their claims."
85 Kuprecht, 2020, *Kulturgüter*, p. 158f.
86 The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) adopted by the General Assembly of the United Nations in 2007 (61/295), an annexe of which grants Indigenous peoples "the right to maintain, control, protect and develop their cultural heritage […]" (§ 31), for instance, is not legally binding. Even the *Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, or in short the *Faro Convention* (2005) is not legally binding either, nor has it been

ratified by Germany. Based on the right to "freely participate in the cultural life of the community" according to Art. 27 of the *United Nations Declaration of Human Rights Act*, the *Faro Convention* explicitly looks at "cultural heritage […] independently of ownership" and is limited to the protection of the "common heritage of Europe" (Art. 3 Faro Convention), without clarifying the term in respect of the cultural heritage of non-European colonial provenance that is currently located in Europe.

87 Campfens, 2020, *Bangwa Queen*, p. 199.

88 International Council of Museums (2017): *ICOM Code of Ethics for Museums*, des International Council of Museums (ICOM), Paris, https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf, accessed 23 March 2023.

89 German Museums Association (2021): *Guidelines for German Museums "Care of Collections from Colonial Contexts"*, Berlin, 3rd Edition, https://www.museumsbund.de/wp-content/uploads/2021/03/mb-leitfaden-en-web.pdf, accessed 23 March 2023.

90 Cf. below, note 92.

91 The "restitution of cultural property" requires the claimant to provide proof that the property came to Europe "in violation of the principles of international and national conventions", which precludes today's conventions from being applied retrospectively. Moreover, any museum that is willing to return any of its cultural assets must be "legally free to do so" under state law (section 6.3 *ICOM Code of Ethics for Museums*).

92 See only Manase, 2021, *Restitution*, pp. 182–184; Osadolor, Osarhieme Benson (2021): "The Benin Sculptures: Colonial Injustice and the Restitution Question", in: Sandkühler et. al, *Geschichtskultur durch Restitution?*, pp. 207–221, pp. 207, 215–221, about the history of restitution claims concerning the Benin Sculptures, which has lasted for more than half a century: "Since Nigeria regained independence from Britain in 1960, the Benin Royal Court and the Nigerian Government have consistently demanded a return of the stolen cultural objects […]."

93 German Museums Association, 2021, *Guidelines*, p. 82.

94 *Washington Conference Principles on Nazi-Confiscated Art, released in connection with The Washington Conference on Holocaust Era Assets*, Washington, DC, December 3, 1998, https://www.state.gov/p/eur/rt/hlcst/270431.htm, No. 4. In Germany this consideration is reflected in the possibility of reversing the burden of proof by governmental indications on the implementation of the *Declaration of the German Federal Government, the Federal States ("Bundesländer") and the Central Municipal Associations on the tracing and restitution of cultural property seized as a result of Nazi persecution, in particular from Jewish property* of December 1999 [Beauftragter der Bundesregierung für Kultur und Medien (2019), *Handreichung zur Umsetzung der Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz vom Dezember 1999*, New Edition 2019, p. 35, https://www.kulturgutverluste.de/Content/08_Downloads/DE/Grundlagen/Handreichung/Handreichung.pdf, accessed 23 March 2023].

95 Nietzel, 2021, *Kulturgutschutz*, pp. 160–162, disagrees and argues that the "maximum demand" of a reversal of the burden of proof, which "simply [*sic!*] labels the entire phenomenon of European colonialism a complex of injustice" and calls for proof of the contrary in each case, is not "enforceable or practicable". His solution to this problem is that *instead* of carrying out "extensive provenance research […], research projects on the history of heritage protection" should shift their focus away "from an exclusively western European perspective" and should, in future, "give less priority to the material [i.e. the artefacts of colonial provenance in European collections]" and seek an "open dialogue" as well as "a solution based on ethical and moral considerations, rather than on formal legal principles". Regardless of the question of whether exactly this approach does not express a rather western perspective, Nietzel, however, overlooks three things: *firstly*, open dialogue with the descendants of the colonised and provenance research is not mutually exclusive, but actually mutually dependent.

This was shown by the PAESE project, which, among other things, was the catalyst for this volume of conference proceedings. *Secondly*, "ethical and moral considerations" and "formal legal principles" are not necessarily opposites. This is precisely where the call for a reversal of the burden of proof arises, i.e. in cases where the *descendants of the colonised* are not satisfied by dialogue alone, and *this* decision should most certainly not be in the hands of the descendants of the colonial masters. *Thirdly*, the enforceability or practicability of the reversal of the burden of proof does, in fact, depend on whether the descendants of the colonial masters today are finally becoming aware of the fact that the "entire phenomenon of European colonialism" is part of "a complex of injustice" of historic importance as well as the German persecution of the European Jews in the 20th century.

96 German Museums Association, 2021, *Guidelines*, p. 83.

97 Ibid., p. 83f.

98 Ibid., p. 86.

99 *Erste Eckpunkte zum Umgang mit Sammlungsgut aus kolonialen Kontexten der Staatsministerin des Bundes für Kultur und Medien, der Staatsministerin im Auswärtigen Amt für internationale Kulturpolitik, der Kulturministerinnen und Kulturminister der Länder und der kommunalen Spitzenverbände* (13 March 2019), p. 7, https://www.auswaertiges-amt.de/blob/2210142/b4e7b4f2249f51cf9d-60cb31ef9888bb/190412-stm-m-sammlungsgut-kolonial-kontext-data.pdf, accessed 23 March 2023.

100 Deutscher Bundestag Drucksache 19/8545 (19 March 2019): *Antrag von Einzelabgeordneten und der Fraktion der Freien Demokratischen Partei (FDP)*, p. 2, https://dserver.bundestag.de/btd/19/085/1908545.pdf, accessed 23 March 2023.

101 Ibid.

102 Deutscher Bundestag, Dokumente, *Textarchiv, 2019, 2./3. Lesung*, https://www.bundestag.de/dokumente/textarchiv/2019/kw14-pa-kultur-medien-631622, accessed 23 March 2023.

103 Deutscher Bundestag Drucksache 19/9340 (11 April 2019), *Antrag von Einzelabgeordneten und der Fraktion DIE LINKE*, p. 2, https://dserver.bundestag.de/btd/19/093/1909340.pdf, accessed 23 March 2023.

104 Deutscher Bundestag Drucksache 19/7735 (13 February 2019), *Antrag von Einzelabgeordneten und der Fraktion BÜNDNIS 90/DIE GRÜNEN*, p. 3, https://dserver.bundestag.de/btd/19/077/1907735.pdf; Deutscher Bundestag Drucksache 19/9340 (11 April 2019), *Antrag von Einzelabgeordneten und der Fraktion DIE LINKE*, p. 2, https://dserver.bundestag.de/btd/19/093/1909340.pdf, accessed 23 March 2023.

105 Kuprecht (2020): "Kulturgüter", p. 163.

106 National Museum of World Cultures (2019), *Return of Cultural Objects: Principles and Process*, p. 6 (4. Criteria for Claims for Return), https://www.tropenmuseum.nl/sites/default/files/2019-03/Claims%20for%20Return%20of%20Cultural%20Objects%20NMVW%20Principles%20and%20Process_1.pdf, accessed 23 March 2022).

107 Kuprecht, 2020, *Kulturgüter*, p. 163.

108 Deutscher Bundestag Drucksache 19/9340 (11 April 2019), *Antrag von Einzelabgeordneten und der Fraktion DIE LINKE*, p. 2, https://dserver.bundestag.de/btd/19/093/1909340.pdf, accessed 23 March 2023.

109 Deutscher Bundestag, *Dokumente, Textarchiv, 2019, 2./3. Lesung*, https://www.bundestag.de/dokumente/textarchiv/2019/kw14-pa-kultur-medien-631622, accessed 23 March 2023.

110 Deutscher Bundestag Drucksache 19/20546 (30 June 2020), *Antrag von Einzelabgeordneten und der Fraktion DIE LINKE*, p. 4, https://dserver.bundestag.de/btd/19/205/1920546.pdf, accessed 23 March 2023.

111 Deutscher Bundestag Drucksache 19/7735 (13 February 2019): *Antrag von Einzelabgeordneten und der Fraktion BÜNDNIS 90/DIE GRÜNEN*, p. 2, https://dserver.bundestag.de/btd/19/077/1907735.pdf, accessed 23 March 2023.

112 Hackmack; Kaleck, 2021, *Warum restituieren?*, p. 395.

113 Niedersächsischer Landtag Drucksache 18/9921, *Entschließung des Landtags vom 14.09.2021*, p. 1, https://www.landtag-niedersachsen.de/Drucksachen/Drucksachen_18_10000/09501-10000/18-09921.pdf, accessed 23 March 2023.

114 Coalition agreement 2021–2025 between the Social Democratic Party of Germany (SPD), ALLIANCE 90/The Greens and the Free Democratic Party (FDP): *Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*, 20th legislative period of the *Bundestag*, p. 100, https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1, accessed 23 March 2023. The agreement drawn up by the previous coalition in the 19th legislative period (2017–2021) had made specific reference only to the "return of cultural assets seized during the period of Nazi persecution", while the "colonial-era cultural heritage in museums and collections" had only been mentioned in the context of "establishing its provenance" (*Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land*, *Koalitionsvertrag zwischen CDU, CSU und SPD,* 19th legislative period of the Bundestag, p. 169, https://gfx.sueddeutsche.de/pdf/Koalitionsvertrag2018.pdf, accessed 23 March 2023.

115 https://www.provenienzforschung-niedersachsen.de/patronengurt-gehoerte-legendaerem-anfuehrer-der-ovambanderu/, accessed 23 March 2023.

116 https://www.kmk.org/fileadmin/Dateien/pdf/PresseUndAktuelles/2019/2019-10-16_Konzept_Sammlungsgut_aus_kolonialen_Kontexten_oeffentlich.pdf, accessed 23 March 2023.

117 Niedersächsischer Landtag Drucksache 18/9921: *Entschließung des Landtags vom 14.09.2021*, p. 1f.

118 https://www.postcolonial-provenance-research.com/datenbank/, accessed 23 March 2023.

119 This proposed list does not include all possible cases but is based on the criteria listed in point 4.3 of the Guidelines of the *Nationaal Museum van Wereldculturen* [National Museum of World Cultures (2019): *Return of Cultural Objects: Principles and Process*, p. 6, https://www.tropenmuseum.nl/sites/default/files/2019-06/NMVW%20Return%20of%20Cultural%20Objects%20%20Principles%20and%20Process.pdf, accessed 23 March 2023.

120 If and as long as different claimants, who have shown to be culturally affiliated with the same cultural objects of colonial provenance, are in dispute because of their conflicting claims for repatriation, said repatriation to any one of those claimants is highly problematic. Premature repatriation to any one party in a case such as this would mean that the European owners would effectively cast the deciding vote in the dispute, although they have no legal, moral or cultural right to do so, thereby creating a situation which would most likely be irrevocable. Such disputes must be settled among the claimants themselves, supported, for instance, by a process of mediation through a neutral ethics committee.