

# IFAR<sup>®</sup> Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH



*In this issue*

**Colonial Loot**

**The Scourge of  
Avant-Garde Fakes**

**Courbet & WWII  
Lost and Found**

**News & Updates**

**—and Much More ...**

INCORPORATING  
**STOLEN ART ALERT<sup>®</sup>**

IFAR JOURNAL

VOLUME 21 NOS. 3 & 4 2022/2023

COLONIAL LOOT

AVANT-GARDE FAKES

COURBET & WWII: LOST AND FOUND

Volume 21 Numbers 3 & 4 2022/2023

## 2 NEWS & UPDATES

- 2 Fragonard Portrait Reviewed by IFAR in 1970 Reappears in Utah
- 3 Was Van Gogh's *Sunflowers* a Nazi Forced Sale?  
Mendelssohn-Bartholdy Heirs Say "Yes" for the Version in Japan
- 8 "Duress" at Issue in Restitution Claim Against Guggenheim for Picasso's *Woman Ironing*
- 10 Court Rules for Howard University over Charles White's *Centralia Madonna*
- 11 CPAC (the "Other" One) Meets to Review Import Restrictions
- 14 Dispute over Van Gogh Lent to Detroit Ends with Immunity from Seizure Law Intact

## 17 IN MEMORIAM

Jack A. Josephson  
David Mitten

---

## 19 YEARS AFTER FRANCE'S PLEDGE TO RETURN COLONIAL LOOT, WHERE DO EUROPEAN AND U.S. MUSEUMS STAND?

Thomas R. Kline and Olga Symeonoglou

## 29 THE SCOURGE OF RUSSIAN AVANT-GARDE FAKES

Konstantin Akinsha

## 42 COURBET LOST AND FOUND: THE FATE OF THE FRENCH REALIST'S WORKS IN WORLD WAR II GERMANY

Petra Ten-Doesschate Chu

---

## 52 DONOR ACKNOWLEDGMENTS FY 2022

## 55 STOLEN ART ALERT<sup>®</sup>

**COVER:** *Figure of a king*. Benin kingdom court style. Edo artist, Nigeria. 18th-19th century. Copper alloy.  
41 x 17.1 x 15.2 cm Photo: Franko Khoury. National Museum of African Art, Smithsonian Institution. See story on p. 19.

## YEARS AFTER FRANCE'S PLEDGE TO RETURN COLONIAL LOOT, WHERE DO EUROPEAN AND U.S. MUSEUMS STAND?

SMITHSONIAN RETURNS 29 OBJECTS  
AAMD ISSUES GUIDANCE ON ART FROM COLONIZED AREAS  
LAUNCH OF THE DIGITAL BENIN DATABASE  
GERMANY-NIGERIA REACH HISTORIC AGREEMENT

THOMAS R. KLINE AND OLGA SYMEONOGLOU\*

The legacy of colonial rule includes more than the killing of millions of people and the stripping of natural resources. Due to the pervasive removal of art and cultural property, untold numbers of objects displaced under colonial regimes are held in collections around the world and circulate on the art market. Years after the 2018 publication of the groundbreaking Sarr-Savoy Report, "The Restitution of African Cultural Heritage. Toward a New Relational Ethics"<sup>1</sup> — which urged restitution of items of African cultural heritage acquired under violent or inequitable colonial conditions — some governments and institutions have adopted policies and restituted objects. As standards for reconsidering objects removed under colonial rule are starting to emerge, many museums and institutions in the U.S. and Europe search for a path forward for their colonial collections in relatively uncharted territory.

French President Emmanuel Macron brought renewed attention to this subject in a 2017 speech in Burkina Faso, declaring it unacceptable that a large share of African cultural heritage is held by French museums and saying that he wanted "the conditions to exist for temporary or permanent returns of

African Heritage to Africa" within five years.<sup>2</sup> Those conditions are now coming into focus, although the details are developing slowly.

The discussion concerning restitution of objects improperly displaced during colonial rule is not new.<sup>3</sup> In 1978, for example, Director-General of UNESCO Amadou-Mahtar M'Bow issued an appeal for return of cultural heritage "to those who created it" — stressing that some nations have been robbed not only of "irreplaceable masterpieces" but have also lost "a memory which would doubtless have helped them to a greater self-knowledge and would certainly have enabled others to understand them better."<sup>4</sup>

The newfound momentum to address this longstanding issue is perhaps generational, as those who continue to be privileged by the legacies of colonialism are finally having to reckon with its painful history.

Following his speech, President Macron issued a mandate to Senegalese economist and writer, Felwine Sarr, and French art historian, Bénédicte Savoy: study the history of French colonial looting in sub-Saharan Africa, identify the objects in French national collections acquired under colonial rule, and recommend

\* Thomas R. Kline, Of Counsel, is an art law attorney with Schindler, Cohen & Hochman LLP. Olga Symeonoglou, Associate, is an art law attorney with Cultural Heritage Partners, PLLC.

<sup>1</sup> Felwine Sarr and Bénédicte Savoy, "The Restitution of African Cultural Heritage. Toward a New Relational Ethics," (November 2018), (official English translation of French Report).

<sup>2</sup> Emmanuel Macron's speech at the University of Ouagadougou (Nov. 28, 2017), <https://www.elysee.fr/emmanuel-macron/2017/11/28/emmanuel-macrons-speech-at-the-university-of-ouagadougou.en>.

<sup>3</sup> "Restitution" means return to the owner, whereas "repatriation" means return to the country of origin. We use the term restitution in this article as the more encompassing term, noting that the correct use of "repatriation" depends on the sovereign status of the claimant.

<sup>4</sup> UNESCO, "A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It," (June 7, 1978).

**“In the United States, four years after publication of the Sarr-Savoy Report, recent guidance from the Association of Art Museum Directors (AAMD) picks up many of the themes from Sarr and Savoy’s Report ...”**

procedures for considering restitution or other solutions. The Sarr-Savoy Report addressed the brutality and theft that took place under colonial rule and suggested sweeping solutions. In researching their Report, Sarr and Savoy also uncovered documentation about demands for restitution voiced in the decades after colonial independence — effectively silenced in the European narrative, though not forgotten by the countries who have continued seeking return of their art and cultural objects.<sup>5</sup>

By some estimates, as much as 90% of the cultural objects created in sub-Saharan Africa remain outside the continent.<sup>6</sup> As Director-General M’Bow described in 1978, these losses have been detrimental to former colonies, depriving those who live there today of the ability to appreciate these objects and use them to educate their youth. For objects taken through violence or duress, their display in museums in Europe and the United States constitutes a continuing reminder of that violence and ensures that the histories continue to be written from the perspective of the former colonial powers. As Sarr and Savoy put it: “The great museums of Europe are at once the conservationists of incredible human creativity and the receptacles of what often amounts to a violent dynamic of appropriation that is still largely poorly understood” (pp. 14–15).

In the United States, four years after publication of the Sarr-Savoy Report, recent guidance from the Association of Art Museum Directors (AAMD) picks up many of the themes from Sarr and Savoy’s Report, providing standards and methods for addressing colonial collections that U.S. museums have no doubt been anxiously anticipating.

<sup>5</sup> This information was later published in a book: Bénédicte Savoy, *Africa’s Struggle for Its Art: History of a Postcolonial Defeat* (Princeton: Princeton University Press, 2022), pp. 1–3. (Susanne Meyer-Ablach, translator).

<sup>6</sup> Sarr-Savoy Report p. 3. Subsequent page references to the Report will appear in parentheses within the article text.

## THE SARR-SAVOY REPORT

The Sarr-Savoy Report made sweeping recommendations for addressing the 90,000 or more objects from sub-Saharan Africa presently housed in French national collections, 70,000 of which reside in the Musée du quai Branly–Jacques Chirac in Paris (p. 44). Through these recommendations, the Report sought to create a new atmosphere of cooperation, suggesting that France negotiate bilateral agreements with its former colonies to govern the restitution process. Many of these displaced objects were taken as spoils of war or trophies during military operations; others derive from scientific or pseudo-scientific expeditions, or were acquired by colonial administrators or their associates through inequitable transactions. Some objects removed during the colonial era circulated into private collections and were later donated to French museums.

Recognizing that the criteria for restitution must reflect the conditions of an object’s transfer out of the continent, Sarr and Savoy categorized the sub-Saharan African objects in French collections accordingly (pp. 49–61). For objects seized in military contexts, the Report recommended that requests for restitution be favorably received despite the existence of legal barriers to claims, such as the absence of a national law allowing restitution of objects in national collections, the expiration of a statute of limitations, or questions about whether any dispossession violated the laws of the time, particularly under international law. The Hague Convention, for instance, which codified the prohibition on pillaging cultural artifacts during times of armed conflict, was not adopted until 1899, post-dating the removal of many objects looted under colonial rule. Sarr and Savoy also recommended favorable treatment of claims for objects acquired during supposedly “scientific” expeditions and those donated by private collectors unless there is explicit evidence of consent. Finally, Sarr and Savoy recommended research and restitution for objects improperly acquired after 1960 (the year the first 17 African nations became independent) in those instances where there were proven conditions of illicit trade.

The Report also considered some of the more structural barriers to restitution, the most significant being the principle in French law that objects in national collections are legally inalienable and museums can only return objects where a specific law allows it.



Because inalienability poses the greatest legal obstacle to restitution of objects in French state-owned collections, Sarr and Savoy proposed amending French law to allow for exceptions where a bilateral agreement is in place between France and an African nation. France has yet to enact such an exception or to enter into any bilateral agreements with its former colonies.

### FRANCE'S PROGRESS

Now, four years after publication of Sarr and Savoy's Report, France has seen only limited movement toward achieving Macron's goals, although the Report has made a substantial impact outside of France, motivating other countries and institutions to begin to address their colonial collections. In December 2020, the French Parliament approved the first permanent restitutions—of a sword to Senegal (which had already been transferred on loan) and, to the Republic of Benin, 26 works seized by French troops in the 1892 sack of the Abomey Palace in the Kingdom of Dahomey (now part of the modern-day Republic of Benin).<sup>7</sup> (France previously refused to retribute those same 26 objects to Benin in 2016 (before the publication of the Sarr-Savoy Report), pointing to the inalienability of state-owned collections.)

In 2020, France also returned the crown of Ranavalona III (**FIG. 1**), the last queen of Madagascar,



**FIGURE 1. "Crown" of Queen Ranavalona III.** Golden zinc top ornament for a ceremonial canopy used by Queen Ranavalona III of Madagascar when declaring war against France in 1895. On long-term loan from France to Madagascar, but still officially in the Musée de l'armée, Paris. Ph. Wikipedia.

<sup>7</sup> The French 1892 attack and the British sacking of Benin City (in today's Nigeria) in 1897 are two of the most frequently discussed raids of this type, with works taken during these raids being the subject of continuous calls for restitution.

**"... the requirement that separate legislation be passed for each restitution from a French national collection means that progress will continue to be slow."**

on long-term loan without requesting or receiving the approval of France's Parliament. France, however, still has not passed legislation to make this return permanent. The crown, more precisely a crowning of a royal canopy, is still officially in the collection of the French Army Museum.

While these returns are significant on their individual merits and as precedent, the requirement that separate legislation be passed for each restitution from a French national collection means that progress will continue to be slow. Any broader measures, such as creation of the joint commissions between France and individual former colonies seeking to recover their cultural heritage, contemplated by Sarr and Savoy, have yet to be realized.

### PROGRESS ELSEWHERE IN EUROPE

Since publication of the Sarr-Savoy Report, Germany and Nigeria signed a historic repatriation agreement; the Netherlands approved a plan for widespread restitution; and most recently, the United Kingdom issued new museum guidance on repatriation (although not specifically focused on colonial collections). Uniform standards in Europe have yet to develop, although the European Union or UNESCO could provide a forum for developing more consistent rules.

#### The United Kingdom

Given the magnitude of its colonial empire and the prominence of its museums, any policy the United Kingdom adopts will no doubt be influential. Yet the British Museum and U.K. museums generally have been reluctant to retribute works of art or to address more broadly the question of colonial dispossessions, so progress has been sporadic.

The Benin bronzes (an estimated 3,000 objects actually made of various materials, such as copper alloy, wood, terracotta, ivory, and iron) constitute the most notorious of the disputed objects, and the largest number are in British hands (**FIG. 2**). The British looted them during the 1897 sacking of Benin City from the Kingdom of Benin in what is now



**FIGURE 2.** Nigeria: British soldiers with looted art during the punitive Benin Expedition of 1897. Ph: CPA Media Pte Ltd / Alamy Stock Photo.

Nigeria; the spoils from that sanguinary raid can be found at the British Museum and other institutions and private collections in Europe and the U.S. Because of their artistic excellence and the violence of their taking, the Benin bronzes have come to symbolize the colonial repatriation movement much as the Parthenon marbles embody the broader question of cultural property dispossession.<sup>8</sup> A German foundation's launch of the Digital Benin database in November 2022 will likely be pivotal in the restitution process for these works. By providing a list of institutions where Benin bronzes are currently located and their provenance information, the database will facilitate restitution claims.<sup>9</sup>

In 2018, the British Museum announced that it would loan certain bronzes to the planned Royal

**“A German foundation’s launch of the Digital Benin database in November 2022 will likely be pivotal in the restitution process ...”**

<sup>8</sup> See Dan Hicks, *The British Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution* (London: Pluto Press, 2020).

<sup>9</sup> The Digital Benin database can be viewed at: <https://digitalbenin.org/>.

Museum in Benin City, Nigeria, once the new museum is completed.<sup>10</sup> The announcement grew out of an agreement brokered through the Benin Dialogue Group — a working group of museum directors and representatives from Nigeria, the Royal Court of Benin, and several European countries. Famed Architect Sir David Adjaye designed the museum to “facilitate a permanent display reuniting Benin works of art dispersed in collections around the world.”<sup>11</sup>

In August 2022, the Arts Council England, which oversees the museum sector, released long-awaited advice for English museums: “Restitution and Repatriation: A Practice Guide for Museums in England.”<sup>12</sup> The guidance is similar to repatriation policies published elsewhere, recommending provenance research, transparency and accessibility, and the development of restitution and repatriation policies. The guidance then builds a framework for museums to work through restitution claims and authorizes making returns for compelling ethical reasons, even if not strictly required by law. The guidance does not address colonial collections specifically, leaving museums to craft their own policies on that issue or make returns on a case-by-case basis.

Recent changes to the Charities Act authorize museums in the U.K. to restitute lower-value objects on moral or ethical grounds, even if there is no legal basis for restitution, or to repatriate more valuable objects for moral reasons with approval from the Charity Commission, Attorney General, or the courts. As of this writing, however, these amendments appear to be too controversial and their implementation has been deferred.<sup>13</sup>

Even before the recent guidance from Arts Council England, some regional U.K. institutions have begun addressing objects removed during colonial rule.

<sup>10</sup> <https://www.cnn.com/2018/11/26/africa/africa-uk-benin-bronze-return-intl/index.html>.

<sup>11</sup> “Press Statement on the Meeting of The Benin Dialogue Group,” (July 11, 2019), <https://www.tropenmuseum.nl/nl/press-statement-meeting-benin-dialogue-group-1>.

<sup>12</sup> Arts Council England, “Restitution and Repatriation: A Practical Guide for Museums in England” (2022), <https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/restitution-and->

<sup>13</sup> Alexander Herman, “Museums, restitution and the new Charities Act,” The Institute of Art & Law (Sept. 25, 2022), <https://ial.uk.com/museums-restitution-and-the-new-charities-act/>.

“... some regional U.K. institutions have begun addressing objects removed during colonial rule. Oxford and Cambridge Universities, for example, approved the return of 213 Benin bronzes ...”

## Germany

Oxford and Cambridge Universities, for example, approved the return of 213 Benin bronzes, reflecting a possible sea change in museum attitudes in the U.K. on the issue of restitution, even without broader guidance for U.K. museums or concurrence of the British Museum.

## The Netherlands

Dutch efforts to address the country's colonial collections are being spearheaded by attorney and human rights activist Lilian Gonçalves-Ho Kang You. A 2020 Dutch Advisory Committee report recommended procedures for addressing colonial objects in Dutch collections, focusing particularly on items from Indonesia.<sup>14</sup> The report suggested that the Netherlands work with countries where the Dutch once exercised prolonged colonial authority to jointly develop a policy concerning colonial collections. The report also focused on return of cultural objects to former colonies of the Netherlands where evidence shows “the source countries suffer[ed] an involuntary loss of possession.”<sup>15</sup>

In a swift move, the Dutch government adopted these recommendations and is beginning to put them into action, promising to return objects wrongfully taken from Dutch colonies, providing funding to develop guidance for Dutch museums, and setting up a committee to analyze requests for return.<sup>16</sup>

In 2019, culture ministers of the 16 German states agreed to a declaration on colonial collections that included restituting human remains, digitizing collections to provide better access to information, and conducting provenance research.<sup>17</sup> The German Museums Association has also updated its guidelines on art taken under inequitable circumstances in the colonial era.<sup>18</sup> In cases where there is no legal right to restitution, museums should consider whether the work has significant meaning to its community of origin and whether the work was “wrongfully” taken (a term the guidelines deliberately do not clarify).<sup>19</sup> Germany also created a fund to support colonial-era provenance research to be administered by the German Lost Art Foundation, whose primary mission thus far has been to document cultural objects that were illegally seized during the Nazi era and World War II.<sup>20</sup>

Building on these initial steps, in July 2022, Nigeria and Germany reached a historic agreement to transfer ownership of over 1,100 objects to Nigeria from several different state museums in Germany.<sup>21</sup> Some of these artifacts have already been physically returned. Transfer of other objects will be negotiated later, and Germany will retain some of the items on long-term loan. As part of the agreement, the Humboldt Forum, a new museum in Berlin, will

<sup>17</sup> Kate Brown, “In a Landmark Resolution, German Culture Ministers Pledge to Lay the Groundwork to Return Colonial-Era Art,” *Artnet news* (March 14, 2019), <https://news.artnet.com/art-world/germany-declaration-on-restitution-1488250>.

<sup>18</sup> German Museums Association, “Guidelines for German Museums Care of Collections from Colonial Contexts,” 3rd Edition 2021, <https://www.museumsbund.de/publikationen/guidelines-on-dealing-with-collections-from-colonial-contexts-2/> (English translation).

<sup>19</sup> *Id.* at 82 (“The authors do not consider it appropriate, at least not at present, to arrive at a final prescription or definition of the circumstances of acquisition which are to be considered as wrongful and could thus lead to the return of a collection item, because of the many different forms of cases and also the very different views of the countries and communities of origin.”)

<sup>20</sup> “Germany allocates \$2.17 million for colonial-era provenance research,” *Artforum* (Feb. 5, 2019), <https://www.artforum.com/news/>.

<sup>21</sup> Gareth Harris, “‘The Benin Bronzes are returning home’: Germany and Nigeria sign historic restitution agreement,” *The Art Newspaper* (July 4, 2022).

<sup>14</sup> Summary of the report Advisory Committee on the National Policy Framework for Colonial Collections (2020), <https://www.raadvoorcultuur.nl/english/documenten/adviezen/2020/10/07/summary-of-report-advisory-committee-on-the-national-policy-framework-for-colonial-collections>.

<sup>15</sup> *Id.*, p. 2.

<sup>16</sup> Catherine Hickley, “Forging ahead with historic restitution plans, Dutch museums will launch 4.5m project to develop a practical guide on colonial collections,” *The Art Newspaper* (March 10, 2021), <https://www.theartnewspaper.com/2021/03/10/>.

**“... no consensus has yet developed on the standards for evaluating specific claims except those for works taken in military contexts ...”**

transfer ownership of all its Benin bronzes, although some objects will remain at the Humboldt Forum on a ten-year loan before returning to Nigeria.<sup>22</sup>

As shown by these developments, France, the U.K., Germany, and the Netherlands are coming to believe that colonial collections warrant a fresh look and the adoption of new policies and practices, beginning with conducting provenance research and sharing this research with the countries of origin and the public. These countries are also considering legal changes to allow or even require museums to address colonial restitution issues. There seems to be a shared sense that these new rules and procedures will help former colonial powers promote justice and fairness and also build stronger and more balanced relationships with their former colonies. However, no consensus has yet developed on the standards for evaluating specific claims except those for works taken in military contexts, and it seems that European museums will continue to address each dispute on a case-by-case basis—although the agreement between Germany and Nigeria provides a path forward for larger-scale repatriations along the lines suggested by the Sarr-Savoy Report.

### HOW HAVE U.S. INSTITUTIONS BEEN RESPONDING?

Until very recently, the United States lagged behind European cultural institutions in its consideration of colonial collections. The United States was not a major colonial power in the same way European countries were, so the scale of the problem is nowhere near the magnitude faced by European museums. Yet the subject is still significant and weighs heavily on numerous museum curators, administrators and board members. Bénédicte Savoy's recent (2022) book, estimates that around 50,000 objects from sub-Saharan Africa alone can be found in U.S. museums, indicating that the legacy of colonial

looting in the United States warrants attention.<sup>23</sup> As in Europe, colonial-era collections in the United States are not necessarily illegal to possess, but they nevertheless raise powerful ethical and moral questions about the manner in which the objects were acquired. As ethical concerns become more prominent in numerous national guidelines addressing colonial collections in other countries, the technicality of whether a claim is legally viable seems likely to become less important by comparison.

Unlike European countries, the United States has few federally-owned museums, and decisions on restitution rest largely with museum administrators and directors. Museums hold their collections in trust for the public and museum board members owe a fiduciary duty to their institutions, making it difficult to deaccession objects without compelling policy-based or legal reasons.

To assist museum boards with such difficult policy questions, museum associations develop guidelines, guidance, and policies, and also recommend best practices to the museum community, similar to the direction provided by cultural officials in European countries. The United States has two principal museum organizations, the Association of Art Museum Directors (AAMD) and the American Alliance of Museums (AAM). AAMD currently has 219 member institutions, enrolled through their directors; its member museums and the remainder of the U.S. museum and collecting community generally look to AAMD for guidance on challenging issues. AAM is a more broad-based organization representing thousands of museums and similar institutions ranging from historic houses to zoos to gardens. Given its narrower focus solely on art museums, AAMD is more nimble and usually acts promptly on issues affecting art museums, with AAM often following afterwards with its own analysis and guidance.

### AAMD Publishes Guidance

On November 18, 2022, AAMD released its “Guidance on Art from Colonized Areas”.<sup>24</sup> (AAM has not yet publicly issued any official commentary

<sup>22</sup> Philip Oltermann, “‘Inconvenient truths’: Berlin’s Humboldt Forum faces up to its colonial past,” *The Guardian* (Sept. 19, 2022).

<sup>23</sup> Savoy, 2022, op. cit., p. 7.

<sup>24</sup> Association of Art Museum Directors, “Guidance on Art from Colonized Areas” (Oct. 2022), <https://aamd.org>.



**“On November 18, 2022, the Association of Art Museum Directors released its ‘Guidance on Art from Colonized Areas’. ... AAMD calls its announcement ‘guidance’ ... as opposed to guidelines or a statement of policy ...”**

on colonial collections.) The AAMD Guidance was compiled jointly by its Task Force on Cultural Property, chaired by Bill Griswold, Director of the Cleveland Museum, and its African Art Working Group, chaired by Karol Wight, Director of the Corning Museum of Glass. The latter was formed three years ago when AAMD recognized the need for guidance as the issue of colonial collections gained prominence. AAMD’s Guidance also acknowledges the leadership role played by Dr. Victoria S. Reed, Sadler Curator for Provenance at the Museum of Fine Arts, Boston, whose forthcoming publication addressing these issues no doubt supported the development of AAMD’s Guidance.<sup>25</sup>

AAMD cautions that its advice is addressed to museums holding a wide variety of colonial objects that were acquired in myriad ways. For example, AAMD suggests that different considerations may be appropriate for official seizures during armed conflict “sanctioned” by a colonial power as opposed to “looting” that may have occurred during unsanctioned violence. Because of the many ways an object may have been transferred, AAMD calls its announcement “guidance” to museums to aid them in formulating policies appropriate to their own collections as opposed to guidelines or a statement of policy which would, presumably, provide museums with more specific requirements and which the association’s member museums would be expected to follow more closely.

The AAMD Guidance nonetheless provides museums with a more comprehensive set of recommendations than some of the proposals seen so far in Europe, focusing on the 19th century but recognizing that each museum may choose to define the colonial period differently, depending on the nature and scope of its collections. The Guidance is geared toward advising member museum directors whose institutions “are considering the potential acquisition, display, interpretation, or deaccession of works

of art from colonized areas.”<sup>26</sup> In particular, AAMD advises museums to research provenance of colonial collections, be transparent with the public about its findings, and act responsibly in addressing claims.

In emphasizing the importance of provenance research and public education, AAMD’s guidance underscores that transparency requires that an object be exhibited in its full and accurate context, including explaining how the object changed hands during colonial rule. To assist institutions in characterizing an object’s removal from the former colony, the guidance provides a non-exhaustive list of the way in which an object may have been removed from its place of origin, including private gift or purchase, seizure in armed conflict, and outright theft.

Once a museum gathers information about an object, the institution should evaluate whether its acquisition or continued possession of that object complies with legal considerations, professional guidelines, ethical standards, and the museum’s own policies. AAMD recognizes the limitations in applying legal considerations, given that customary international law surrounding the taking of objects during armed conflict was in flux during the colonial era. Since there was a period where international law was changing and at times the applicable rules may not have been clear, assessing legal claims will not necessarily provide the full picture a museum board may want to consider.

Even if an object was actually or arguably acquired legally or is presently possessed legally, the Guidance recognizes that a museum may decide it should not keep (or not acquire) the object for ethical reasons.<sup>27</sup> In encouraging museums to consider past and present-day ethics in making acquisition, exhibition, and deaccession determinations, AAMD’s Guidance recommends transparency about the basis for making a particular decision and attention to its precedential implications. Such ethical determinations, the Guidance observes, can be consistent with the

<sup>25</sup> Victoria S. Reed, “American Museums and Colonial-Era Provenance: A Proposal,” *International Journal of Cultural Property* (forthcoming - May 2023).

<sup>26</sup> AAMD Guidance, p. 1.

<sup>27</sup> AAMD Guidance, p. 7.

## Smithsonian Returns 29 Benin Bronzes to the National Commission for Museums and Monuments in Nigeria

*Bronzes Were Transferred in a Ceremony at the National Museum of African Art in Conjunction With the National Gallery of Art*

October 11, 2022 • News Release



Ceremonial Head of a King. Photograph by Franko Khoury, National Museum of African Art, Smithsonian Institution

**FIGURE 3.** Smithsonian press release, October 11, 2022.



**FIGURE 4.** *Altar stand.* Benin kingdom court style. Edo artist, Nigeria. 18th–19th century. Copper alloy. 24.4 x 23.5 cm (9 5/8" x 9 1/4").



**FIGURE 5.** *Plaque.* Benin kingdom court style. Edo artist, Nigeria. Mid-16th to 17th century. Copper alloy. 47 x 36.8 x 6 cm (18 1/2" x 14 1/2" x 2 3/8"). Photos of Figures 4 and 5 by Franko Khoury, National Museum of African Art, Smithsonian Institution.

fiduciary obligations of the museum's governing board, although the scope of fiduciary duty is governed by state-specific laws which will have to be considered.

### MFA Boston and Smithsonian

Even before release of the AAMD Guidance, some U.S. museums had already started addressing their colonial collections. Consistent with its forthright approach to the questionable objects, for example, MFA, Boston developed a policy on Colonial-Era Provenance and posted it on the museum's website.<sup>28</sup> Under that policy, the MFA conducts "research on colonial-era provenance to identify objects in the collection that may have been looted, forcibly sold, or stolen during 19th- and early 20th-century periods of conflict or colonial occupation." The objects identified are then listed on the museum's website.<sup>29</sup> The MFA has sought under this policy to take a pro-active approach in considering Benin bronzes. Nevertheless, the MFA defended its possession of objects on loan to the museum in response to a 2012 claim for their return by the Nigerian government. "We would like to restore the rightful ownership of them in some way," curator Reed told the *Boston Globe*. "They're really not acceptable under our collections policy."<sup>30</sup>

The Smithsonian Institution also recently adopted an ethical returns policy which authorizes restitution where an object or collection was acquired unethically; for example, if an object was stolen, taken under duress, or removed without the owner's consent.<sup>31</sup> On October 11, 2022, several months after adopting this policy, the Smithsonian's National Museum of African Art transferred ownership of 29 Benin bronzes to the National Commission for Museums and Monuments in

Nigeria. (FIGS. 3-5)<sup>32</sup> At the same time, the U.S. National Gallery of Art also returned a Benin bronze. These returns reflect the singular prominence of the Benin bronzes as candidates for restitution and indicate that the focus on repatriation of works taken in a military raid will continue to be the highest priority for return. After the Smithsonian announced its return of Benin bronzes, a private organization called the Restitution Study Group sued the Smithsonian to prevent the return, arguing that descendants of enslaved individuals in the U.S. have as much a right to these objects as Nigeria. The lawsuit reflects some of the complex historical and current-day policy issues at play in making a decision whether to return an object.

### DEVELOPING STANDARDS FOR RESTITUTION OF COLONIAL COLLECTIONS

The recent AAMD Guidance on colonial collections draws on existing frameworks for Holocaust-era and Native American claims by emphasizing the importance of provenance research, transparency, responsible decision-making, and attention to the burden of proof, the passage of time, or other legal barriers to claims.

Conducting provenance research and publicizing the results is a foundational element of any restitution law or policy, and so it is present in the European guidelines on colonial collections as well as in the AAMD Guidance. In prioritizing the providing of information to possible claimants, the AAMD Guidance also draws on NAGPRA, the U.S. Native American Graves Protection and Repatriation Act, passed in 1990 to address historical looting and other inequitable disposessions from Native American tribes.<sup>33</sup>

<sup>28</sup> MFA Boston: Colonial-Era Provenance, <https://www.mfa.org/collections/provenance/colonial-era-provenance>.

<sup>29</sup> *Id.*

<sup>30</sup> Malcolm Gay, "MFA's Victoria Reed is a leading voice in debate over looted artworks—and what to do with them," *Boston Globe* (October 14, 2022), <https://www.bostonglobe.com/2022/10/14/arts/mfas-private-eye-provenance/>.

<sup>31</sup> News release, "Smithsonian Adopts Policy on Ethical Returns" (May 3, 2022), <https://www.si.edu/newsdesk/releases/smithsonian-adopts-policy-ethical-returns>.

<sup>32</sup> News release, "Smithsonian Returns 29 Benin Bronzes to the National Commission for Museums and Monuments in Nigeria" (Oct. 11, 2022), <https://www.si.edu/newsdesk/releases/smithsonian-returns-29-benin-bronzes-national-commission-museums-and-monuments>.

<sup>33</sup> 25 U.S.C. §§ 3001–3013. With respect to NAGPRA, however, provenance research into an object's history must be distinguished from scientific research, such as DNA testing or other invasive research, on ancestral remains and sacred objects, which members of tribes typically object to strenuously as being highly disrespectful.

In another parallel to NAGPRA, the recent Guidance recommends that museums look to indigenous and other relevant communities for assistance in determining if an object is appropriate to display, needs special care or handling, or should not be photographed or displayed online.

The centrality of provenance research and access to information held by museums is also visible in the AAMD and AAM procedures for addressing art looted during World War II and the Holocaust. Publicizing this provenance research has helped claimants come forward.<sup>34</sup> With regard to colonial restitution, securing funding for provenance research remains a priority for American museums, as many of these collections presently lack sufficient documentation to support decision-making, and the MFA Boston is rare in having a dedicated full-time provenance researcher.

Many of the artifacts covered by NAGPRA were looted or acquired in military contexts, scientific or pseudo-scientific expeditions, or unethical transactions, similar to those that occurred in sub-Saharan Africa in the late 19th and early 20th centuries. An important motivation behind NAGPRA, the framework suggested by Sarr and Savoy, and the AAMD Guidance, stems from a desire to right historical wrongs, heal old wounds, and create stronger ties going forward.

<sup>34</sup> See, e.g., American Alliance of Museums, Recommended Procedures for Providing Information to the Public about Objects Transferred in Europe During the Nazi Era, at 1 (noting that the AAM, AAMD, and the Presidential Advisory Commission on Holocaust Assets in the United States agreed “on the desirability of expanded online access to museum collection information that could aid in the discovery of objects unlawfully appropriated during the Nazi era”), <https://www.aam-us.org/wp-content/uploads/2018/01/nepip-recommended-procedures.pdf>.

Another consideration in any restitution law or policy is identifying who has the burden of proof. In the United States, that burden is typically carried by the claimant, but a restitution policy could change this burden in a variety of ways. Sarr and Savoy, for example, recommend the restitution of objects acquired in military contexts, presuming that there was an absence of consent in those circumstances. Shifting the burden of proof to the current possessor more broadly is unlikely to gain acceptance in the United States, although it may be justified for claims to works removed through violence during the colonial era.

Rapidly developing policies in Europe in the aftermath of the Sarr-Savoy Report have opened the door to restitution or other remedies that U.S. and European institutions have thus far hesitated to walk through, although small steps are being taken. We have, on the other hand, yet to see private collectors publicly stepping forward to return colonial objects. The art market is undoubtedly watching these developments closely and one can expect increasing attention to be paid to objects likely looted during a period of colonialism. Given the vast numbers of objects — in Europe and the United States — that could be encompassed by Sarr and Savoy’s reasoning, the work lies ahead for those institutions who will be tasked with researching and addressing claims for objects removed under colonial rule. In the U.S., museums and other collecting institutions and individuals will be analyzing the recently-issued guidance from AAMD. Along with the Smithsonian’s recent adoption of an ethical returns policy and the MFA, Boston’s transparency, the AAMD Guidance, which also foregrounds ethical considerations, will be key to setting the standards for how claims for objects removed in the colonial era will be handled in the United States.

• • •