

An Examination of Law's Role in the Restitution Debate

A case-study on Trésor des rois d'Abomey' Collection at Musée du quai Branly



Photograph: Patrick Gries/guardian.co.uk, Description available online at: <http://www.theguardian.com/world/gallery/2009/dec/14/outlook-art>.

'Statue royale anthro-zoomorphe. Musée du quai Branly Inv. 71.1893.45.2. Statue évoquant le règne du roi Glélé (1858-1889) représenté sous la forme d'un personnage à tête de lion - Usage de l'objet : Représenterait Glélé, roi du Dahomey (1858-89) - Auteur de l'œuvre : Sossa Dede - Date de l'œuvre : entre 1858 et 1889 - Matériaux et techniques : Bois, pigments, cuir - Dimensions : 179 x 77 x 110 cm.

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Introduction

The restitution of objects seized during the colonial-era has attracted insufficient attention from legal practitioners and scholars so far. The legal problem posed by such cases is, perhaps, unconventional. Namely, due to the absence of a generally recognised international norm to apply to colonial wars during the nineteenth century, judicial remedies are largely unavailable for claims arising as a result of such situations. Accordingly, claimants have been unable to pursue such claims through national or international judicial redress producers so far. In this context, legal practitioners and scholars often regard such historical material as peripheral to their concerns. In this paper, I show why this topic deserves closer examination by the legal scholarship.¹

I propose a change of perspective. Rather than asking whether museums should repatriate objects which constitute colonial war plunder, I ask: What are the historical sources of what some lawyers see as a lack of judicial redress for such claims? How is the nineteenth century legal doctrine reflected in contemporary talks about restitution? To address these questions, the paper explores the international legal doctrines of the nineteenth century with regard to war plunder and restitution. Firstly, I provide a review of these legal ideas and their historical evolution. Secondly, I illustrate how these ideas applied to colonization missions. In doing so, my purpose is to challenge the view that the lack of legal recourse for colonial-related restitution claims solely originates in the absence of a legal norm applicable to colonial contexts. This view, I argue, insufficiently stresses the inequalities inherent in the international law doctrines of the nineteenth century. Furthermore, this paper suggests that revealing these historical inequalities could help illuminate the contemporary restitution debate concerning colonial-related cases. The case-study of this reflection on the history of international law and its relevance to the restitution debate is the so-called ‘*Trésor des rois d’Abomey*’ (also known as ‘*Trésor de Béhanzin*’; hereafter the ‘Royal Treasure of Abomey’). Currently part of *Musée du quai Branly*’s collections in Paris, this comprises twenty-seven royal objects seized by the French army in the aftermath of a colonising military campaign

¹ I thank the Museum of quai Branly for the generous support and intellectual stimulation provided during my research in Paris. In particular, I would like to thank Gaëlle Beaujean, Emmanuel Kasarhérou, and Frédérique Servain-Riviale for their kind help and warm welcome to the Museum. All the views expressed in this paper are mine alone. All translations from French to English in the text are mine, unless otherwise specified.

against the Kingdom of Dahomey, in 1894. Since 2013, the collection has been subject to a restitution campaign initiated by *Le Conseil Représentatif des Associations Noires de France* (*Le CRAN*). More recently, in 2015, some members of the former Dahomean royal family joined voices with *Le CRAN* in requesting that this collection be returned to Benin. By taking this case-study, the paper looks back to the nineteenth century international law doctrine in view of identifying some of the ways in which this historical legacy frames our restitution debate today. This paper is not intended as a plea for the return of the ‘Royal Treasure of Abomey’ to Benin, but rather as an attempt to put the broader restitution debate into historical perspective.

1 The Case Study

Western museums are ‘full of war spoils’, as one French museum curator so bluntly put it (Guerrin, *Le Monde*, 24 November 2010).² The collection that I took as my case-study, i.e. the ‘Royal Treasure of Abomey’, is not singular in this respect, but rather one of the many examples of artworks acquired by European museums as a result of colonisation and imperial expansion. Yet, a number of aspects relating to its forceful removal from Dahomey by the French army make this case interesting for this paper.

I first came across this case in the French media in 2013. A French non-governmental organisation called *Le Conseil Représentatif des Associations Noires de France (Le CRAN)* initiated a request for the restitution of this collection to Benin (e.g. Rivière, *Libération*, 10 December 2013). Given that only a limited number of colonial-related restitution claims have been made so far, this case caught my attention and I decided to look into it more closely. I was interested to find out more about how French museums dealt with cases linked to the colonial past of France, as well as to know more about how common such requests were. I pursued this interest by submitting an application to the grant competition annually held by *Musée du quai Branly*. This Parisian museum currently holds a vast collection of objects acquired by France from its former colonial territories, which also includes the ‘Royal Treasure of Abomey’. This museum was an ideal place from where to start my research. I was lucky enough to be successful in this application. During my research fellowship with *Musée du quai Branly*, I conducted a series of interviews with curators from the various Parisian museums.

Further research into the case revealed that the dispossession took place during a colonising military campaign conducted by the French army. From a legal point of view, this detail is significant because it raises questions with regard to the nature, reach, and application of international law norms in existence at the time. The nineteenth century marks the emergence of a customary international law principle concerning the protection of artworks and monuments during armed conflict (O’Keefe, 2006: 13-34). Moreover, this period also saw the rise of a customary law ‘restitution principle’ which became particularly

² Exact quote in French: ‘*Nos musées sont pleins de prises de guerre. Si on fait de la repentance, on vide les musées d’un bon tiers*’.

relevant in the aftermath of the Napoleonic Wars, during the negotiations for the Second Treaty of Paris in 1815 (Kiwara-Wilson, 2013: 388-390, Goodwin, 2008).³ However, whilst these principles of international law applied to relations between European states, they did not extend to armed conflicts between a European state and a non-European polity.⁴ Whilst this nonuniformity was pointed out by legal scholars such as Anghie (2007) or Koskenniemi (2001), its potential for shedding light on some of the contemporary repatriation debates remains insufficiently investigated. By taking the *Trésor d'Abomey* as a case-study, I seek to explore precisely this inconsistency in the nineteenth century international legal order.

Finally, unlike other collections that France and other former colonial empires acquired throughout the colonial period, the 'Royal Treasure of Abomey' is a suitable case-study because of the conditions in which it was removed from its original owner. Specifically, the dispossession took place during an armed conflict that eventually led to the establishment of the French colony known as Dahomey. As Byrne et al. (2011) show in their book, the colonial-era circumstances in which cultural and artistic objects were relocated to Western museums vary enormously. For example, collections can include objects that were collected by colonial ethnographers or missionaries, as well as objects that were acquired as a result of transactions such as gifts, sales, or exchanges of goods between the colonised and the colonisers. This collection's clear-cut forceful removal during war allows me to draw a comparison with other armed conflicts happening during the nineteenth century which also resulted in the loss of artworks. The question I ask is this: what distinguishes the 'Royal Treasure of Abomey' from a case of war plunder involving European artworks, from the point of view of the nineteenth century customary international law?

³ In the aftermath of the Napoleonic Wars, the European allied powers requested the return of spoils of war constituting artworks. According to Quynn (1945: 449), between 1814 and 1815, Austria, Prussia, and several Italian cities were given back the manuscripts, paintings, and statues that the French armies had looted during the wars.

⁴ I use the term 'polity' to signal that, according to the nineteenth century international law, non-European political entities were not considered sovereign states. I will develop this argument in more detail later in the paper.

1.1. *Historical Background*

The section of the paper outlines the historical setting in which the collection known as the ‘Royal Treasure of Abomey’ was seized from the Kingdom of Dahomey by the French army during a colonising military mission initiated in 1892. As mentioned above, I use this brief historical account in order to introduce a discussion about the nineteenth century legal order and its relevance for contemporary restitution debates.⁵

Founded around the year 1600, the West African Kingdom of Dahomey was geographically located in present-day Benin. According to Hargreaves (1969: 28), regular European commerce with West African kingdoms, including slave trade, started during the sixteenth century. By the eighteenth century, various European nations had permanent establishments on the coast, notably the French and English, but also Spaniards, Portuguese and Brazilians (ibid). In 1863, France established a protectorate in Porto-Novo, a coastal kingdom Dahomey was looking to capture. Seeking to assert its influence on these coastal territories, Dahomey came into military conflict with the French, which lasted between 1890 and 1894. In the aftermath of this conflict, Behanzin, the King of Dahomey, was defeated. The French army took over the capital Abomey in November 1892. The Dahomeans set fire to the city and to the royal palaces as they fled the city (see Beaujean, 2015: 189). In 1894 a new king took over the reign of Dahomey. He was going to rule under the French protectorate (Argyle, ibid: 54).

As Beaujean notes (2007: 2), between 1893 and 1895, a total number of twenty-seven objects from Abomey were received by the *Musée d’Ethnographie du Trocadéro* in Paris by army officials returning to France.⁶ Beaujean, an African art curator at *Musée du quai Branly*, explained the details of these objects’ arrival in Paris in her scholarly work (2015: 201-208). According to her, no archival evidence indicates the fact that official orders were issued by the central French authorities in Paris to seize these objects.⁷ Nevertheless, Beaujean quotes archival documents showing that the French Lieutenant-Colonel Dodds, who was in charge

⁵ For a more substantial historical and ethnographic description of the Dahomean local context and of the colonial encounter, see Argyle, 1966; Hargreaves, 1969; Manning, 1982.

⁶ *Musée du quai Branly*, Collection 71.1893.45* and 71.1895.16*.

⁷ Unlike in the case of the ‘punitive expedition’ conducted by the United Kingdom in Benin in 1897, during which the so-called ‘Benin Bronzes’ were seized. See Kiwara-Wilson, 2013.

of the military mission carried out in 1892, was personally involved in seizing some of these objects (2012: 2; 2015: 201-208). On his return to France, Dodds donated most of these objects to *Musée d'Ethnographie du Trocadéro*, providing little information about their use in the Dahomean local context (ibid. 2007: 5-6).⁸ However, it would be difficult to determine the precise number of Dahomean objects seized by the French army in the aftermath of this military campaign. Some of the seized objects were sold or donated to private collectors by the military personnel on their return to France. This is the case a statue representing the Dahomean god called 'Gou' currently held by a private museum in Paris, *Musée Dapper*.⁹ Another example is the royal throne of King Behanzin which was sold at a Sotheby's auction in Paris, on the 3rd December 2004, for 33.600 euros.¹⁰

As Murphy (2009: 2) documents, the seized objects were exhibited in *Musée d'Ethnographie du Trocadéro* starting with 1894, as a 'symbol of French imperial power'. Following a series of institutional transformations that took place on the French museum scene, these Dahomean objects were eventually incorporated into the collections of *Musée de quai Branly*.¹¹ Some of them are currently on display in the permanent exhibition (African section, *vitrine AF 065 to 074*) of this museum.¹² These include various items taken from the royal palaces in Abomey which belonged to the kings of Dahomey, notably three statues representing the kings of Dahomey, two royal thrones, several royal sceptres, and the gates of the royal palace.

⁸ There are reasons to believe that not all the objects Dodds brought from Dahomey reached the museum after his return. For example, a Dahomean royal throne sold at an Sotheby's auction in 2004 is described as 'having been offered by Dodds to the French Minister of Marine of the Navy (*Ministre français de la marine*)' Sotheby's, Paris, 3 Dec. 2004, n° 62), <http://www.sothebys.com/en/auctions/ecatalogue/2005/art-africain-ocanien-et-dasie-du-sud-est-divers-amateurs-pf5015/lot.61.html>, accessed 5 July 2015.

One object was donated by Captain Fonssagrives, see *Musée du quai Branly* 71.1894.32.1.

⁹ *Musée Dapper*, <http://www.dapper.fr/>, accessed 5 July 2015.

¹⁰ <http://www.sothebys.com/en/auctions/ecatalogue/2005/art-africain-ocanien-et-dasie-du-sud-est-divers-amateurs-pf5015/lot.61.html>, accessed 5 July 2015.

¹¹ The so-called '*Trésor des rois d'Abomey*' was transferred to *Musée du quai Branly* from *Musée de l'Homme* in 2000. *Musée du quai Branly* was open in 2006 and brought together the collections of the Anthropology Department of the *Musée de l'Homme*, and those of *Musée National des Arts d'Afrique et d'Océanie*. *Musée de l'Homme* was established in 1937-1938 and undertook the collections of *Musée d'Ethnographie du Trocadéro*.

¹² Indexed in the collections of the *Musée du quai Branly* as: N° inventaire 71.1893.45.1; 71.1893.45.2; 71.1893.45.3; 71.1893.45.4; 71.1893.45.5; 71.1893.45.6 ; 71.1893.45.7, 71.1895.16.7; 71.1895.16.8, available at www.collections.quaibrantly.fr, accessed 10 Jul. 2015.

1.2. *The Restitution Campaign*

In November 2009, *Musée de quai Branly* opened a temporary exhibition entitled ‘Artistes d’Abomey. Dialogue sur un royaume africain’ (‘Artists of Abomey. A conversation on the topic of an African Kingdom’), which featured some of the objects seized during the colonising mission, alongside other objects acquired from Dahomey throughout the colonial period. The topic of this exhibition was the Dahomean artistic tradition and the role of art at the royal court of Dahomey. The main curator of this exhibition, Gaëlle Beaujean, is also an academic researcher in Dahomean art, who conducted ethnographic fieldwork in Benin as part of her doctoral studies. The project of this exhibition benefitted from the input of two other experts in Dahomean art, a curator – Léonard Ahonon – and a researcher – Joseph Adandé –, respectively, both of which are Beninese. According to the main curator, the exhibition put together objects that arrived in France as a result of different historical processes, including diplomatic gifts, donations, commissions throughout the colonial period, or as a consequence of ‘plunder during the colonial war’ (*Musée du quai Branly*, Press release ‘Artistes d’Abomey’, p. 3).¹³ Furthermore, the curators of the exhibition suggested that the various ways through which these Dahomean objects arrived in France ‘bears witness to the encounter between France and Dahomey’ (ibid.).

As noted above, the term ‘colonial war plunder’ (fr. ‘*butin de guerre*’) was openly used in the press release of the exhibition in order to describe the context in which some of the exhibited objects were acquired by France. However, it is worthwhile mentioning that the term does not feature in *Musée du quai Branly*’s official database which comprises information about each object, including the origin place, year of acquisition, and any previous collections the object was part of.¹⁴ Nor does this admittedly important aspect about the provenance of these Dahomean objects appear in the description accompanying the objects shown in the permanent exhibition of the museum. On the other hand, the term ‘colonial war plunder’ is used by Beaujean, the curator of this exhibition and *Musée du quai*

¹³ http://www.quaibrantly.fr/uploads/tx_gayafeespacepresse/MQB_DP_Artistes_d_Abomey.pdf, accessed 10 Aug. 2015.

¹⁴ E.g. <http://collections.quaibrantly.fr/#c5e98c63-026d-4eee-92d9-dc5beda40933>, accessed 10 Aug. 2015.

Branly's main expert on the collection, in her doctoral research and scholarly publications on the artistic traditions of Dahomey (e.g. 2007: 2; 2015: 99).¹⁵

Whilst minor, this detail is nevertheless telling for the overall situation in which some Western museums currently find themselves with respect to the restitution question. On the one hand, the term 'colonial war plunder' is the recognition of a historical fact. It is likely that the curators of the exhibition '*Artistes d'Abomey. Dialogue sur un royaume africain*' wanted to convey this meaning and nothing more. On the other hand, the contemporary use of the notion of 'war plunder' also carries another layer of symbols, namely those of misappropriation. Judging 'war plundering' as misappropriation does, of course, involve a sense of anachronism, given that the reference is made to contemporary legal, ethical, and moral standards that were not necessarily in place at the time the historical event took place. Yet, museums such as *Musée du quai Branly* are sometimes cautious about using the term altogether, fearing that the nuance of misappropriation would be inadvertently conveyed. On the one hand, this could stir up potential restitutions claims or public controversies, if used as a media story. On the other hand, the French curators I interviewed often seemed to regard the topic as something peripheral to their concerns and job responsibilities.¹⁶ It is therefore significant that Beaujean used the term in the exhibition, especially if we consider the statement she made in an interview published by *Africulture*, a French-speaking online magazine reporting on African cultural events. She stated:

*'Exhibiting the twenty-seven objects donated in the aftermath of the colonial wars is for us [i.e. Musée du quai Branly] a way of speaking about colonialism. It is important to remember all the events surrounding these objects, of which colonialism is part, for the generations to come. These objects are crucial in evoking these questions.'*¹⁷

The exhibition '*Artistes d'Abomey. Dialogue sur un royaume africain*' closed in January 2010. No immediate responses, in the media or elsewhere, brought up the issue of restitution. Yet, on 10 December 2013, the collection known as the 'Royal Treasure of Abomey', which comprises objects seized by the French army during the colonial wars of

¹⁵ This scholarly work is conducted in parallel to her curatorial position at *Musée du quai Branly*.

¹⁶ During my research fellowship with *Musée du quai Branly*, I conducted a series of interviews with curators from various Parisian museums. When asked about restitution request, a common answer was that such affairs are only addressed at the level of the Ministry of Culture and that they could not comment on them. I will discuss this in more detail later in the paper.

¹⁷ <http://www.africultures.com/php/?nav=article&no=9026#sthash.Uh67NXIF.dpuf>.

1892-1894, was brought back into the media's focus by a letter published in the biggest left-wing magazine, *Le Monde*.¹⁸ The author of this letter, Louis-Georges Tin, requested that the collection should be returned to Benin.¹⁹ On that same day, Louis-Georges Tin and the non-governmental association he leads, *Le Conseil Représentatif des Associations Noires de France (Le CRAN)*, organised a so-called 'guided tour of pillaged objects' at the *Musée du quai Branly*.²⁰ As reported in the media (*Liberation*, 10 December 2013), this 'guided tour' was a way to draw media's attention to the issue of colonial-era cultural object displacement from the former colonies towards the imperial capital. The activists' initiative was not well received by the museum's representatives. According to media articles, the members of *Le CRAN* were forbidden the access to the museum as a group and only allowed to enter as individual ticket payers (*ibid.*). In parallel, *Le CRAN* started an online campaign that petitioned the French Minister of Culture and Communication, the Minister of Justice, and the Minister of Education, for 'opening up a constructive dialogue with the concerned country in view of the ['Royal Treasure of Abomey' collection] restitution'.²¹

During my interviews with the curators of *Musée du quai Branly*, I wanted to check whether the media reports on this incident were accurate. Most of the museum curators I spoke to were reluctant to comment on this issue. Some invoked a legal obligation linked to their quality as public servants, known as 'the self-restraint duty' (*'l'obligation de réserve dans la fonction publique'*).²² As noted on the French Government's official website, this limits the freedom of expression that public servants are allowed to publically exercise, in order to ensure that they maintain a position of neutrality with regard to politics and

¹⁸ L.-G. Tin, 'Appel concernant les biens mal acquis de la France', *Le Monde*, 10. 12. 2013, available online at: http://www.lemonde.fr/idees/article/2013/12/10/appel-concernant-les-biens-mal-acquis-de-la-france_3528775_3232.html#qQF6dzH4mMukqsSf.99, accessed 6 October 2015.

¹⁹ The list and photo of the objects requested for restitution by *Le CRAN* can be viewed online at: https://dl.dropboxusercontent.com/u/7924285/Tr%C3%A9sors_des_rois_d%27Abomey.pdf, accessed on 15 August 2015.

²⁰ The chosen day was symbolic because it was the anniversary of king Béhanzin's death and the international human rights day, as L.-G. Tin mentioned in his letter published in *Le Monde*.

²¹ This online petitioning campaign gathered 3000 signatures. It can be viewed online at: <https://www.change.org/p/restitution-des-tr%C3%A9sors-d-abomey-%C3%A0-la-famille-royale-et-au-peuple-b%C3%A9ninois#petition-letter>, accessed on 15 August 2015.

²² This obligation is not specified by the law governing the rights and obligations of civil servants, i.e. *Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*, but it was introduced by the jurisprudence of Conseil d'Etat. Available online, accessed 10 September 2015: http://www.fonction-publique.gouv.fr/droits-et-obligations#Obligation_reserve.

politically sensitive issues.²³ Likewise, others curators I interviewed indicated that the museum is not institutionally enabled to deal with such requests itself, and that such matters are addressed at the level of the Ministry of Culture and of Communications.²⁴ Among curators' responses, one grabbed my attention in particular. This described *Le CRAN*'s initiative that requested that the 'Royal Treasure of Abomey' collection be returned to Benin as 'unofficial'. The curator meant that the claim was not made by the Beninese State itself. The word 'unofficial' made a strong impression on me and it became more meaningful as I started to examine the ways in which the nineteenth century law is reflected in the contemporary discussion about post-colonial restitution. What does 'unofficial' mean in the context where 'official' judicial remedies are largely inaccessible to potential claimants? Who is 'officially' enabled to speak publicly about colonial plunder?

According to its website, *Le CRAN* is a French non-governmental organisation which fights against racial discrimination.²⁵ As *Le CRAN*'s president, Louis-George Tin (L.-G. Tin) told me, this restitution request is part of a larger campaign which aims to draw the public's attention to what he describes as the 'heritage loss' the former colonies underwent as a result of colonial regimes.²⁶ As L.-G. Tin mentioned, *Le CRAN* chose to focus specifically on the 'Royal Treasure of Abomey' collection because, in their view, this is an 'unambiguous case of war plunder', recognised as such even by *Musée du quai Branly*. Consequently, they hoped that it would be easier to make a stronger claim in this case than in other colonial-related ones, where the historical context is more equivocal.²⁷ Nevertheless, *Le CRAN* seeks to open a larger conversation about these colonial dispossessions, and go beyond this case. For example, they are currently gathering information about various other colonial-era objects located in other European museums that could become subject to similar restitution requests.

²³ Ibid.

²⁴ *Musée du quai Branly* is jointly administered by the Ministry of Culture and Communications and the Ministry of Education, respectively. See *Décret n°2004-1350 du 9 décembre 2004 relatif au statut de l'Établissement public du musée du quai Branly*, available online, accessed on 10 Sept. 2015 : <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005927306&dateTexte=20110322>.

²⁵ http://www.le-cran.fr/le-cran_30_cran-associations-noires-de-france.html, accessed on 12 July 2015.

²⁶ Personal communication, August 2015.

²⁷ E.g. objects acquired as a result of gifts, sales or exchanges that took place during the colonial-era, between the colonised and the colonisers.

Le CRAN's president mentioned that the organisation he leads would not be able to pursue these claims through legal or diplomatic negotiations. Following their restitution campaign in December 2013, *Le CRAN* discussed the matter with the Beninese State authorities, and the members of the Beninese royal family.²⁸ According to L.-G. Tin, *Le CRAN* has sought the support of the Beninese Prime-Minister and President, and of the Beninese royal family, respectively, for taking this request further through diplomatic negotiations with the French State. It is worthwhile noting that the restitution request initiated in 2013 was also signed by Nicephore Soglo, former President of Benin. Yet, as L.-G. Tin admitted during our conversation, their campaign did not benefit from the support of the royal family of Benin with whom *Le CRAN* had been in contact. According to L.-G. Tin, the members of the royal family feared that the collection would not be appropriately preserved in Benin, and considered that the Parisian museum had better resources for caring for the objects. As L.-G. Tin recounted to me, since then, *Le CRAN* has also contacted representatives of *Fondation Zinsou*, a cultural centre launched in 2005 by a well-known Franco-Beninese financier, Lionel Zinsou.²⁹ In 2013, the *Fondation* opened the first museum devoted to African contemporary art in sub-Saharan Africa outside of South Africa.³⁰ L.-G. Tin added that *Le CRAN* managed to obtain the *Fondation*'s guarantees that they would assist with the preservation of the collection if the restitution request was successful. L.-G. Tin was confident that these guarantees would persuade the members of the royal family of Benin to join *Le CRAN*'s restitution campaign.

Whilst I was not able to verify the above information from other sources, it appears that some progress has been achieved, according to media reports.³¹ In April 2015, one member of the royal family, Prince Guézo, addressed a public letter to the French President, François Hollande, during his official visit to Benin. According to the information provided by L.-G. Tin, earlier this year, Prince Guézo's letter was answered by the French president's office, *Palais de l'Élysée*. The written response made two points. Firstly, it stated that the collection requested for restitution was incorporated into the French public domain without violating the

²⁸ Benin is, of course, a republic. Accordingly, whilst some still consider the royal family important from a historical and national identity point of view, it does not have the institutional authority to officially represent the Beninese state.

²⁹ http://www.fondationzinsou.org/FondationZinsou/Fondation_Zinsou_Accueil.html.

³⁰ <http://www.theguardian.com/artanddesign/2014/jan/06/contemporary-art-benin-ouidah-zinsou>.

³¹ Available online media, accessed 20 August 2015: <http://blogs.mediapart.fr/edition/les-invites-de-mediapart/article/020715/les-biens-mal-acquis-de-la-france-au-benin>.

international law requirements in place at the time. Secondly, it specified that the French State would not discuss the matter with anyone other than the official representative of the Beninese State. In spite of this discouraging reaction from the French authorities, *Le CRAN* still awaits a greater implication of the royal family, including the King himself. In seeking the King's support, their hope is that the royal family would have legal standing before a French court and therefore be able to fill a legal action for this return claim. Whether or not the royal family can actually fill in a legal request before a French legal court is less straightforward than it looks at a first glance. Other problems such as an expired statute of limitations due to the considerable lapse of time between the when possession was lost and when a legal action would be initiated, are also likely to arise (see Kiwara-Wilson, 2013: 406-407). I will discuss some of the technical legal aspects of this claim, including the question of whether national or international law would apply in this case, in detail in the next sections of the paper.

With regards to *Fondation Zinsou*, it is worth mentioning that it collaborated in various occasions with *Musée du quai Branly*, and in particular with the curator Beaujean who specialises in Dahomean art. One such example is the 2009 exhibition '*Artistes d'Abomey*'. Moreover, another significant detail is that the initiator and benefactor of *Fondation*, Lionel Zinsou, has been appointed Prime-Minister of Benin in 2015. It is a well-known fact that Lionel Zinsou maintains a good relationship with France and French authorities.³² Moreover, Zinsou is also President of *Société des Amis du Musée du quai Branly*. Accordingly, it would be difficult to anticipate the implications of Zinsou's prime-ministership for the restitution request that *Le CRAN* started in 2013. On the one hand, it could lead to a situation where the diplomatic negotiations with the French State would be considerably eased by Lionel Zinsou's involvement in the case. As a consequence, a positive resolution for this request could be more easily achieved, and the objects could, eventually, return to Benin.³³ On the

³² Zinsou is half French by his mother. He was born, raised, and educated in France (and in the UK). He was an adviser to the former French Minister of Foreign Affairs and International Development, Laurent Fabius. See <http://www.jeuneafrique.com/238064/politique/benin-cinq-choses-a-savoir-sur-lionel-zinsou-le-nouveau-premier-ministre/>. <http://www.rfi.fr/afrique/20150619-benin-lionel-zinsou-nomme-premier-ministre/>, accessed 1 September 2015.

³³ Given that judicial remedies are hardly possible in this case, a more likely solution would be an extra-judicial remedy. Such extra-judicial remedies were used by the France in the past. One such example is the so-called 'long-term loan agreement' used in the case of the Korean manuscripts' restitution that took place in 2011. See Cox, 2011.

other hand, a government which is close to France and seeks to strengthen this diplomatic relation even more could also choose to be less confrontational and not bring up the topic of this restitution.³⁴

Yet, L.-G. Tin concluded our conversation on a positive note. He was confident that the Beninese authorities, through their embassy in Paris, would fill an ‘official request’ and initiate diplomatic negotiations with their French counterparts for the return of these objects. To sum up, this restitution request started as a public campaign by a non-governmental organisation which fights against racial discrimination in France. Aiming to get the public’s attention, *Le CRAN* first organised a so-called ‘guided tour of plundered works of art’ at *Musée du quai Branly* where they invited various French journalists. Admittedly, this ‘guided tour’ could be seen by some as an unconventional and, perhaps, confrontational type of protest. Yet, it could also be regarded as an attempt to start a public conversation about what *Le CRAN* considers to be a case of historical injustice: the lost heritage of the former colonies as a result of colonisation. From this perspective, this protest could be regarded as a political act and an exercise of the freedom of speech.

Whilst it does not conform to institutionally validated ways of petitioning for the return of collection from a French museum, describing the request as ‘unofficial’ fails to observe the legitimacy of this statement as a political act. On the other hand, *Le CRAN*’s efforts to obtain the direct involvement of the Beninese authorities and of the royal family were an attempt to turn their ‘unofficial’ claim into one that is ‘officially’ recognised by the French State. Nevertheless, as the next section will show, there is a sense of paradox in using the official/unofficial category altogether. Given the absence of judicial remedies that can be petitioned by following a judicial route, any dispute resolution mechanisms, including diplomatic negotiations, could be considered extra-judicial, and thus alternative to official legal dispute resolution techniques.

³⁴ At the level of the French State, the topic of colonialism remains a sensitive one. This is apparent, for example, in the public controversy triggered by the French Law n° 2005-158 which recognises the contribution of the Algerian ‘harkis’ who fought alongside France’s colonial troops in the Algerian Independence War 1954-1962. In art. 4, this law required school history teachers to stress the ‘positive aspects’ of French colonialism (*‘Les programmes scolaires reconnaissent en particulier le rôle positif de la présence française outre-mer’*). This article was eventually repealed in 2006. However, this was not without a debate in the *Assemblée Nationale* where the right-wing party Union for a Popular Movement (UMP) regarded the amendment as ‘unjustified’.

2 The Legal Framework

2.1. *The Legacy of Nineteenth Century International Law*

In this section, I look back to the history of international law in order to sketch out the ways in which the international legal doctrine of the nineteenth century understood the problem of war plunder. The nineteenth century saw the rise of a customary international law principle concerning the protection of artworks and monuments during armed conflict. Moreover, in the aftermath of the Napoleonic Wars, a customary law ‘restitution principle’ emerged. Yet, these international law norms did not apply to wars which involved non-European belligerents. The section examines the sources of this double standard identified in the nineteenth century international law, and discusses its implications on current debates concerning museum objects’ restitution.

A conventional contemporary understanding of international law is as a set of rules which states use in order to regulate relations between each other. Moreover, an important feature of this type of legal norm is its universality. That is to say, we understand international law as a body of legal norms applicable to all states around the world regardless of their specific legal culture or form of government. Yet, the scholarship suggests that this important characteristic of international law is, in fact, a relatively new addition, dating back to only the early twentieth century. As Kennedy suggestively noted, most international legal scholars and practitioners regard the history of international law as ‘largely a twentieth century tale’ (Kennedy, 1996: 390). Moreover, according to him, most practitioners of this area of law see the nineteenth century as a ‘non-legal, even pre-legal background (...) for an emerging legal order’ (ibid.). What did, then, the international law of the nineteenth century look like?

It is only recently that the legal scholarship has become interested in exploring this past. Legal historians such as Koskenniemi (2001) have convincingly argued that studying these early stages in the development of international law is key for understanding the present status of the discipline, and the contemporary configuration of the international arena. According to Anghie (2007), one defining feature of the nineteenth century international law was its Eurocentrism. The change from Eurocentrism to universalism, Anghie (2007) argues,

was the process of the very making of international law as we know it today. The defining moment was, according to him, the moment when the non-European states were recognised as full members of the ‘international society’ and subjects of law with attendant rights and powers.

The concept of sovereignty has, perhaps, one of the richest scholarships in the history of political and legal theory. From an international law point of view, it has a defining significance. It provides the conceptual basis for a system of regulation and governance at an international level. Specifically, the fact that all the members of the so-called ‘international society’ should be understood as equal and exercising absolute power within their own territory, i.e. enjoying what is known as ‘sovereignty’. Understanding states as equal among each other and fully-potent within their own territory (i.e. sovereign) opened the way towards setting up a mechanism through relations among states could be normalised and international conflicts could be resolved.³⁵ As it has been documented by scholars such as Koskenniemi (2001) and Tuck (1999), designing a conceptual framework through which states can be seen as equals constitutes the beginning of international law.³⁶

An important aspect of this early conception of the ‘international society’, understood as a community of sovereigns, was that it only included European states. According to Anghie (2007: 311), as a consequence of this, sovereignty came to be seen as an attribute of European states and its existence was taken for granted. The colonial encounter challenged this assumption by opening up a set of problems that were new for the international law discipline. Namely, should non-European polities be recognised as ‘sovereigns’ too? From there, further questions followed regarding the task of defining and identifying the characteristics a state should have in order to be recognised as ‘sovereign’. This involved telling apart ‘proper’ sovereigns from other entities and actors on the international arena (ibid.: 57). In order to solve these questions, international lawyers of that period based this distinction on what they understood to be a fundamental difference between European and non-European states (Anghie, 2007: 35). Specifically, these jurists asserted that the ‘international society’ should only comprise states which could prove the civilised nature of

³⁵ This model of sovereignty emerged from the Treaty of Westphalia of 1648.

³⁶ For an alternative model which discusses the emergence of a non-European concept of sovereignty, see Anghie (2007).

their society by the existence of (European-like) legal institutions (ibid.). As a consequence, during the nineteenth century, sovereignty was seen as something reserved for European-only states. Accordingly, the nascent international law of the nineteenth century was deeply marked by a vocabulary and conceptual framework that contemporary scholarship would univocally denounce as racist. Anghie (2007) makes a powerful case in showing the many ways in which this early international law was itself part of the colonial project. He argues that, even from the point of view of international law, the interaction between European and non-European societies during the colonial expansion was an encounter between unequal entities. Non-European societies, he writes, were ‘denied sovereignty’ based on a racialised understanding of cultural difference (ibid.: 101). One consequence that followed from this inferior status of non-European states under international law was that ‘virtually no legal restrictions were imposed on the actions of European states with respect to them’. Lacking sovereignty, ‘non-European states exercised no rights recognizable by international law’ (ibid.: 103) and ‘they were precluded from making any sort of legal claim in the realm of international law’ (ibid.: 55).

The impact of this history on the next century’s international relations and legal framework cannot be emphasised enough. Even the way the ‘international society’ was expanded in order to allow non-European states to become full members with all the attendant rights and powers bears the legacy of this historical era. A decisive moment for this was the Berlin Conference of 1884-1885. As Elizabeth Heath (2010: 177) explains, the Berlin Conference was significant in that, whilst it did not initiate the European colonisation of Africa, it legitimised and formalised the process. The main focus of the Conference was trade and free navigation of the Congo and Niger rivers. Nevertheless, this Conference brought about a new rhetoric for the European states to describe the ends and values of international law and European intergovernmental cooperation. This new rhetoric is called by Koskenniemi (2001) the ‘civilising mission’. An example of how this rhetoric was deployed can be found in Art. 6 of the General Act of the Berlin Conference on West Africa:

All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of

*creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.*³⁷

Whilst the Conference was a decisive moment in the history of the Africa, African peoples played no role in the deliberations which effectively resulted in a partitioning of the continent between European powers (see Umozurike, 1979: 26). Anghie suggests that a more accurate understanding of the international society's expansion would be as 'the process by which Asian and African societies were made to accept European standards as the price of membership' (ibid.: 101). The process of gaining full recognition under international law was completed during decolonisation.

Yet, the legacy of this past may not have been completely overcome. One instance which shows the enduring effects of the nineteenth-century legal doctrines and ideas was analysed by anthropologist Elizabeth Povinelli. In her book, Povinelli (2002) documents the ways in which the Australian politics of multiculturalism still bore, until recently, the mark of the nineteenth century international law. It was not until 1992, with the famous Mabo [2] ruling, that Australia finally broke with the nineteenth century international law doctrine of *terra nullius*³⁸ on which the British Crown's title acquisition over the Australian lands rested.³⁹ Whilst much has changed,⁴⁰ legal scholars such as Pottage (2007) point out that some of the legal doctrines consolidated during the nineteenth century still frame the status of Aboriginal and Torres Strait Islanders population before Australian law. Whilst common law is said to recognise native title's authority as originating in indigenous law, this recognition continues to be observed in relation to one single instance of sovereignty: the British Crown. As Povinelli argued, indigenous law is not recognised as a valid and functioning legal culture and system, but only as 'fact'. Anything else, Pottage argues, would imply that the land title dispute should be treated as an intra-territorial conflict of laws. Pottage further suggests that

³⁷ Available at: <http://africanhistory.about.com/od/eracolonialism/1/bl-BerlinAct1885.htm>, accessed 10 Sept. 2015.

³⁸ Terra nullius (more or less meaning 'land belonging to nobody') is an early international law doctrine according to which territories which are not subject to the sovereignty of any state can be appropriated and incorporated into the territory of sovereign states. See Pottage, 2007.

³⁹ Available online at: <http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html>, accessed 22 September 2015.

⁴⁰ The Australian High Court denounced this doctrine as a 'reminiscence of a reprehensible racial discriminatory past'. See ibid. In 1993, Australia passed the Native Title Act which recognised a native ownership title over Australian lands and seas.

the recognition had an unexpected effect: the reinforcement of the common law's autochthonous (or exclusive) existence on the Australian territory. The above example shows how the nineteenth century legal doctrine can still have obscured effects on the contemporary world.

It is important not to overlook this legacy in the restitution debate either. Claims seeking to recover non-European objects seized in war during the colonial-era are confronted with a basic, yet fundamental problem: the absence of a relevant recognised international law to forbid such actions at the time these objects were relocated. This view, I showed above, insufficiently stresses the political and legal inequalities inherent in that nascent body of international norms.

2.2. *A Brief History of the Law on the Spoils of War*

This chapter discusses the emergence of a restitution principle in the aftermath of the Napoleonic Wars. Admittedly, this nineteenth century principle was not uniform and still far from what we would recognise today as an international law rule. However, given that non-European peoples were excluded from the realm of international law, no similar actions directed at the restitution of seized objects were or could have been possible in their cases. The early international law, as I discussed above, was inaccessible to non-European states. As Kiwara-Wilson (2013: 386) notes, in cases where possession was lost as a result of colonial wars, the acquired title 'ostensibly rests on nineteenth century law on the spoils of war, as applied to non-European peoples'.⁴¹

The problem of establishing rules regarding the destruction and plunder of cultural objects and monuments in war preoccupied the theorists of the law of nations since the 1500s. The initial reflection was part moral philosophy: early international lawyers sought to determine the conditions under which war could be just. Their aim was to establish a set of criteria, justifications, and rules that would indicate when engaging in war is just (*jus ad bellum*), and what the limits of acceptable wartime conduct should be (*jus in bello*). These

⁴¹ Kiwara-Wilson makes this statement with regard to the British title to the Benin bronzes and ivories seized during the punitive expedition' conducted by the United Kingdom in Benin in 1897.

early writings on the theory of just war are considered to be at the origin of contemporary public international law.⁴² In what concerns enemy goods' destruction in war, these early writing generally regarded it as permissible and lawful for all types of property. No difference was made with regard to works of art, cultural or religious objects, grand edifices, or monuments. Likewise, the appropriation of the enemy's property during war was generally seen as permissible 'without limit or restriction' (H. Grotius, *De Jure Belli*, 1625, book 3, chapt. 6, s.2, quoted in O'Keefe, 2006: 8).

According to O'Keefe (ibid.: 8-9), during the next two centuries, a consciousness that works of art and monuments deserved special treatment developed. A quote from Emer de Vattel, one of the most important international lawyers of the eighteenth century, exemplifies this: 'wilful destruction of public monuments, places of worship, tombs, statues, paintings, etc. (...) was absolutely condemned even by the voluntary law of nations, as never being conducive to the rightful object of war' (E. de Vattel, *Le Droit des Gens*, book 3, chap. 9, para. 173, 1764, quoted in O'Keefe, 2006: 10). Nevertheless, O'Keefe (ibid.: 11) explains that this early doctrine should not be understood as uniform. For Vattel, a necessity to pursue a certain military operation could justify the destruction of monument (Vattel, ibid. para. 168 quoted in ibid.). As for appropriation, the recognised doctrine was that the victor could justly capture and remove goods to the value of any debts (O'Keefe: 13). The Napoleonic Wars, however, brought a turning point in the European lawyers' attitudes towards the kind of legal protection that should be given to monuments and art works, at both national and international levels.⁴³

It is a well-documented historical fact that the Napoleonic Wars were accompanied by the systematic plundering of artworks and monuments from France's defeated enemies. These looted art objects were kept in *Musée Napoléon*, opened in the aftermath of the French Revolution. According to Sandholtz (2007: 49), this plundering of artworks was officially organised by the French State. For example, one of the tasks undertaken by *La Commission*

⁴² Some examples that are well-known political and legal theory scholars include: H. Grotius, *De Jure Belli ac Pacis*, text of 1625; F. de Vitoria, *De Indis et De Jure Belli Relectiones*, text of 1557; S. Pufendorf, *De Jure naturae et Gentium*, text of 1672, E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués a la Conduite et aux Affaires des Nations et des Souverains*, text of 1764, etc.

⁴³ In France, the aftermath of the Revolution saw the birth of a notion of 'national heritage' (*patrimoine national*), and the establishment of protective legal rules directed at it. For a full account of these changes at the national level, see Héritier, 2003.

de Commerce et d'Approvisionnement established in 1794 was to 'extract' artworks from the conquered territories in order to take them to France. According to Goodwin (2008: 680), the negotiations that took place during the Paris Peace Conference in 1814-1815 did not only force France to return the conquered territories, but also pressed France for returning the looted artworks.

According to Goodwin (ibid: 681), the Second Treaty of Paris did not establish the method through which the restitutions were to take place. In spite of this, some restitutions were carried out after the Peace Conference. For example, the Heidelberg manuscripts were returned to Heidelberg in 1815. Moreover, several Flemish paintings were returned to the Netherlands (Greenfield, 2007: 390).⁴⁴ However, according to Kiwara-Wilson (2013: 389), the restitution practice developed in the aftermath of the Napoleonic Wars should not be regarded as a uniform practice. Many other plundered artworks stayed in France.⁴⁵ Yet, Goodwin (ibid: 681) argued that this moment was significant because it challenged for the first time the practice and norm known as '*To the victor go the spoils*', which was predominant in international law doctrine until then.

O'Keefe (2006) reviews other historical moments that have contributed to the emergence of clearer and more coherent international legal rule to forbid the destruction and plunder of cultural objects and monuments during war. For example, the Lieber Code (1863), i.e. the first codification of the laws of war, and the so-called Brussels Declaration (1874), i.e. the first intergovernmental (non-binding) code of the laws of war, included requirements that the destruction of the enemy's property not demanded by the necessity of war was forbidden. O'Keefe also notes that the late nineteenth century marked the rise of rules for the protection of cultural property during belligerent occupation (ibid.: 18-19; 21-22). These attempts formed the basis of the 1899 and 1907 Hague Conventions which established the first formal intergovernmental binding statement of the laws of war and war crimes in international law (ibid.). Regulation Art. 27 1907 Hague Convention forbids any bombardment directed at or likely to cause avoidable incidental injury to churches, art galleries, museums, historic

⁴⁴ The Heidelberg manuscripts were actually taken by the French from Vatican, but they were returned to Heidelberg in accordance to the territoriality requirement, explained above. The Flemish paintings had actually been taken by the French from Belgium, but returned to the Netherlands. See Goodwin (2008) and Greenfield, (2007) for full accounts.

⁴⁵ For example, several Flemish paintings taken by the French army took from Belgium. See Greenfield, 2007.

monuments, and so on, unless such attack was imperatively demanded by the necessities of war.⁴⁶ More important for the purpose of this paper is Regulation Art. 56, which provides that:

'The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings'.⁴⁷

Furthermore, the Convention established the premises for preventing the misappropriation of and wilful damage to cultural property in a territory under belligerent occupation (Regulation Art. 43, see O'Keefe, 2006: 31). Moreover, the first Hague Convention is considered to be the first binding international law norm regulating belligerents' conduct in war. In 1954, a new Hague Convention was adopted for the specific purpose of protecting cultural property during war (Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention).⁴⁸ Moreover, in the aftermath of the Second World War, a UN agency, i.e. UNESCO, was established for the protection of culturally-valuable sites, monuments, and objects through intergovernmental cooperation. Since then, a body of international legislation and instruments has been developed for the safeguard of what came to be known in English language as 'cultural property'. One of the most important such instruments is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).⁴⁹

Furthermore, in 1970, the UNESCO Convention introduced explicit provisions concerning the restitution of illicitly acquired cultural property.⁵⁰ It is worthwhile mentioning

⁴⁶ Available online, accessed on 25 Sept. 2015: <https://www.icrc.org/ihl/INTRO/195>.

⁴⁷ Ibid.

⁴⁸ Available online, accessed on 25 Sept. 2015:

http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁴⁹ The full array of UNESCO legislation is available online, accessed on 25 Sept. 2015:

http://portal.unesco.org/en/ev.php-URL_ID=13649&URL_DO=DO_TOPIC&URL_SECTION=-471.html,

⁵⁰ The 1970 UNESCO Convention defines the illicit loss of cultural property as follows: 'The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit' (Art. 3). Specific provisions are: art. 6 (b), export without certificate; art. 7 (b) (i), import of property stolen from a museum or other institution; and 13 (a), transfers of ownership likely to promote import and export. Under the Conventions, the aforementioned acts constitute unlawful

that this Convention does not apply retrospectively to acts committed before 1970. Nevertheless, UNESCO set up a framework for international cooperation within which even claims which fall outside the scope of the Convention can be addressed. This framework is known as the Intergovernmental Committee for Promoting the Return of Cultural Property (ICPRCP) and it can act as a mediator in cases where international conventions cannot be applied.⁵¹ The ‘Royal Treasure of Abomey’ could, in theory, be brought before the ICPRCP by the Beninese State. With regards to requests made under the 1970 Convention, Members States are expected to ratify or implement the Convention into domestic law. Accordingly, claims for enforcing the Convention are addressed to the national courts of the country in which the requested object is located. Yet, in a study published in 2011, Prott noted that less than 10 states had incorporated mechanism specifically designed for the return of illegally acquired objects (p. 3). As a consequence, it is common that even the restitutions effected according to the 1970 Convention take place without the direct use of the mechanisms provided by the Convention.⁵²

2.3. Possible Solutions in Private and Public International Law?

This section discusses how feasible a legal action that seeks the restitution of the ‘Royal Treasure of Abomey’ would be in either private or public international. I also briefly review the French legal framework that could be relevant to this claim, and explain why the likelihood of success for such a legal action is minimum.

There are two conceivable legal routes through which reparation could be sought in this case. On the one hand, a private law approach. In this case, a possible legal action to seek the reparation for stolen property could be initiated by members of the Beninese royal family. In this situation, the members of the royal family would appear before a court of law as

transactions and are to be treated as such by the State Parties to the Convention. This convention introduces provisions for the restitution of cultural property which was illicitly transferred.

⁵¹ Information available at: <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/>, accessed on 25 Sept. 2015.

⁵² According to Prott (2011: 4), in a number of cases customs authorities have seized suspicious objects, but it has not been necessary to litigate since the importer concedes the evidence and consents to the return of the object.

private individuals and not as representatives of the Beninese State. This explains partly why *Le CRAN* wanted the support and direct involvement of the royal family. Given that the ownership of this collection was lost in an international context, the competent law would then be private international law. The next step is to identify what court would have jurisdiction in such a case. Because the collection is currently located in France, at *Musée du quai Branly*, French courts would have jurisdiction over such a hypothetical legal action. The following step is to identify what the applicable law would be in this case. France signed the private international law agreement known as the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, but it never ratified it.⁵³ Consequently, the applicable law in the case would be French property law.

Under the above-described circumstances, a legal case in private law would be severely weakened by the passage of time. According to the French Civil Code (art. 2224 nouv. du code civil),⁵⁴ the general statute of limitations requires an appellant to bring a case to reclaim property of a lost object from a possessor that acquired it in good faith within five years from the date of loss or theft. In our case, the acquisition of the collection by the French authorities was done forcefully during war. The acquisition of title in this case was, arguably, not founded on good faith. Accordingly, the court could decide that a longer statute of limitation would apply in this case: thirty years (art. 2227 nouv. du code civil).⁵⁵ Yet, this would also be insufficient, given that the loss of property took place more than a hundred years ago. Consequently, there is little hope that this legal action in private international law would lead to a feasible solution. According to this scenario, the claim is likely to be found inadmissible and the legal action would stop then and there.

Even if a court would find the claim admissible, further challenges would arise for the plaintiff. The *Code général de la propriété des personnes publiques*, which governs French public authorities' property, provides that 'the goods of public institutions (...), as part of the

⁵³ The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organisation whose purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. The 1995 UNIDROIT Convention formulates a uniform law instrument in international private law for the specific purpose of cultural property recovering stolen or illegally exported cultural objects. Information available online, accessed 25 Sept. 2015: <http://www.unidroit.org/instruments/cultural-property/1995-convention>.

⁵⁴ See <http://www.economie.gouv.fr/dgccrf/Publications/Vie-pratique/Fiches-pratiques/Delais-de-prescription>

⁵⁵ Ibid.

public domain, are inalienable and imprescriptible' (art.L3111-1). Art. L2112-1 defines the 'public domain' as the goods owned by public institutions which present a public interest from the point of view of history, art, archaeology, science or technology. Museum public collections are expressly included in the French public domain. As Prott (2012: 78) notes, the imprescriptibility rule ensures that 'ownership [by state institutions] cannot be defeated by the title of a good faith purchaser'. With regards to the inalienability principle, Pontier (2012: 135) explains that this rule ensures that assets owned by public institutions cannot be removed from the public domain.⁵⁶ As a consequence of these two protective rules of the French public domain, the transfer of this collection's ownership would be difficult to pursue by following this legal route.

Yet, Goodwin (2008: 697) discusses a precedent: the claim made by Greece for the restitution of Venus de Milo, located in *Musée du Louvre*. The Greek statue was legally acquired by a Frenchman in Constantinople in 1821. According to Greenfield (2007: 113), in this case, the French court asserted that French law prevented the restitution of this object in spite of a willingness of the French authorities to do so. However, Goodwin (ibid.) suggests that 'this precedent (...) does not engender title by looting'. What she means is that, given the different conditions of acquisitions, i.e. by war plunder, the legal solution to be provided by French courts could also be different in the case of a restitution claim for the 'Royal Treasure of Abomey'. Furthermore, Goodwin quotes an example of precedents where French courts appeared to be more lenient with regard to similar claims to recover property lost by looting. For example, in 1950, France returned an artwork seized during the colonial invasion in 1893-1894 (ibid. 2008: 697) from Laos. Goodwin suggests that there might be some hope in filling a request to a French court under private international law. However, as I explained above, the various problems that arise due to an expired statute of limitations, and to France's unique legal protections for public property, weaken considerably the odds of a successful claim for recovering objects which constitute colonial plunder.

In public international law, on the other hand, the claim for the recovery of this collection should come from the Beninese State itself. Whilst public international law has no

⁵⁶ Art. L2141 defines the conditions under which objects can be 'declassified' in order to be removed from the public domain: that the object is no longer 'reserved for a public service or the direct use of the public'. A more detailed discussion of this procedure can be found in my QT papers (2015) at University of Oxford.

statute of limitations, it is unlikely that this legal route would be any easier to follow. First, the Beninese State would have to support a case that asserts the fact that it is the successor state of the Kingdom of Abomey. Moreover, the other major problem that such legal action would encounter is the absence of a relevant recognised international norm to forbid war looting from non-European states, at the time the plundering took place. As I showed above, a number of artwork restitutions towards European states were carried out by France in the aftermath of the Napoleonic Wars. No similar efforts were undertaken for non-European states. As discussed in the previous sections of this paper, one reason for this was that non-European states were not recognised as subjects of international law at the time. This fact rested, I showed above, on a racial discriminatory understanding of cultural difference which maintained that non-European states were not ‘civilised enough’ as to be recognised as full sovereigns under international law.

Accordingly, these legal routes appear unlikely to allow a restitution claimant seeking to recover the ‘Royal Treasure of Abomey’ to bring forward a legal case before a French court of law. In the following section, I will argue that the adjudication system in which such legal actions can be put forward by a restitution claimant is problematic and a solution should be sought elsewhere.

2.4. Adversarial Inalienability?

This section takes up one of the questions posed in the outset of this paper. Namely, I aim to offer a preliminary response to the following interrogation: How is the nineteenth century legal doctrine reflected in contemporary restitution talks? The final argument of this paper is that, in my view, the judicial system is not able to deliver the most equitable resolution in this case. Furthermore, I argue that a better way to address and engage with a restitution request should be sought, preferably, outside the judicial system. By this I do not

mean that the remedies should go against the law, but simply that they should be extra-judicial, i.e. achieved through what is known as ‘alternative dispute resolution mechanisms.’⁵⁷

As mentioned above, perhaps the greatest challenges posed to a legal claim seeking redress in the case comes from the rules protecting the French public domain. The inalienability rule is one of the most important legal issues arising in the case of request seeking the restitution of objects held in French museums. The way this ‘inalienability’ principle works in practice leaves little, if at all, room to de-accession objects from national collections. That is, once an object enters the collections of a French museum, it is legally understood as property of the French State, and a part of the French *patrimoine*.

On the other hand, anthropologist Elizabeth Coleman (2010: 82) argued that, regardless of specific motivations and reasons, restitution request can generally be seen as searches for the recognition of an ‘inalienable right’ to the claimed objects. According to Coleman, such ‘inalienable rights’ are derived from the belief that ‘a special kind of value, and a relationship [exists] between an object and a person or group’s identity’ (ibid.). Coleman links her analysis of restitution claims to a long-standing discussion in anthropology on the topic of so-called ‘inalienable possessions’. As early as 1914, Lévy-Bruhl described the existence of two classes of nouns in Melanesian grammar: ‘alienable’ and ‘inalienable’ objects (quoted in Coleman, ibid.: 83). According to him, the latter stood for ‘an indissoluble connection between two entities – a permanent and inherent association between the possessor and the possessed’ (ibid.: 84).⁵⁸

A similar relationship between the possessor and the possessed object was famously acknowledged by Mauss (1921) in his essay on gift-giving in various non-Western societies. In particular, Mauss aimed to illuminate what compels a receiver of a gift to reciprocate. He proposed that reciprocity is provoked by the existence of a ‘spirit’ which inhabits the object and impels it to return to its original owner. More recently, Weiner (1992: 5) called this the ‘paradox of keeping-while-giving’ and saw it as a ‘universal predicament’ of exchange relations. Furthermore, she argued that ‘inalienable possessions’ represent ‘absolute value’

⁵⁷ For a detailed discussion about alternative dispute resolution techniques and mechanisms used in cultural property disputes see Cornu and Renaud (2011).

⁵⁸ This same line of argument is also used and further developed in my transfer papers for admission to the second year of my DPhil University of Oxford.

and that they ‘speak to and for an individual’s or a group’s social identity and, in so doing, affirm the difference between one person or group and another’ (ibid.: 42; 43). Godelier (1999: 24) too interpreted Mauss’s argument as ‘indicat(ing) that the thing given is not completely alienated, that it remains attached’.

Building on this previous analyses of ‘inalienable possession’, Coleman (2010) argues that this special identity relationship assumed in the notion of ‘inalienable possession’ is used as ‘the moral justification for repatriation, and presents the idea that there are people who should, rightfully, possess and control certain things because they are of special significance to them.’ (ibid.: 86). She suggests that the implication of framing the claim in terms of ‘inalienability’ is that ‘museums holding such objects do so wrongfully’ (ibid.: 83). Accordingly, this analysis of restitution requests as an attempt to assert a culturally-specific type of relationship between a group and an object is illuminating because it shows that repatriation requests are not (only) about possession. Perhaps more importantly, Coleman suggests, they are about the recognition of a ‘special relationship’ and the attempt to keep that relationship active.⁵⁹

This discussion appears to be particularly salient for the French case, where we encounter something that we could call ‘adversarial inalienability’. On the one hand, we can see how, by following Coleman’s explanation, a restitution request can be framed as a claim for the recognition of an ‘inalienable right’. On the other hand, the French state’s protection of public property also invokes the existence of an ‘inalienable right’ to objects. What does it mean, then, to acknowledge the existence of two adversarial claims to inalienability? First, it is clear that we are not dealing with the same type of ‘inalienability’. The French one originates in the French legal system and the way the French law protects public property. The restitution claim to inalienability could be said to originate, in the argument used by Coleman, in a culturally-different system of protecting one’s property, i.e. the belief that a part of one’s identity is located in the claimed object, which assigns that claimant something similar to an ownership right.

In the following, I would like to briefly dissociate the legal adjudication mechanism from the claims used by each respective party in a legal adversarial adjudication process. This

⁵⁹ Ibid.

distinction was explained by the legal philosopher L.L. Fuller (1978: 363) as follows: the former is a system used to resolve differences which involves a method and a legal rule according to which the merits of claims are judged against. The latter is an argument put forward by each respective disputing party in order to support his/ her case as to why, in accordance with the legal rule, his/her view should be favoured. Moreover, Fuller works within the assumption that the legal rule according to which the merits of claims are judged is consented upon by both disputing parties. Fuller's distinction could help us explain why a legal adjudication mechanism does not provide an unbiased way to resolve cases of so-called 'adversarial inalienability'. Firstly, the adjudication mechanism was not consented upon. Secondly, whilst one party mobilises legal arguments, the other uses a type of argument that can be said to be identity-based. Yet, the legal adjudication mechanism can only comprehend claims that are translated into the legal language.

If we use this simplified framework of adjudication processes for colonial-related restitution disputes, we would be able to bring to light another element important for the discussion. Namely, whilst one of the parties is able to employ a legal-type of argument, the other *cannot*. As this paper has shown, one of the reasons why the restitution claimant cannot pursue a feasible legal route is because, historically, this claimant was not a subject of law at the time the property of these goods was lost. In a way, therefore, a legal adjudication mechanism partly inherits the exclusionary logic of the nineteenth century international law. Accordingly, I propose, a more balanced solution should be sought not within, but outside the judicial system. By this I do not mean that remedies should go against the law, but simply that they should be extra-judicial, i.e. achieved through what is known as 'alternative dispute resolution mechanisms'. An extra-judicial mechanism, I argue, would be able to consider both legal and non-legal merits and arguments that the claimants use in support of their case. Likewise, an extra-judicial mechanism could envisage more creative ways of imagining ownership, and therefore be in a better position to deal with more difficult questions such as whether or not two adversarial claims to inalienability could be simultaneously recognised.

Conclusion

The paper looked at restitution claims for objects seized during the colonial-era. My interest in this type of restitution request emerged out of an observation that the legal practitioners and scholars commonly regard such cases as peripheral to their preoccupations. As I showed in the paper, this is largely because judicial remedies tend to be unavailable for these circumstances. The paper interrogated the historical causes of judicial redress's unavailability for these cases. For this purpose, the paper provided a historically-informed picture of the legal and political context in which the non-European objects were lost during the colonial-era.

To illustrate this, this paper took as its case-study the restitution request concerning the so-called '*Trésor des rois d'Abomey*', currently located at *Musée du quai Branly* in Paris. For this, I drew on the interviews conducted with some of the claimants, i.e. representatives of *Le CRAN*, and with curators from *Musée du quai Branly*. The paper further examined the merits of the legal routes through which this collection could be requested for restitution. It concluded that a more equitable way to engage with a possible restitution request coming from the Beninese State would be, however, through an extra-judicial redress mechanisms.

Bibliography

ANGHIE, A. 2007. *Imperialism, sovereignty and the making of international law*, Cambridge, UK, Cambridge University Press.

ARGYLE, W. J. 1966. *The Fon of Dahomey: a history and ethnography of the Old Kingdom*, Oxford, Clarendon Press Oxford.

BEAUJEAN, G. 2007. Du trophée à l'œuvre: parcours de cinq artefacts du royaume d'Abomey. *Gradhiva. Revue d'anthropologie et d'histoire des arts*, 70-85.

BEAUJEAN, G. 2012. Vers l'Afrique: au rythme d'une promenade. Voir, ne pas voir. Les expositions en question. Journées d'étude INHA. Université Paris 1 – Panthéon Sorbonne - HiCSA, Paris.

BEAUJEAN, G. 2015. *L'art de cour d'Abomey: le sens des objets*. PhD, EHESS.

BYRNE, S., CLARKE, A., HARRISON, R. & TORRENCE, R. 2011. Networks, agents and objects: frameworks for unpacking museum collections. *Unpacking the Collection*. Springer.

COLEMAN, E. 2010. *Repatriation and the concept of inalienable possession*.

COX, D. 2011. "Inalienable" Archives: Korean Royal Archives as French Property under International Law. *International Journal of Cultural Property*, 18, 409-423.

DE VATTEL, E. 1916. *Le droit des gens: ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, Carnegie institution of Washington.

FULLER, L. L. & WINSTON, K. I. 1978. The forms and limits of adjudication. *Harvard Law Review*, 353-409.

GODELIER, M. 1999. *The enigma of the gift*, University of Chicago Press.

GOODWIN, P. S. 2008. Mapping the limits of repatriable cultural heritage: a case study of stolen Flemish art in French museums. *University of Pennsylvania Law Review*, 673-705.

GREENFIELD, J. 2007. *The return of cultural treasures*, Cambridge University Press.

GROTIUS, H. 1964. *The Law of War and Peace: De Jure Belli Ac Pacis, Libri Tres*, Oceana Publications.

GUERRIN, M. 2010. Inquiétude après le départ des manuscrits coréens. *Le Monde*. 24 Nov. 2010 ed., available online at http://www.lemonde.fr/culture/article/2010/11/24/inquietude-apres-le-depart-des-manuscrits-coreens_1444372_3246.html, accessed 6 Nov. 2015.

HARGREAVES, J. D. 1969. *France and West Africa: an anthology of historical documents*, Bristol, UK, Macmillan St Martin's Press.

HEATH, E. 2010. Chronology of Selected Events: Berlin Conference of 1884-1885. In: APPIAH, A. & GATES, H. L. (eds.). Oxford University Press.

- HÉRITIER, A. 2003. *Genèse de la notion juridique de patrimoine culturel 1750-1816*, Paris, L'Harmattan.
- KENNEDY, D. 1996. International law and the nineteenth century: History of an illusion. *Nordic Journal of International Law*, 65, 385-420.
- KIWARA-WILSON, S. 2012. Restituting colonial plunder: The case for the Benin bronzes and ivories. *DePaul J. Art Tech. & Intell. Prop. L*, 23, 375.
- KOSKENNIEMI, M. 2001. *The gentle civilizer of nations: the rise and fall of international law 1870–1960*, Cambridge, UK, Cambridge University Press.
- MANNING, P. 1982. *Slavery, colonialism and economic growth in Dahomey, 1640-1960, USA*, Cambridge University Press.
- MAUSS, M. 1954. *Essai Sur Le Don. The Gift. Forms and Functions of Exchange in Archaic Societies*, London.
- MURPHY, M. 2009. *Du champ de bataille au musée: les tribulations d'une sculpture fon. Les actes de colloques en ligne du musée du quai Branly*.
- O'KEEFE, R. 2006. *The protection of cultural property in armed conflict*, Cambridge University Press.
- PONTIER, J.-M. 2012. La question de l'inaliénabilité appliquée au patrimoine contemporain. In: CORNU, M., FROMAGEAU, J., POLI, J.-F. & TAYLOR, A. C. (eds.).
- POTTAGE, A. 2007. *Conflicts of laws: comparing autochthonous legal cultures*, Routledge.
- POVINELLI, E. A. 2002. *The cunning of recognition: Indigenous alterities and the making of Australian multiculturalism*, Duke University Press.
- PROTT, L. 2011. *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption Background paper*. Paris: UNESCO.
- PROTT, L. 2012. *Inalienability and Other Modes of Protection in Current Legal Systems*. In: CORNU, M. (ed.) *Inaliénabilité des collections, performances et limites?* Paris: L'Harmattan.
- QUYNN, D. M. 1945. The art confiscations of the Napoleonic wars. *The American Historical Review*, 437-460.
- RIVIÈRE, M. 2013. *Au musée du quai Branly, visite guidée des «œuvres pillées»*. Libération, available online at: http://www.liberation.fr/societe/2013/12/10/au-musee-du-quai-branly-visite-guidees-des-oeuvres-pillees_965532, accessed 6 Nov. 2015.
- SANDHOLTZ, W. 2007. *Prohibiting Plunder: How Norms Change: How Norms Change*, Oxford University Press, USA.
- TIN, L.-G. 2013. *Appel concernant les biens mal acquis de la France*. Le Monde. Paris.

TUCK, R. 1999. *The rights of war and peace: political thought and the international order from Grotius to Kant*, Oxford University Press.

UMOZURIKE, U. O. 1979. *International law and colonialism in Africa*, Nwamife Publishers.

WEINER, A. B. 1992. *Inalienable possessions: The paradox of keeping-while-giving*, University of California Press.