

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 31 XXX/
Number 4

Article 7

2021

Should They Stay or Should They Go? African Cultural Goods in France's Public Domain, Between Inalienability, Transfers, and Circulations

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Clara Cassan, *Should They Stay or Should They Go? African Cultural Goods in France's Public Domain, Between Inalienability, Transfers, and Circulations*, 31 *Fordham Intell. Prop. Media & Ent. L.J.* 1248 (2021). Available at: <https://ir.lawnet.fordham.edu/iplj/vol31/iss4/7>

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Cover Page Footnote

LL.M Graduate in Intellectual Property & Information Technology Law from Fordham University School of Law, Dec. 2019; Master's degrees in Art Law and International Law from Université Paris I, Panthéon-Sorbonne, 2018; LL.B from Université Montpellier I, 2016. I would like to thank Professor Leila Amineddoleh and the IPLJ team for inspiring me to write and expand this paper. My special gratitude goes to Volume XXXI Senior Writing & Research Editor Sara Mazurek and Editor-in-Chief David Devich for their insightful comments. Finally, I wish to thank my family for their indispensable support throughout this process. This Note is for my father.

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Clara Cassan*

France's colonialism over Subsharan Africa until the 1960s has had persistant psychological and material consequences. Amongst them is the lingering presence of a significant amount of African objects in French museum collections. In the last five years, Subsaharan African countries have reiterated their desire to receive parts of these collections. Through their "restitution requests," they identify themselves as the objects' legitimate owners and claim to have been robbed of their cultural property during colonialism.

The exact conditions under which each Subsaharan artifact arrived on French grounds—whether through theft, donations, sales, or looting—remain unsettled. Even where thefts can be proven, they occurred at a time where colonialism was approved by international law. The French government's recent favorable responses to African restitution requests might have concluded this debate had France's national heritage not been protected by the five-century old inalienability principle, which prohibits the transfer of any

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property out of France's public domain, including the Subsaharan objects in its public museum collections.

This Note studies these legal difficulties and proposes a solution based on France's international duty to promote African culture as a human right. Rather than amending the fundamental inalienability rule, this Note calls for the creation of a legislative commission that will study individual requests in the respect of French legislations, international conventions, national objectives, and world heritage.

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INTRODUCTION

When Patrice Talon became the President of Benin in April 2016, he vowed to strengthen the country's tourism and cultural industries.¹ These, he said, were the key to Benin's economic development.² In August of that year, President Talon challenged Paris's Quai Branly Museum, the French capital's most prominent anthropological institution, to return a series of Beninese objects on the grounds that these objects were illicitly taken out of Benin during France's colonial rule over most of Sub-Saharan Africa.³ But on March 8, 2017, the Quai Branly Museum published its rejection statement to the Beninese request: "The goods you mention have been integrated for a long time, sometimes for more than a century,

¹ *Rupture An 4: Secteur Tourisme, Culture et Arts - La marche vers la révolution culturelle et touristique au Bénin*, REPUBLIC OF BENIN GOVERNMENT (Apr. 20, 2020), <https://www.gouv.bj/actualite/619/rupture-4—secteur-tourisme—culture-arts-marche-vers-revolution-culturelle-touristique-benin> [https://perma.cc/YN7V-G6YA].

² *Id.*

³ *Bénin: la France dit "non" à la restitution des biens culturels mal acquis*, LE POINT (Mar. 14, 2017), https://www.lepoint.fr/culture/benin-la-france-dit-non-a-la-restitution-des-biens-culturels-mal-acquis-14-03-2017-2111708_3.php [https://perma.cc/854S-DKCY].

into the public domain of the French State. In accordance with current legislation, they are subject to the principles of inalienability, imprescriptibility, and inseparability. As a result, their return is not possible.”⁴

This was not the first restitution request France had received from a former African colony; similar petitions began with Africa's decolonization movements in the 1960s.⁵ Benin's request, however, revived the unresolved political and legal question on how to reconcile the development of Africa's cultural economy and heritage, universal culture, and the legal barriers that protect France's multicultural public art collections from leaving the country's public domain. Soon after France rejected Benin's request, French President Emmanuel Macron began his first official tour around Africa.⁶ In November 2017, he arrived in Burkina Faso, one of France's former Sub-Saharan colonies, where he spoke at the University of Ouagadougou. Only a few months after France dismissed Benin's restitution request, Macron made the groundbreaking promise that, in the next five years, France would ensure that Africa saw “temporary or permanent returns” of its cultural heritage to its countries of origin.⁷

In its broadest sense, cultural heritage refers to the tangible (objects, monuments, etc . . .) and intangible (traditions, dialects, rituals, performing arts, etc . . .) property within a community.⁸ When applied to cultural heritage, the term “restitution” is a legal remedy involving the return of personal property following an action brought by the original owner or a person with the right of

⁴ *Id.*

⁵ FELWINE SARR & BÉNÉDICTE SAVOY, THE RESTITUTION OF AFRICAN CULTURAL HERITAGE. TOWARD A NEW RELATIONAL ETHICS 18–19 (2018), available at http://restitutionreport2018.com/sarr_savoy_en.pdf [<https://perma.cc/ZXG9-36X8>].

⁶ *Macron Arrives in Burkina on the First Leg of His First Africa Tour*, FRANCE 24 (Nov. 28, 2017), <https://www.france24.com/en/20171128-france-africa-macron-burkina-faso> [<https://perma.cc/N6TA-8XTJ>].

⁷ *See Emmanuel Macron's Speech at the University of Ouagadougou*, ÉLYSÉE (Nov. 28, 2017), <https://www.elysee.fr/emmanuel-macron/2017/11/28/emmanuel-macrons-speech-at-the-university-of-ouagadougou.en> [<https://perma.cc/GTW4-H7J9>].

⁸ *What Is Meant by “Cultural Heritage”?*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> [<https://perma.cc/4HKW-23G8>].

possession to such personal property.⁹ In international law, restitution implies a prior theft.¹⁰ Through the process of restitution, an object is given back to its legitimate owner and is often accompanied by sanctions against the illegitimate taker.¹¹

To avoid linguistic inaccuracies, this Note will refer to “transfers” when discussing the subject of past and potential movements of objects from France to African countries. French public museums’ ability to transfer art objects out of their collections is strongly limited by a national legislation that forbids extractions from the French public domain.¹² France has attempted to circumvent these legal obstacles but the solutions found thus far have been laws of exceptions that only apply to specific situations. On December 24, 2020, the French Parliament adopted the most recent “exceptional” law to allow the transfer of twenty-six objects to Benin, and one to Senegal.¹³ These “quick-fix,” expedited legislations leave the Franco-African cultural debate in a legal vacuum.

Some of the first attempts at regulating art’s ownership occurred during Europe’s Enlightenment period. The 1886 Berne Convention for the Protection of Literary and Artistic Works allowed artists to have a say over their creations’ immaterial aspects, regardless of the physical objects’ rightful possessor.¹⁴ In doing so, the Berne Convention outlined the possibility for artworks to have two concurrent owners: the work’s “initial owner”—the artist—and its universal

⁹ Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L., 197, 197 (2011).

¹⁰ See, e.g., Marc-André Renold, *Cross-border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations*, Policy Department C: Citizens’ Rights and Constitutional Affairs, Legal Affairs, at 8 (2016), citing Wojciech Kowalski, *Types of Claims for Recovery of Lost Cultural Property*, MUSEUM INT’L, 85 (2004).

¹¹ *Id.* at art. 8.

¹² Loi n° 2002-5 du 4 janvier 2002 relative aux musées de France [Law 2002-5 of Jan. 4, 2002 for the museums of France], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [Official Gazette of France], Jan. 5, 2002, art. 11.

¹³ Loi n° 2020-1673 du 24 décembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal [Law 2020-1673 of Dec. 24, 2020 Relating to the Restitution of Cultural Property to the Republic of Benin and Republic of Senegal], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [Official Gazette of France], Dec. 26, 2020.

¹⁴ See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1998, 25 U.S.T. 1341, 828 U.N.T.S. 221.

possessors—subsequent buyers.¹⁵ This dichotomy, which already gives rise to increasingly sophisticated copyright issues,¹⁶ encounters an additional complexity when the “universal possessor” is no longer an individual.

Today, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) protects over 1,120 sites as World Heritage to ensure their protection and conservation by the international community.¹⁷ Does UNESCO's famous label turn every designated property into a universal one or do World Heritage Sites still primarily belong to the community in which they are physically located? If universality refers to borderless concepts, can it truly include cultural heritage? Not only does culture affect individuals differently, its meanings vary based on the country, decade, or social context in which it exists. Perhaps cultural heritage continuously carries two identities and its complexity stems from the fact that it is inseparable from its local history and universal vocation. If so, can international law define an artwork's current proprietary status without denigrating the object's past or restricting its future? Inversely, should national laws have the power to regulate parts of the world's heritage?

In an attempt to help resolve this situation, this Note will suggest a two-part legislation that would provide a framework to study African countries' cultural transfer requests individually. Unlike previous academic recommendations, this Note's proposal will not seek to amend existing French law or impose forced restitutions. Instead, its legislative solution will seek to show how, on one hand, France has a legal obligation to promote cultural and intellectual cooperation with Subsaharan Africa and, on the other, this cooperation can occur without violating France's own national heritage and legislation. This Note will use principles and obligations from international laws and conventions.

¹⁵ *Id.* at art. 6bis.

¹⁶ See, e.g., Ted Solley, *The Problem and the Solution: Using the Internet to Resolve Internet Copyright Disputes*, 24 GA. ST. U. L. REV. 813 (2008).

¹⁷ Natural Sites, World Heritage, IUCN, <https://www.iucn.org/theme/world-heritage/natural-sites> [<https://perma.cc/HV5P-ZLLF>].

Part I will describe key moments in France's colonization of Sub-Saharan Africa to emphasize the ambiguous circumstances under which Africa's cultural heritage left its countries of origin. It will then introduce the current international conventions and European Union (EU) laws that address the protection of cultural heritage, and end with an introduction of the French inalienability principle, which protects the French public domain from deaccession. Part II will first explain why neither international nor French law offers satisfying solutions to the restitution debate. It will then present France's most recent attempts at circumventing these legal difficulties, including through the commission of a series of recommendations to the French government in 2018, "The Restitution of African Cultural Heritage, Toward a New Relational Ethics" ("Sarr-Savoy Report").¹⁸ Finally, Part III will explain why the Sarr-Savoy Report's recommendations are inapplicable. Instead, this Note will propose a law that would: (1) create a commission that would carefully study African requests for the permanent transfers of objects based on France's international obligation to cooperate; and (2) require French museums to enter into bilateral agreements with African museums to promote the circulation of Africa and foreign art across Africa.

I. ORIGINS OF THE FRANCO-AFRICAN CULTURAL DEBATE AND THE INTERNATIONAL COMMUNITY'S SUBSEQUENT LEGISLATIVE RESPONSES TO THE PROTECTION OF CULTURAL HERITAGE

A. *Historical Overview of Sub-Saharan African Artifacts' Arrival on French Grounds*

1. Africa's Former Colonial Context

In order to grasp the complexity of the current debate around Africa's cultural heritage, it is essential to understand the historical events that led 90% of Sub-Saharan African objects out of the continent.¹⁹ Our contemporary worldview makes it increasingly painful for us to justify—let alone approve of—colonial methods, and one

¹⁸ SARR & SAVOY, *supra* note 5.

¹⁹ *Id.* at 3.

hopes that this Note need not explain why the abolishment of slavery in 18th century France was a necessary milestone for the advancement of human rights. Yet it would be a mistake to limit the study of colonial history to the prism of our current social values. Such a restricted spectrum would lead to an anachronistic application of contemporary international law to historical events, preventing us from learning from our past mistakes or adopting durable legislation that could help remedy colonialism's lingering effects.

Today's European continent owes its power to its colonial past. "Colonialism" is an act of domination from one population over another.²⁰ It was, for decades, a perfectly legitimate way for a powerful nation to expand its territory and impose its politics, religion, beliefs, and economy upon other territories. France's colonialism dates back to the 16th century, but its most notable territorial expansions began under Napoleon III in the first half of the 19th century.²¹ Throughout this period, France conquered Senegal, followed by Algeria, Gabon, Côte-d'Ivoire, and Guinea. The 1845 Berlin Conference officially divided African territories amongst European forces and, by the end of the century, France occupied most of Subsaharan Africa, making it the second largest European empire.²² Thus, at the time, colonialism was encouraged as a means of territorial, military, and economic expansion.

France imposed its national educational system, laws, and Christian doctrines upon its colonized territories. Under its "Code de l'indigénat" ("Indigenous Code"), colonized populations were required to perform forced labor and were deprived of their basic liberties, such as the right to vote or freedom of speech. The Code was applied until the French committee for national liberation ("CFLN") finally required that France reassess its colonial measures during the

²⁰ Margaret Kohn & Kavita Reddy, *Colonialism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2017 ed.), <http://plato.stanford.edu/entries/colonialism> [https://perma.cc/FU25-BQ84].

²¹ See, e.g., Gavin Murray-Miller, *A Conflicted Sense of Nationality: Napoleon III's Arab Kingdom and the Paradoxes of French Multiculturalism*, 15 FRENCH COLONIAL HIST. 1 (2014).

²² See, e.g., Tuğba Korkmaz, 'La Françafrique': *The Special Relationship Between France and Its Former Colonies in Africa*, INSAMER (Aug. 2, 2019), https://insamer.com/en/la-francafrique-the-special-relationship-between-france-and-its-former-colonies-in-africa_2307.html [https://perma.cc/9EZY-D58D].

Conference of Brazzaville, as late as 1944. The CFLN abolished the Indigenous Code, enabling colonized populations to receive financial compensation for their work and to possess social liberties—albeit limited—such as the right to marry. The Conference built a foundation for Africa’s future independence from France.²³

2. The Ambiguous Arrival of Subsaharan African Artifacts on French Grounds

Following his promise that African heritage would return to Africa in the next five years,²⁴ President Macron commissioned French and Senegalese scholars Bénédicte Savoy and Felwine Sarr to lead a reflexion committee on the fate of what he called “our collective knowledge.” In November 2018, they published a series of recommendations often referred to as the Sarr-Savoy Report.²⁵ In his letter of mission to the appointed scholars, Emmanuel Macron wrote that African artifacts had to “circulate”—rather than return or be restituted—in order for communities to understand the context in which these objects were “created, taken, spoiled, saved, or stolen.”²⁶ In fact, the exact conditions under which each individual Subsaharan object arrived in France are unverifiable.²⁷

Due to this historical void, the Restitution debate must focus on the current legal routes that can be taken to elaborate a new framework for object transfers, rather than rely on assumptions and hearsay. A viable and reliable legal framework cannot be based on disputable facts. For example, some scholars refer to all the takings that took place from the 15th to the 20th century as “pillaging” and “spoils” of war²⁸ when a large majority of Subsaharan objects were

²³ Sophie Guerrier, *24 Août 1958: de Gaulle à Brazzaville ouvre la voie à l’indépendance*, LE FIGARO (Aug. 23, 2018, 7:39 PM), <https://www.lefigaro.fr/histoire/archives/2018/08/23/26010-20180823ARTFIG00258-24-aout-1958-de-gaulle-a-brazzaville-ouvre-la-voie-a-l-independance.php> [https://perma.cc/R42D-56XV].

²⁴ See Emmanuel Macron’s *Speech at the University of Ouagadougou*, *supra* note 7.

²⁵ See *infra* notes 218–219.

²⁶ *Document 1. Letter of Mission*, in SARR & SAVOY, *supra* note 5.

²⁷ Luc Saucier, *Restitution du patrimoine : « Étendons à l’Afrique le droit de préemption et le droit de suite »*, LE MONDE (Oct. 24, 2018, 7:00 AM), https://www.lemonde.fr/afrique/article/2018/10/24/restitution-du-patrimoine-etendons-a-l-afrique-le-droit-de-preemption-et-le-droit-de-suite_5373670_3212.html [https://perma.cc/HSS8-EFSA].

²⁸ SARR & SAVOY, *supra* note 5.

actually purchased, sometimes directly from local artisans.

Of course, the 1930s gave rise to ethnographic missions where scientists and members of the military were sent to African colonies to collect artifacts and bring them back as “exhibit pieces” to French anthropological museums.²⁹ Historical archives reveal shocking human abuse and racist acts, both of which are now prohibited by international law.³⁰ For example, the French ethnologist Marcel Griaule, who directed the Dakar-Djibouti mission from 1931 to 1933,³¹ wrote that “[t]he Black man is an ‘auxiliary assistant’ that we can ‘make talk,’ which is not the ideal situation [. . .] but we’re doing the best we can.”³²

Most of us—admittedly not enough—are now sensitized to the horrors of racism and, today, these “colonial anthropological missions” undeniably qualify as racist behavior. Yet these missions occurred at a time when the advancement of our anthropological knowledge was favored over the subjects’ human dignity. Yves Le Fur, Director of the Heritage and Collections Department of the Quai Branly Museum,³³ explains that French anthropological museums presented the newly acquired objects in a scientific manner to study human characteristics.³⁴ He finds it senseless to use modern terms such as “spoils of war” or “systematic pillages” when, at the time, the goal was to further a universal understanding of anthropology.³⁵ While his viewpoint is questionable, humanity’s past mistakes cannot be judged by our current morals.

In 1931, French writer and explorer Michel Leiris became the “secretary-archivist” for Griaule’s mission across Subsaharan

²⁹ *Id.* at 55.

³⁰ *See i.e.*, International Convention on the Elimination of All Forms of Racial Discrimination, January 4, 1969, 88 Stat. 9464, T.S. No. 660.

³¹ Marie Gautheron, *Retour sur la Mission Dakar-Djibouti*, CENTRE D’ETUDES ET DE RECHERCHES COMPAREES SUR LA CREATION (Nov. 2, 2012), <http://cercc.ens-lyon.fr/spip.php?article423> [<https://perma.cc/X738-HJQ3>].

³² SARR & SAVOY, *supra* note 5, at 55.

³³ Yves Le Fur, QUAI BRANLY MUSEUM, <https://www.quaibranly.fr/en/missions-and-operations/biographies/yves-le-fur/> [<https://perma.cc/AXZ8-GEGJ>].

³⁴ EMMANUEL PIERRAT, FAUT-IL RENDRE DES ŒUVRES D’ART A L’AFRIQUE? 32 (2019).

³⁵ *Id.*

Africa.³⁶ Over the course of two years, Leiris wrote around 600 pages which were compiled in a book titled *Phantom Africa*. While some find that Leiris's work can "give off the feeling of how much the colonial framework is in favor of and facilitates the massive exportation of cultural items . . ."³⁷ French art-lawyer Emmanuel Pierrat reminds us that Leiris later became the director of the African Art department of the Musée de l'Homme, Paris's anthropological museum, where Leiris supported a neutral, scientific approach to the study of Sub-Saharan cultures.³⁸ According to Pierrat, this approach illustrates Leiris's concern for Sub-Saharan countries and his desire to depict their cultures as adequately as possible.³⁹ Indeed, in 1939, Leiris would warn the Western world about the danger of the "imposition of our European casts of mind upon the facts" of ethnography: "However intensely we imagined living the experience of the native person, we cannot enter his skin, and it is always our own experience that we live."⁴⁰ In his book *Faut-il rendre des oeuvres d'art à l'Afrique?* ("Must artworks be returned to Africa?") Pierrat also celebrates African art's influence on European art.⁴¹ Fundamental artists like Picasso, Brancusi, Matisse, Calder, and later, those of the Surrealist movement, were inspired by the African masks and other artifacts they discovered in anthropological museums.⁴²

To deny the importance of cross-border connections between artistic cultures would negate art's history altogether. In fact, parts of Africa's current borders were drawn during the Berlin Conference of 1885 and correspond to European ideals⁴³ in the same way new European countries emerged from the collapse of the

³⁶ Sasha Frere-Jones, *The Man Who Saw Through Himself*, THE NEW YORKER (Dec. 9, 2020), <https://www.newyorker.com/books/page-turner/the-man-who-saw-through-himself> [<https://perma.cc/MC98-BKJ8>].

³⁷ *Id.*

³⁸ PIERRAT, *supra* note 34, at 32.

³⁹ *Id.*

⁴⁰ Frere-Jones, *supra* note 36.

⁴¹ PIERRAT, *supra* note 34, at 57.

⁴² *Id.*

⁴³ Saucier, *supra* note 27.

Russian, Austro-Hungarian, and German Empires after World War I.⁴⁴ Thus, we might consider that a royal saber originates from contemporary Senegal when, in fact, it was created in Mali or Guinea Bissau. If so, to whom would the saber morally belong? This geographical factor challenges certain nationalist arguments according to which artworks must imperatively return to their “countries of origin.”⁴⁵

In order to study the debate from a legal standpoint, this Note must set aside some overly moral arguments to focus on one of the key legal issues, which is that colonial objects “have been removed during an era where there were no laws and regulations to control such removal.”⁴⁶ Because current international and European law cannot regulate acts that occurred over a century ago, future circulations or transfers of African objects cannot be justified by *how* these objects initially arrived in France, but rather on *why* such circulations can be beneficial to Africa’s cultural development, in spite of important legal obstacles. World War II’s atrocities prompted international reactions in favor of cultural heritage protection and international law will serve as an inspiration for this Note’s proposal.⁴⁷

B. The International Community’s Efforts to Protect Cultural Heritage

1. Cultural Heritage in International Law

An overview of current conventions reveals that the international community has been increasingly protective of cultural heritage. International law experienced a semantic shift from the term “cultural property” to “cultural heritage” that is justified by a progressive understanding that a State or a community’s culture is

⁴⁴ Jacqui Frank, *This Animated Map Shows How World War I Changed Europe's Borders*, INSIDER (Apr. 11, 2017), <https://www.businessinsider.com/animated-map-how-wi-changed-europe-borders-2017-4> [<https://perma.cc/HD72-HKBH>].

⁴⁵ *Id.*

⁴⁶ Naazima Kamardeen, *The Protection of Cultural Property: Post-Colonial and Post-Conflict Perspectives from Sri Lanka*, 24 INT’L. J. OF CULTURAL PROP. 429 (2017).

⁴⁷ See *infra* Part III.

larger than mere physical property.⁴⁸ Heritage has come to include cultural property, intangible property, a community's history, and its relationship to physical property.⁴⁹ Thus, international law has become increasingly aware that protecting cultural property is linked to the protection of a larger, intangible world heritage.

The protection of cultural heritage was first included in the international community's larger legal effort to regulate the "laws of war."⁵⁰ The Convention with Respect to the Laws and Customs of War on Land (1899) was written to limit physical damages during wartimes generally, not just on cultural sites.⁵¹ In its second version, dated 1907, Article 56 of the Convention states: "All seizure of, destruction or willful 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."⁵² Both versions embody rules of customary international law and, thus, also bind States that have not ratified the Convention.⁵³

After World War II, "the international community reacted to unprecedented cultural property destruction by drafting the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict" ("the Hague Convention").⁵⁴ The Hague Convention was the first major international text entirely devoted to the protection of cultural property, which it defines as movable and immovable heritage of "great importance for the cultural heritage

⁴⁸ See EMMA CUNNLIFE ET AL., THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: UNNECESSARY DISTRACTION OR MISSION RELEVANT PRIORITY? 2 (Vol. 2, No. 4, Summer 2018).

⁴⁹ *What Is Meant by "Cultural Heritage"?*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> [<https://perma.cc/7HKN-YFCS>].

⁵⁰ See Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403.

⁵¹ See *id.* at 257.

⁵² Convention (IV) Respecting the Laws and Customs of War on Land art. 56, Oct. 18, 1907, 36 Stat. 2277.

⁵³ *Laws and Treaties Protecting Cultural Property, 1899 & 1907 Hague Conventions*, U.S. COMMITTEE OF THE BLUE SHIELD, <https://uscbs.org/1899---1907-hague-conventions.html> [<https://perma.cc/F4AS-AZLU>].

⁵⁴ EMMA CUNNLIFE ET AL., THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: UNNECESSARY DISTRACTION OR MISSION RELEVANT PRIORITY? 4 (Vol. 2, No. 4, Summer 2018).

of people.”⁵⁵ While its authors used the terms “property” and “heritage” interchangeably,⁵⁶ the Convention’s main message is one of universality. It introduces cultural property laws as “components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”⁵⁷ Through the Hague Convention, peoples’ right to cultural heritage became a human right. This historic shift is emphasized in the text’s Preamble, which states: “[D]amage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”⁵⁸ For the first time, States were made collectively responsible for the preservation of international—rather than States’—cultural heritage, advancing the shift from property to heritage.⁵⁹ Cultural heritage becomes at least partly universal in the sense that it must be protected by all and for all. While the Convention’s scope is limited to acts committed during armed conflicts, it requires its Contracting Parties to prepare “for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict” in times of peace.⁶⁰ Thus, following World War II, the protection of cultural heritage protection extends beyond a State’s geographical borders and applies at all times.

The Hague Convention was amended by its Second Protocol in 1999, which furthered the protection of cultural property.⁶¹ Article 7 of the new Protocol seems to broaden the Convention’s application. It states:

Without prejudice to other precautions required by

⁵⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 36 U.S.T. 2279, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

⁵⁶ *See id.*

⁵⁷ John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L., 831–32 (1986).

⁵⁸ 1954 Hague Convention, *supra* note 55.

⁵⁹ *See* Ashlyn Milligan, *Targeting Cultural Property: The Role of International Law*, 19 PRINCETON U. J. OF PUBLIC AND INT’L AFFAIRS 91, 93–4 (2008).

⁶⁰ 1954 Hague Convention, *supra* note 56, at art. 3.

⁶¹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212 [hereinafter Second Protocol].

international humanitarian law in the conduct of military operations, each Party to the conflict shall:

a) [D]o everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;

b) [T]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;

c. refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.⁶²

Law Professor and Director of the Center for Art, Museum and Cultural Heritage Law at DePaul University Patty Gerstenblith argues that some of the Hague Convention's softer obligations—such as the obligation to “respect” cultural heritage—even apply to non-State actors and organizations.⁶³

UNESCO's 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the 1970 Convention”) was a response to frequent museum and archeological looting, rather than war crimes.⁶⁴ It has been described as the “natural extension” of the Hague Convention.⁶⁵ While it is a fundamental instrument in the advancement of the protection of cultural property—the Convention also uses the terms “cultural property” and “cultural heritage”

⁶² *Id.* at art. 7.

⁶³ Patty Gerstenblith, *Beyond the 1954 Hague Convention*, in CULTURAL AWARENESS IN THE MILITARY: DEVELOPMENTS AND IMPLICATIONS FOR FUTURE HUMANITARIAN COOPERATION, 83, 86 (Robert Albro and Bill Ivey eds., Macmillan 2014).

⁶⁴ See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 7, Nov. 14, 1970, T.I.A.S. No. 83-1202, 823 U.N.T.S. 231 [hereinafter 1970 Convention].

⁶⁵ Katarzyna Januszkiewicz, *Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia*, 41 BROOK. J. INT'L L. 329, 338 (2015).

interchangeably⁶⁶—its important drawbacks have complicated the subject of cultural restitution in the context of decolonization.⁶⁷

To date, the most recent international treaty on the subject of cultural heritage was enacted by the International Institute for the Unification of Private Law (“UNIDROIT”).⁶⁸ This intergovernmental organization was created to modernize and harmonize private legislations between States to achieve common goals.⁶⁹ In 1995, UNIDROIT adopted the Convention on Stolen or Illegally Exported Cultural Objects (“the UNIDROIT Convention”), which seeks to remedy the 1970 Convention’s lack of uniformity “by ensuring that all states, civil and common law jurisdictions alike, apply a uniform body of cultural property law.”⁷⁰ One of this Convention’s novelties is that it makes the buyer responsible, at the time of an art purchase, for checking the object’s provenance and legitimacy.⁷¹ If it is later discovered that the object in question was stolen or trafficked, the buyer will only be able to receive compensation if he/she can prove that he/she acted with due diligence at the time of the transaction.⁷²

When the Convention was drafted, the concept of “good faith”—rather than due diligence—was purposely avoided as it was deemed subject to too many different interpretations across national legal systems.⁷³ The hope was that the use of “due diligence” would enable a more harmonious application of the Convention.⁷⁴ Article 4 states that due diligence requires the buyer to pay special attention to the entire acquisition process such as “the character of the parties, the price paid, whether the possessor consulted any reasonably

⁶⁶ See e.g., 1970 Convention, *supra* note 64, at art. 4.

⁶⁷ See Januskiewicz, *supra* note 65.

⁶⁸ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Jun. 24, 1995, 2421 U.N.T.S. 457 [hereinafter UNIDROIT Convention].

⁶⁹ *History and Overview*, UNIDROIT, <https://www.unidroit.org/about-unidroit/overview> [https://perma.cc/JRN9-D5P3].

⁷⁰ Spencer A. Kinderman, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT’L L. REV. 457, 461 (1993).

⁷¹ See Marina Schneider, *The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive*, 2 SANTANDER ART AND CULTURE L. REV., 149, 155 (2016).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 151–53.

accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained” and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.⁷⁵ Thus, due diligence refers to a necessary vigilance from all actors of the art market and law enforcement officials in the fight against the illicit trafficking of cultural goods.⁷⁶

The UNIDROIT Convention prohibits reservations “except those expressly authorized in [the] Convention.”⁷⁷ Unlike with the 1970 Convention, Member States cannot independently choose the provisions to which they will be bound. Because UNIDROIT aims to harmonize legislations around illicit trafficking of cultural goods, its text can only be uniformly adopted. Through its commitment to legislative harmony, the UNIDROIT Convention has the potential to spearhead colossal advancements in international cultural heritage law—under the condition that it is ratified. Unfortunately, some of the art world’s major State actors, such as France and the United States, refuse to implement the Convention’s “constraining” terms.⁷⁸ As of today, the UNIDROIT Convention has 50 Members.⁷⁹

Finally, France is subject to the International Council of Museums (“ICOM”)’s Code of Ethics, which “reflects principles generally accepted by the international museum community.”⁸⁰ According to the ICOM Statutes adopted on 24 August 2007:

A museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates, and exhibits the tangible and

⁷⁵ *Id.* at 155 n.23.

⁷⁶ MARIE CORNU, FIGHTING ILLICIT TRAFFICKING IN CULTURAL OBJECTS, SEARCHING FOR PROVENANCE AND EXERCISING DUE DILIGENCE IN THE EUROPEAN UNION 2 (2017).

⁷⁷ UNIDROIT Convention, *supra* note 70, at art. 18.

⁷⁸ *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - Status*, UNIDROIT, <https://www.unidroit.org/status-cp> [<https://perma.cc/F2HQ-XRNZ>].

⁷⁹ *Id.* (In comparison, the 1970 Convention has been ratified by 140 Member States). States Parties, About the 1970 Convention, UNESCO, <https://en.unesco.org/fight-trafficking/1970> [<https://perma.cc/2VNT-QXB4>].

⁸⁰ INTERNATIONAL COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS Preamble (2017), <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> [<https://perma.cc/P8YV-7YZJ>].

intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.⁸¹

ICOM defends the universal and humanistic roles of museums across the world. It prohibits museums from purchasing or exhibiting illicitly acquired objects.⁸² It invites institutions to adopt scrupulous rules on the acquisition of their collections by applying UNIDROIT's due diligence principle to establish the provenance of each item since its discovery or production. Regarding restitution, ICOM's Code of Ethics states that when a country or a community "seeks the restitution of an object or specimen that *can be demonstrated* to have been exported or otherwise transferred in violation of the principles of international and national conventions," and that it shows that the object was part of that country's or people's cultural heritage, the museum in questions should, if possible, "take prompt and responsible steps to cooperate in its return."⁸³ By adding that museums must be free to engage in a restitution process, ICOM encourages national museums to deaccession works from their collections in certain situations, when national laws do not prohibit the process.⁸⁴ These situations include the "museum's possession of the object" that "was, or may have been, stolen or illegally exported or imported," or "subject to other legal claims for return or restitution."⁸⁵

2. Cultural Heritage in the European Union

The EU has adopted two important directives and recent regulation proposals that have inspired Member States to modify their national legislations, bringing EU and international laws closer

⁸¹ *Museum Definition*, ICOM, <https://icom.museum/en/resources/standards-guidelines/museum-definition/> [https://perma.cc/LR43-439H].

⁸² See INTERNATIONAL COUNCIL OF MUSEUMS, *supra* note 80, at 41.

⁸³ *Id.* at 33.

⁸⁴ INTERNATIONAL COUNCIL OF MUSEUMS, GUIDELINES ON DEACCESSIONING OF THE INTERNATIONAL COUNCIL OF MUSEUMS (2019), <https://icom.museum/wp-content/uploads/2019/10/Guidelines-on-Deaccessioning-of-the-International-Council-of-Museum-s.pdf> [https://perma.cc/C2CU-68GK].

⁸⁵ *Id.*

together.⁸⁶ The European movement towards the protection of cultural heritage began in 1993 when the Council of the European Union, then called Council of the European Communities,⁸⁷ adopted Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State.⁸⁸ The Directive did not seek to combat illicit trafficking but encouraged the protection of national cultural heritage through the creation of accessible return and restitution mechanisms for Member States.⁸⁹ When France implemented this Directive on a national level, it created an exception to the French doctrine of non-application of foreign public law in private international law, which usually forbids French courts from enforcing foreign public laws that restrict the export of cultural objects.⁹⁰ Unfortunately, by 2011 Directive 93/7/EEC was deemed insufficient to fight against illicit trafficking throughout the European Union.⁹¹ State representatives briefly discussed the possibility for all Member States to uniformly adopt the 1995 UNIDROIT Convention until they encountered national resistance against this “forced” implementation.⁹² Instead, the European Union adopted Directive 2014/60/EU,⁹³ which expanded to all “national treasures possessing artistic, historic or archaeological value under national legislation”⁹⁴ regardless of their economic value. Directive 2014/60/EU is still in force today. It gives Member States complete

⁸⁶ Council Directive 93/7/EEC on The Return of Cultural Objects Unlawfully Removed From The Territory of a Member State, Mar. 15, 1993, O.J. (L 74) [hereinafter Directive 93/7/EEC] and Directive 2014/60/EU of the European Parliament and of the Council on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Amending Regulation, May 15, 2014, O.J. (L 159) [hereinafter Directive 2014/60/EU].

⁸⁷ See The Council of the European Union: 1952–2012: Sixty Years of Law and Decision-Making 13, CONSILIUM (2013), <https://www.consilium.europa.eu/media/30558/qc3112311en.pdf> [<https://perma.cc/E4NG-9GJ5>].

⁸⁸ Directive 93/7/EEC, *supra* note 86.

⁸⁹ Schneider, *supra* note 71, at 158.

⁹⁰ Sophie Vigneron, *The Return of Illicitly Exported Cultural Objects: The Implementation of the 2014/60 Directive in France*, 2 SANTANDER ART & CULTURE L. REV. 35, 44 (2016).

⁹¹ Stella Sarapani, *Return of Cultural Treasures under Directive 2014/60/EU* 5, 5 (2017) (unpublished M.A. dissertation, International Hellenic University) (on file with the International Hellenic University).

⁹² Schneider, *supra* note 71, at 160.

⁹³ Directive 2014/60/EU, *supra* note 86.

⁹⁴ *Id.* at arts. 1 and 2.1.

leeway to decide what can be considered as goods of “cultural value” on a national level.⁹⁵

Symbolically, the Directive has been an important step towards a more uniform approach to fighting against illicit trafficking of cultural goods. As an opening statement, it justifies the EU’s legitimacy by stressing the Union’s “valuable role in encouraging cooperation between Member States with a view to protecting cultural heritage of European significance, to which such national treasures belong.”⁹⁶ The Directive then provides Member States with practical guidelines on how to reach cooperation.⁹⁷ For example, it requires that each State’s central authorities cooperate and promote consultation with other States’ competent authorities.⁹⁸ Article 10 provides guidelines on how national courts should approach future restitution requests.⁹⁹ It is for the judge to decide, according to the circumstances of the case, whether the possessor “demonstrates that he exercised due care and attention in acquiring the object.”¹⁰⁰

C. France’s Inalienability Law

The Franco-African cultural debate—and, indeed, most restitution requests that involve objects held in French public art collections—must confront the rigidity of a fundamental French legal principle according to which all goods in France’s public domain are inalienable (*inaliénables*).¹⁰¹ Inalienability affects “things which cannot be bought or sold or transferred from one person to another.”¹⁰² It is often accompanied by imprescriptibility (*l’imprescriptibilité*), the idea that a concept or rule of law cannot be

⁹⁵ Geo Magri, *Directive 2014/60/EU and Its Effects on the European Art Market*, 2 SANTANDER ART & CULTURE L. REV. 195, 203 (2016).

⁹⁶ Directive 2014/60/EU.

⁹⁷ See e.g., *id.* at art. 5.

⁹⁸ *Id.*

⁹⁹ *Id.* at art. 10.

¹⁰⁰ *Id.*

¹⁰¹ Code général de la propriété des personnes publiques, Article L3111-1.

¹⁰² *Inalienable*, BLACK’S LAW DICTIONARY, <https://thelawdictionary.org/inalienable/> [https://perma.cc/E7NR-5JF6].

extinguished.¹⁰³ When applied to French heritage, these rules prohibit any object that belongs to the French public domain from *ever* (imprescriptibility) being *transferred or sold* to a private party or another country (inalienability).

The Édit de Moulins, a royal legislative act signed by French King Charles IX, first formalized the concept of inalienability in 1566.¹⁰⁴ At the time, the act sought to prevent a king from abusively selling the Kingdom's property and leading its people to poverty.¹⁰⁵ It divided French property into two categories: fixed property, which belonged to the Kingdom and was inalienable; and "casual" property, which the Crown could sell and dispose of.¹⁰⁶ When royalty was replaced by public institutions after the French Revolution, public museums became the natural heirs of France's art collections.¹⁰⁷ Yet, until less than two decades ago, the principle solely existed through case law.¹⁰⁸ In regard to precious objects, the principle was first mentioned by the Paris Court of Appeal (*cour d'appel de Paris*) in 1846, in a case that involved a manuscript with Molière's original signature.¹⁰⁹ At the time, the manuscript belonged to the former Royal Library.¹¹⁰ In a "modern" take on the Édit de Moulins, the Court confirmed that precious objects such as manuscripts, architectural plans, or autographs that were kept in public institutions belonged to the public domain and, thus, were inalienable.¹¹¹

In 2002, as part of the government's ongoing "cultural democratization" project (*démocratisation culturelle*), which seeks to

¹⁰³ *Imprescriptible Rights*, BLACK'S LAW DICTIONARY, <https://thelawdictionary.org/imprescriptible-rights/> [https://perma.cc/673Q-T5CN].

¹⁰⁴ *Inaliénabilité et Imprescriptibilité*, LE MONDE POLITIQUE, https://www.lemondopolitique.fr/cours/droit_administratif_des_biens/domaine_public/inalienabilite-imprescriptibilite.htm [https://perma.cc/38WB-A3JX].

¹⁰⁵ *Id.*

¹⁰⁶ *Droit Administratif des Biens, Historique*, LE MONDE POLITIQUE, https://www.lemondopolitique.fr/cours/droit_administratif_des_biens/domaine_public/historique.html [https://perma.cc/CP7K-SB2E].

¹⁰⁷ JACQUES RIGAUD, REFLEXIONS SUR LA POSSIBILITE POUR LES OPERATEURS PUBLICS D'ALIENER DES ŒUVRES DE LEURS COLLECTIONS 18 (2008).

¹⁰⁸ Jacques Caillosse, *Le Principe D'inaliénabilité Du Domaine Public*, 55 L. REV. U. SPLIT 29, 34 (Croatia) (2018).

¹⁰⁹ PIERRAT, *supra* note 34, at 107.

¹¹⁰ *Id.*

¹¹¹ *Id.*

broaden cultural outlets to people from different social and economic classes,¹¹² the French Parliament adopted a law relative to France's museums.¹¹³ The legislative text created the now-famous national label "Museums of France" (*Musées de France*), attributed to any permanent collection whose objective is to educate and entertain the public.¹¹⁴ In addition, the law redefined French museums' role and position as actors in the service of cultural development and democratization. It also harmonized legislations surrounding State and regional museums while respecting their specificities.¹¹⁵ Most importantly for this Note, the 2002 law was the first to confirm and codify the inalienability of French museum collections.¹¹⁶ Thus, the inalienability of art collections is inscribed within a democratic objective. The main goal was—and remains—to protect art collections in favor of the public interest and ensure that French museums exist as a stable and sacred source of culture, and education.¹¹⁷ Nonetheless, the law enables museums to "declassify" and sell objects from their collections.¹¹⁸ According to the law, a work's declassification would be subject to the authorization of a scientific commission whose composition would vary.¹¹⁹ The process excludes any object that was acquired by donation, bequest, or with the help of the State.¹²⁰ To this day, though, the declassification procedure has not been used by public museums.

It is important to note that France's public museum collections are subject to a more protective regime than all other public properties. According to the 2002 law, public museum collections are

¹¹² See, *i.e.*, Patrick Brunel, *Democratization of Culture*, 416 *ÉTUDES* 617, 621 (2012).

¹¹³ Loi n° 2002-5 du 4 janvier 2002 modifiée relative aux musées de France [Law 2002-5 of Jan. 4, 2002 for the museums of France], *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE* [J.O.] [Official Gazette of France], Jan. 5, 2002.

¹¹⁴ *Id.* at art. 1.

¹¹⁵ *Les Quatre Principales Dispositions de la Loi Relative Aux Musées De France*, ICOM, <https://www.icom-musees.fr/ressources/loi-musee-2002> [<https://perma.cc/M5NF-VXQA>].

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Loi n° 2002-5 du 4 janvier 2002 modifiée relative aux musées de France [Law 2002-5 of Jan. 4, 2002 for the museums of France], *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE* [J.O.] [Official Gazette of France], Jan. 5, 2002.

inherently part of France's public domain and, as such, are inalienable. The law does not require museums to demonstrate that their collections benefit the public interest.¹²¹ Instead, the 2002 law uses an inverse logic where public museum collections are automatically inalienable because they are assumed to be artistic or educational by nature and, thus, contribute to the public interest. Yet, in order for any other type of property to benefit from inalienability, it must be proven that the property is available to the public's direct use, or part of and directly useful to a public service.¹²² When or if "ordinary" public property ceases to contribute to the public interest or a public service, it is removed from the public domain and loses its inalienability protection.¹²³ On the other hand, it is always assumed that public art collections benefit the nation. Thus, their contribution to a public service need not be demonstrated. As such, French museum collections enjoy a stronger legal protection than any other public property in the country.

French legislators have discussed inalienability's role and importance for decades. In 2008, the French government chose Jacques Rigaud, who served as the country's Minister of Culture in the late 1960s, to write a report that would discuss whether public institutions could alienate works from their collections without compromising the Nation's heritage.¹²⁴ In his innovative report ("the Rigaud Report"), Rigaud argued that museums should use the declassification law to allow their collections "to breathe."¹²⁵ To him, declassification would allow flexibility, decluttering, and renewal. Yet, Rigaud also wrote that the inalienability rule was at the heart of the State's sovereignty and should remain untouched.¹²⁶ He found that, but for inalienability, French collections would lose part of their symbolic value and that, consequently, private companies would stop financing them.¹²⁷ Indeed, it is important to anticipate

¹²¹ *Id.*

¹²² Code général de la propriété des personnes publiques, Article L.2111-1.

¹²³ *Id.* at art. L.2141-1.

¹²⁴ Rigaud, *supra* note 107.

¹²⁵ *Id.* at 27.

¹²⁶ *Id.* at 29.

¹²⁷ *Id.* at 32.

the potential “dangers” of putting an end to the inalienability of France’s public domain, some of which have already occurred.

II. THE CONSEQUENCES OF FRANCE’S CURRENT LEGISLATIVE APPROACH TO ITS NATIONAL HERITAGE

A. *Practical Limits to the International Community’s Approach to Cultural Heritage*

While international and EU laws seem like they could serve as progressive tools to help France find a compromise around the transfer of certain artifacts, their applicability to the Franco-African debate is limited. To start, unless otherwise specified, the relevant international conventions¹²⁸ do not apply retroactively. In other words, they do not extend in scope or effect to matters that have occurred in the past.¹²⁹ UNESCO’s 1970 Convention, for example, can only support restitution requests from countries whose cultural heritage has been looted and/or was illicitly trafficked after 1970.¹³⁰ During the drafting process, some States Parties¹³¹ attempted to push for a general retroactive application of the Convention.¹³² This disagreement led to a compromising text that is not automatically retroactive but *can* be applied as such on a national level.¹³³ As stated by Article 15, nothing prevents States Parties “from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural

¹²⁸ See *supra* Section I.B.1.

¹²⁹ *Retroactive Statute*, BLACK’S LAW DICTIONARY, <https://thelawdictionary.org/retroactive-statute/> [<https://perma.cc/FL93-2LLV>].

¹³⁰ *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (UNESCO, Paris, 1970), UNESCO (2015), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/OPERATIONAL_GUIDELINES_EN_FINAL_FINAL.pdf [<https://perma.cc/FX53-XY4C>].

¹³¹ The term “States Parties” refers to the countries that have adhered to the 1970 Convention. See e.g., *About the 1970 Convention*, UNESCO, <https://en.unesco.org/fightrafficking/1970> [<https://perma.cc/7L49-6DFD>].

¹³² Katarzyna Januskiewicz, *Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia*, 41 BROOK. J. INT’L L. 329, 357–58 (2015).

¹³³ *Id.* (adding that “retroactivity is not explicitly mentioned in the text of the UNESCO Convention nor is it explicitly prevented”).

property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.”¹³⁴

According to former Harvard Law School Professor Paul M. Bator, Article 15 points to the fact that parties are not prevented “from going beyond [the Convention’s] terms and restoring cultural property previously removed from another party’s territory.”¹³⁵ The Convention is centered around international cooperation between States Parties to the Convention and opens the possibility for States Parties “whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials” by means not listed in the Convention, to “call upon other States Parties” for international cooperation.¹³⁶ This cooperative goal is limited by the different times at which States Parties implemented the 1970 Convention. In France’s case, the convention only came into force on April 7, 1997.¹³⁷ Thus, the Convention does not explicitly apply to acts performed throughout French colonialism over Africa, which ended between 1960 and 1970.¹³⁸

Still, in 2015, UNESCO published a set of Operational Guidelines to the 1970 UNESCO Convention¹³⁹ that aimed “to strengthen and facilitate the implementation of the Convention to minimize risks related to disputes over the interpretation of the Convention . . .”¹⁴⁰ The guidelines encourage States to cooperate towards the realization of common “. . .interests in a compatible way through, inter alia, loans, temporary exchange of objects . . . temporary exhibitions, joint activities of research and restoration.”¹⁴¹ Regarding the Convention’s non-retroactivity, the guidelines add that the Convention does not legitimize illicit transactions of any nature that may have taken place *before* the entry into force of this

¹³⁴ 1970 Convention at art. 15.

¹³⁵ Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV 275, 378 (1982).

¹³⁶ 1970 Convention at art. 9.

¹³⁷ *Conventions - France*, UNESCO, <https://en.unesco.org/countries/france/conventions> [<https://perma.cc/WCW4-VT2S>]; see also *About the 1970 Convention*, *supra* note 131.

¹³⁸ Ruth Ginio & Jennifer Sessions, *French Colonial Rule*, AFRICAN STUDIES (2015).

¹³⁹ See *Operational Guidelines*, *supra* note 130.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.*

Convention, nor does it prevent States or other persons from making claims under legal procedures available outside the Convention's framework for the restitution or return of cultural objects that were stolen, or illegally exported before the Convention's entry into force.¹⁴² Thus, depending on how States Parties formulate their national laws, they can decide to give retroactive effect to the 1970 Convention.

For example, Australia's implementing legislation applies the 1970 Convention "to objects imported after 1 July 1987, but which were previously exported from another country at any time where there was a cultural heritage protection law in force, contrary to the provision of that law."¹⁴³ In France, non-retroactivity is a matter of public policy. It is inscribed in the 1789 Declaration of the Rights of Man and of the Citizen, and has been the subject of the Civil Code's second article since 1804.¹⁴⁴ Even after the French Parliament enacted the Loi Taubira in 2001 to officially recognize slavery as a crime against humanity,¹⁴⁵ the higher French court (Cour de Cassation) refused to allow financial compensation for acts that were committed before France abolished slavery in 1848.¹⁴⁶ The court continues to hold that the Loi Taubira's recognition of slavery as a crime against humanity does not give rise to an indemnification system in favor of prior victims or victims' heirs.¹⁴⁷ Given the importance of non-retroactivity in the French legal system, it seems unlikely that the 1970 Convention will be considered an exception to the principle.

Additionally, the 1970 Convention's instigation towards international cooperation is weakened by the lack of uniformity in its implementation, as States Parties can cherry pick which Articles they wish to enact in their national legislations.¹⁴⁸ Thus, while some

¹⁴² *Id.* at 22.

¹⁴³ Januszkiewicz, *supra* note 132, at 363 (citing Patrick J. O'Keefe, Commentary on the UNESCO 1970 Convention on Illicit Traffic (2000), at 17).

¹⁴⁴ C. CIV., art. 2 (Fr.).

¹⁴⁵ Loi n°2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité.

¹⁴⁶ Cour de cassation, civile, Chambre civile 1, 17 avril 2019, 18-13.894, Publié au bulletin.

¹⁴⁷ *Id.*

¹⁴⁸ Januszkiewicz, *supra* note 132, at 366.

States Parties may decide to allow retroactivity, they will be unable to impose this retroactivity upon States that have not agreed to it. Professor Helaine Silverman of the University of Illinois even argues that the Convention's various translations across the world and between hemispheres perpetuate the dominant majorities' control over the fate of their former colonies' cultural heritage.¹⁴⁹ In the case of the Franco-African debate, this unfortunate dynamic is likely to persist. Indeed, the artifacts requested by former African colonies are kept in national museums and are protected by the inalienability rule.¹⁵⁰ While this Note will offer a legal proposal to facilitate object transfers in the future,¹⁵¹ French institutions will ultimately have the final say over the fate of French art collections.

B. Competency Limitations to the European Union's Authority over National Cultural Heritage Laws

In spite of its legislative efforts, the EU has limited latitude in its ability to regulate its Member States' protection of their cultural heritage on a national level. Culture falls under the Union's "supportive competences" in which its actions are limited to the support, coordination, or complementation of its Members' cultural legislations.¹⁵² Thus, while EU law can provide its Member States with guidelines on how to protect cultural heritage, it cannot directly interfere with national cultural issues such as art transfers between France and Sub-Saharan African countries.

By adopting Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State,¹⁵³ the EU revealed a desire to join international conventions in protecting cultural heritage. As an example, UNIDROIT's Senior Legal Officer, Marina Schneider, argues that the 1995 Convention has been "an inspiration for the 2014/60/EU Directive."¹⁵⁴ As

¹⁴⁹ HELAINE SILVERMAN & D. FAIRCHILD RUGGLES, CULTURAL HERITAGE AND HUMAN RIGHTS (2007).

¹⁵⁰ See *supra* note 116.

¹⁵¹ See *infra* Part III.

¹⁵² *EU Competences in the Field of Culture*, EUR. COMMISSION, <https://ec.europa.eu/culture/policies/eu-competences-field-culture> [<https://perma.cc/S539-XUK3>].

¹⁵³ See *supra* note 89.

¹⁵⁴ See Schneider, *supra* note 71, at 149.

mentioned above,¹⁵⁵ due diligence is the key principle in the UNIDROIT Convention. Directive 2014/60/EU refers to this principle when it requires buyers to act with “due care and attention.”¹⁵⁶ This similarity highlights the Directive’s ambition to facilitate a uniform protection of cultural goods across the European continent.

Yet, unlike UNIDROIT’s text, the EU Convention leaves it up to States to fill the Directive’s terms with their national definitions, ultimately reducing the chances of uniformity. This might explain why France and other EU Member States reached an agreement around the Directive’s content but still refuse to implement the UNIDROIT Convention’s more constraining terms. On a practical level, the EU encourages its Member States to apply uniform protection tactics, regardless of their deferring national legislations. In November 2018, the EU sponsored UNESCO’s first three-day workshop to train European judiciary and law enforcement officials on the 1970 Convention. About sixty representatives from thirty-one European countries attended the training.¹⁵⁷ The goal was for Member States to learn from each other’s successful tactics and continue to work towards increased cooperation to block imports and exports of trafficked goods throughout the Union. As the training occurred within the scope of UNESCO’s Convention, no mention was made of the possible fate of art objects that entered European borders before 1970.¹⁵⁸

The EU’s most recent step towards the protection of cultural heritage is a legislative proposal by the European Commission from 2017. The proposal aims to stop the import of cultural goods that were illegally exported from their country of origin.¹⁵⁹ The Commission also encourages all States to adopt the UNIDROIT

¹⁵⁵ *Id.*

¹⁵⁶ Directive 2014/60, of the European Parliament and of the Council of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Amending Regulation (EU) 1024/2012, 2014 O.J. (L 159) 1.

¹⁵⁷ U.N.E.S.C.O., FIGHTING THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY, A TRAINING WORKSHOP FOR EUROPEAN JUDICIARY AND LAW ENFORCEMENT OFFICIALS, 5 (2018).

¹⁵⁸ *Id.*

¹⁵⁹ *Proposal for a Regulation of the European Parliament and of the Council on the Import of Cultural Goods*, COM (2017) 0375 final (2017).

Convention's definition of cultural goods at import.¹⁶⁰ During UNESCO's previously mentioned November 2018 training,¹⁶¹ over a year after the Commission's proposal was published, participants still found that one of the main issues EU countries were faced with was the difference in key definitions. "Cultural heritage," "war crime" and "provenance," for example, have different meanings amongst Member States, which leads to disharmonic interpretations—and applications—of current EU law.

In spite of the EU's efforts to create a uniform body of law around the subject of cultural heritage, legal differences amongst Member States are bound to exist for the simple reason that the EU is not a federal entity.¹⁶² Although the Union's Member States enjoy federalist elements such as governmental representation within EU institutions,¹⁶³ a Monetary Union, and some common regulations, the EU was built upon independent nation States that have retained their individual cultures, languages, history, and legislations. While there can be room for a common European Heritage,¹⁶⁴ France's restrictive legislations around cultural heritage illustrate how this field remains a national issue.

C. Legal Obstacles Created by the Inalienability Rule

1. Inalienability's Effectiveness and Drawbacks

a) Lack of Liberty for Local Museums

Beginning with its strengths, inalienability protects France's cultural heritage. From November 2011 to April 2012, the French auction house Aristophil exhibited over three hundred official manuscripts written by former President Charles de Gaulle around 1940,

¹⁶⁰ *Id.* at 11.

¹⁶¹ *See supra* note 152.

¹⁶² Opinion 2/13, The Court of Justice of the European Union (Dec. 18, 2014).

¹⁶³ James McBride, *How Does the European Union Work?*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/how-does-european-union-work> [<https://perma.cc/FZR2-NGZ7>].

¹⁶⁴ For more information on the EU's European Heritage Label initiative, see *European Heritage Label Sites*, EUROPEAN COMMISSION, <https://ec.europa.eu/culture/cultural-heritage/initiatives-and-success-stories/european-heritage-label-sites> [<https://perma.cc/HHG3-3M75>].

when France was occupied by the Vichy Regime.¹⁶⁵ At the time, President de Gaulle had asked his former secretary to keep the manuscripts in a safe place until France was freed from the Occupation.¹⁶⁶ However, following the secretary's death, her heirs went against de Gaulle's request and sold the archives to Aristophil in 2010.¹⁶⁷ When the manuscripts were exhibited, the French Ministry of Culture sued the auction house on the grounds that these manuscripts had always been part of the French public domain and requested that they be restituted.¹⁶⁸ Aristophil argued that these letters were written under the Occupation, at a time when France did not own a sovereign public domain.¹⁶⁹ On November 20, 2013, Paris's Tribunal de grande instance held that anything that belonged to France under the Vichy Regime had been automatically transferred to Free France's public domain.¹⁷⁰ This case was a positive example of how inalienability enables the preservation of France's history and, thus, its cultural heritage.

Another argument in favor of the inalienability rule is that its implementation prevents museums from impulsively discarding works from the public domain.¹⁷¹ The Rigaud Report clarified the frequent misconception around museum reserves.¹⁷² It is tempting, the author wrote, to think that the artworks kept in an institution's reserve should be the subject of a legal exception to inalienability.¹⁷³ If inalienability protects an important source of the public's education and enjoyment, how do dusty paintings and sculptures fit into the equation? "Conservation," says Rigaud, "is not just a physical act."¹⁷⁴ Works kept in reserve are studied, restored, and repaired by museum experts.¹⁷⁵

¹⁶⁵ Tribunal de grande instances [TGI] [ordinary court of original jurisdiction] Paris, Nov. 20, 2013, n° 12/06156 (Fr.).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See RIGAUD, *supra* note 107, at 10.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

The Rigaud Report also defends the position that inalienability gives museums and, thus, the public, the possibility to rediscover the beauty in works and art movements that may have seemed obsolete a decade ago. Without inalienability, museums would be allowed to sell parts of their collections at a certain moment in time based on current fashions, which would gravely impair cultural, artistic, and historical evolution.¹⁷⁶ Of relevance to this Note, the author recalls that France's former Museum of Mankind kept "ethnic" objects in its storage rooms for scientific and anthropological research. Without these storage rooms, Rigaud writes, the Quai Branly Museum, which now holds the large majority of France's Sub-Saharan artworks, would not exist.¹⁷⁷

This Note recognizes the importance of art reserves and the shelter they provide for pristine art collections and our cultural heritage's preservation. Yet the discussion about which artworks should be kept in storage in case museum curators rediscover their own reserves seems somewhat trivial against the importance of allowing Sub-Saharan African countries to take ownership of their heritage. As a Member State of the United Nations (UN), France must act in accordance with the organization's Universal Declaration of Human Rights ("UDHR").¹⁷⁸ The Declaration states that everyone:

[I]s entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.¹⁷⁹

This statement can be understood as an international call for Member States to help develop communities' and individuals' human rights, including that of culture. Furthermore, the UDHR protects everyone's right to "participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and

¹⁷⁶ Didier Rykner, *Inaliénabilité : quelques faits*, LA TRIBUNE DE L'ART BLOG (Jan. 15, 2008), <https://www.latribunedelart.com/inalienabilite-quelques-faits> [<https://perma.cc/9C6J-DS83>].

¹⁷⁷ See RIGUAD, *supra* note 107, at 10.

¹⁷⁸ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁷⁹ *Id.* at art. 22.

its benefits.”¹⁸⁰ Sub-Saharan African countries currently suffer from a severe lack of cultural heritage.¹⁸¹ France arguably has a duty to help develop Sub-Saharan African culture, through international cooperation.

Amongst inalienability's drawbacks is the fact that it limits museums' independence. As observed by Senator Philippe Richter in a Parliamentary debate in 2015, Article 72.3 of the French Constitution protects the free and independent administration of territorial regions.¹⁸² While France is not a federal State *per se*, it is divided into regions, “departments” (*départements*), and communes that are governed by locally elected State representatives. Article 72.3 allows these local representatives to freely administer their regions and protects them against the centralized government's encroachment.¹⁸³ This rule is based on the idea that some topics are more efficient when governed locally. Yet, similar to the distribution of powers between the EU and its Member States, culture is a shared competence between the French State and its local territories. In his report, Rigaud was asked to reflect on the question of whether local governments should be able to alienate parts of their museum collections.¹⁸⁴ He explained that public museums have been charged with preserving France's cultural heritage since the French Revolution.¹⁸⁵ As such, their mission and administration does not only affect their local territory but the entire nation and, thus, should be overseen by the State.¹⁸⁶ So while inalienability clearly prohibits all regional public museum directors from discarding parts of their collections, it does not violate the French Constitution. The Rigaud Report also added that local museums gained more freedom since the 2002 law's “declassification” procedure,¹⁸⁷ of which the Report is in favor. In fact, instead of relaxing local territories' freedom around

¹⁸⁰ *Id.* at art. 27(1).

¹⁸¹ SARR & SAVOY, *supra* note 5, at 35.

¹⁸² *Quel est le contenu de la libre administration des collectivités locales?*, REPUBLIQUE FRANÇAISE, <https://www.vie-publique.fr/fiches/20157-quel-est-le-contenu-de-la-libre-administration-des-collectivites-locales> [<https://perma.cc/VT2X-H44R>].

¹⁸³ *See id.*

¹⁸⁴ *See* RIGAUD, *supra* note 107, at 12.

¹⁸⁵ *Id.* at 10.

¹⁸⁶ *Id.* at 12, 35.

¹⁸⁷ *Id.* at 34–35.

museum administration, Rigaud supports further declassifications, as those would occur under a special commission's approval.¹⁸⁸

b) Laborious Legislative Procedures

France's Parliament is a bicameral legislative branch divided between the National Assembly and the Senate.¹⁸⁹ When the Executive branch drafts a legal "project," one of either chambers begins the review process.¹⁹⁰ If the Senate is asked to review it first, the project is studied and amended by one of the Senate's permanent commissions.¹⁹¹ These commissions are specialized on major topics such as culture, education, foreign affairs, and the economy. Once the commission agrees on a new version, the project is sent to the National Assembly, which can either accept or reject the commission's amendments.¹⁹² In the latter case, the Assembly must make its own amendments and send the second version to the Senate. This back and forth (referred to as the "shuttle") continues until both chambers reach an agreement. On average, a French legislative procedure—from the text's proposal to its adoption—is thirteen months long. It can also be much shorter; between 2019 and 2020, the Parliament adopted fifty-eight texts.¹⁹³

On the other hand, it seems as though the adoption process for restitution laws is always slightly longer. One of the earliest examples of this occurred at the beginning of the 20th century. Saartjie Baartman was a young South African Khoikhoi woman who, in 1810, was sent to London as a human zoological attraction.¹⁹⁴ Londoners became gruesomely fascinated by her body shape, exhibited

¹⁸⁸ *Id.* at 34.

¹⁸⁹ Nicolas Boring, *National Parliaments: France*, LIBRARY OF CONGRESS, <https://www.loc.gov/law/help/national-parliaments/france.php> [<https://perma.cc/AC7T-LCRG>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Statistiques de l'activité parlementaire, Session 2019-2020 (1er octobre 2019 - 30 septembre 2020)*, ASSEMBLEE NATIONALE, [<https://perma.cc/29BY-K5MB>].

¹⁹⁴ Justin Parkinson, *The significance of Sarah Baartman*, BBC News (Jan.7, 2016), <https://www.bbc.com/news/magazine-35240987> [<https://perma.cc/PZ7D-TMXZ>].

her in a cage, mocked her, and referred to her as “Fat Bum.”¹⁹⁵ Baartman was sent to France in 1814 where she endured similarly horrific treatment.¹⁹⁶ After she died in Paris at age 26, her body was shaped into a life-size mold that travelled across French museums as an art piece under the title *Hottentot Venus*, until it landed in the Museum of Natural History in Paris.¹⁹⁷ In 1994, South Africa expressed its desire to have the *Hottentot Venus* restituted and finally bury Baartman’s human remains with the respect she deserved.¹⁹⁸ Senegal had to form a second request in 1996, as France had ignored its first.¹⁹⁹ The issue was finally addressed by the Senate in December 2001.²⁰⁰ Article 16-1 of the French Civil Code protects the human body and human remains from becoming part of a person’s or an institution’s property.²⁰¹ On this legal ground, it was argued that the body’s mold had never belonged to the public domain and, thus, inalienability could not bar its restitution.²⁰² In March 2002, the Parliament adopted a law that specifically focused on the extraction of Saartjie Baartman’s human-size mold from the Museum of Natural History.²⁰³ While this was a welcomed decision on the defense of human dignity, its application is limited to the mere scope of the *Hottentot Venus*.²⁰⁴

A similarly extensive procedure occurred in 2010 when the National Assembly adopted a circumstantial law that enabled the

¹⁹⁵ Angelique Chrisafis, *Paris Show Unveils Life in Human Zoo*, THE GUARDIAN (Nov. 29, 2011), <https://www.theguardian.com/world/2011/nov/29/huam-zoo-paris-exhibition> [https://perma.cc/Y6FV-4A9P].

¹⁹⁶ Parkinson, *supra* note 194.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Vénus hottentote, Loi relative à la restitution par la France de la dépouille mortelle de Saartjie Baartman à l’Afrique du sud*, SENAT, <https://www.senat.fr/dossier-legislatif/pp101-114.html> [https://perma.cc/X9QE-4MST].

²⁰¹ CODE CIVIL [C. CIV.] [CIVIL CODE] art. 16-1 (Fr.).

²⁰² *Proposition de loi autorisant la restitution par la France de la dépouille mortelle de Saartjie Baartman, dite “Vénus hottentote”, à l’Afrique du sud*, SENAT, <https://www.senat.fr/rap/101-177/101-1773.html> [https://perma.cc/JT8T-9HT2].

²⁰³ Loi n° 2002-323 du 6 mars 2002 relative à la restitution par la France de la dépouille mortelle de Saartjie Baartman à l’Afrique du sud [Law 2002-323 of Mar. 6, 2002 relative to the restitution by France of the remains of Saartjie Baartman to South Africa], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 7, 2002, No. 56.

²⁰⁴ *See Venus hottentote, supra* note 200.

restitution of Maori heads to New-Zealand.²⁰⁵ Here, the cultural commission submitted its legal proposal to the Senate in February 2008.²⁰⁶ In June 2009, the Assembly amended the proposal by adding a time limitation to the restitution, as some members of Parliament worried that, in absence of such a constraint, restitutions would either linger, or extend to more objects than desired.²⁰⁷ A text was finally published in May 2010—a year and a half later—that, again, only applied to the Maori heads.

More recently, in October 2020, and on the subject of Sub-Saharan African objects, the French Government drafted a legal project to allow the return of twenty-seven artifacts to Benin and Senegal from the Quai Branly museum and Musée des Armées.²⁰⁸ After its first meeting, the Senate’s cultural commission deemed the term “return” inadequate and changed it to “transfer.”²⁰⁹ The commission also supported the creation of a National Council that would discuss future transfer requests for “non-western art,” which would advise the government and Parliament on which requests to carry through.²¹⁰ The Senate changed the commission’s term “non-

²⁰⁵ *Têtes maories, Loi visant à autoriser la Restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections*, SENAT, <https://www.senat.fr/dossier-legislatif/ppl07-215.html> [<https://perma.cc/Y8T2-ZC6A>].

²⁰⁶ *Id.*

²⁰⁷ Rapport n° 2447 de Madame Colette Le Moal visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections [Report No. 2447 of Ms. Colette Le Moal seeking to authorize the restitution by France of Maori heads to New Zealand and relating to the management of collections], ASSEMBLEE NATIONALE (Apr. 7, 2010), <https://www.assemblee-nationale.fr/13/rapports/r2447.asp> [<https://perma.cc/5U2E-B5W7>].

²⁰⁸ Loi n° 2020-1673 du 24 décembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal [Law 2020-1673 of Dec. 24, 2020 relating to the restitution of cultural objects to the Republic of Benin and the Republic of Senegal] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [Official Gazette of France] (Dec. 26, 2020).

²⁰⁹ Loi relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal, Dossier législatif, Texte n° 38 (2020) [Law relating to the restitution of cultural property to the Republic of Benin and the Republic of Senegal, Legislative File, Text No. 38 (2020)] (rejected by the adoption of a preliminary question on December 15, 2020).

²¹⁰ Loi relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal, Rapport n° 91 (2020-2021) de Mme Catherine Morin-Desailly [Law on the Restitution of Cultural Property to the Republic of Benin and the Republic of Senegal, Report No. 91 (2020-2021) by Ms. Catherine Morin-Desailly] (made on behalf of the Culture Commission) (October 28, 2020).

western art” to “non-European.” After a few more exchanges, the National Assembly rejected both amendments.²¹¹ The law’s final version, adopted on December 24, 2020, includes two articles that allow twenty-six objects to be transferred to Benin, and a sacred saber’s transfer to Senegal.²¹² Both articles open with a warning that these transfers are exceptions to the principle of inalienability of French museum collections.²¹³

These examples illustrate the discrepancy between the narrow scope of France’s restitution laws and the substantial amount of time the Parliament requires to draft them. Because of inalienability, restitutions must be written as meticulous exceptions. Thus far, these laws have been written in such a way that they can only apply to specific situations. In the case of the *Hottentot Venus*,²¹⁴ for example, the Parliament was careful not to draft a broader law that might have enabled the restitution of *all* human remains. Instead, the text explicitly refers to Saartjie Baartman and South Africa, where her remains had to be returned within two months. By doing so, the legislative and executive branches keep a tight grip on every transfer of cultural property, for without generally applicable laws, each restitution case must be studied and reassessed. Consequently, these laws become moot as soon as the targeted operation is accomplished. This process would be sustainable if the French Parliament was solely responsible for assessing transfer requests and if these circumstantial texts were written within weeks. The Parliament being France’s only legislative organ,²¹⁵ this, of course, will never be the case. Between October 1st, 2019 and September 30, 2020, only one out of the fifty-eight laws adopted by the Parliament concerned the restitution debate.²¹⁶ Instead, this Note will propose the creation of a special legislative commission for permanent and temporary transfers, composed of individuals selected by the French

²¹¹ See *supra* note 205.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See *Venus hottentote*, *supra* note 200.

²¹⁵ See, e.g., *France, Main Executive and Legislative Bodies*, EUROPEAN COMMISSION (Dec. 26, 2018, 4:38 PM), https://eacea.ec.europa.eu/national-policies/eurydice/france/main-executive-and-legislative-bodies_en [<https://perma.cc/V6CA-FLE8>].

²¹⁶ *Statistiques de l'activité parlementaire, Session 2019-2020 (1er octobre 2019 - 30 septembre 2020)*, ASSEMBLEE NATIONALE, [<https://perma.cc/QR7J-EZK4>].

Parliament, the Ministry of Culture, and national museums.²¹⁷ Indeed, if the French government sustains its wish to cooperate with Subsaharan African countries, there will likely be multiple transfers, exchanges, or donations. France's current legislative process is incompatible with long-term, efficient, and durable agreements between French and African museums.

2. The Sarr-Savoy Report

In 2018, Emmanuel Macron asked scholars Bénédicte Savoy and Felwine Sarr to write a report on why and how Subsaharan African objects could “circulate”²¹⁸ out of France's museum collections and throughout its former African colonies.²¹⁹ The President's appointment of Sarr and Savoy was welcomed as a surprisingly efficient political initiative. Yet this enthusiasm was quickly followed by skepticism when Macron chose an art historian and university professor (Bénédicte Savoy), and a writer and professor of economics (Felwine Sarr)—rather than lawyers or actors of the art world—to write the report.²²⁰ Sarr, who is from Senegal and has written extensively about contemporary Africa,²²¹ has also been criticized for being one-sided regarding the restitution issue.²²² Art-lawyer Emmanuel Pierrat worries that the Report, which was directly addressed to the French government, was partly written by someone who belongs to France's “decolonial” movement and who believes reverse-segregation can put an end to racism.²²³ Pierrat also criticizes the fact that Sarr views past colonialism as the only source of Africa's current social and economic difficulties.²²⁴ In this sense, Pierrat worries that the Report was written by two professors with uncompromising viewpoints.

The Sarr-Savoy Report On the Restitution of African Cultural Heritage, Toward a New Relational Ethics is a 252-page legal

²¹⁷ See *infra* Section III.C.

²¹⁸ *Document 1. Letter of mission*, in SARR & SAVOY, *supra* note 5.

²¹⁹ *Id.*

²²⁰ PIERRAT, *supra* note 34, at 14.

²²¹ See FELWINE SARR, *AFROTOPIA* (2016).

²²² PIERRAT, *supra* note 34, at 14.

²²³ *Id.*

²²⁴ *Id.*

proposal divided into three main parts: (1) To Restitute, (2) Restitutions and Collections, and (3) Accompanying Returns.²²⁵ The second part, Restitutions and Collections, draws a three-step process that was launched with the Report's publication in 2018.²²⁶ For the sake of enhanced transparency, the process's first step urged French public museums to build thorough online inventories of the Sub-Saharan objects held in their collections.²²⁷ These lists were to be sent to the objects' African countries of origin. The Report hoped that the inventories would be completed and accessible to the public by spring 2019, which was not the case.²²⁸ Still, starting November 2022, France is expected to return all the objects claimed by the requesting countries.²²⁹ As of February 2021, France has only agreed to the transfer of twenty-seven objects.²³⁰

One of Sarr and Savoy's arguments in favor of the permanent restitution of objects to African countries focuses on the lingering psychological effects of past colonialism on future generations.²³¹ They argue that the "after-effects of colonialism in Europe and Africa" will mostly be overcome through a collective reflection "on a history that we are the inheritors of, and through the clarification concerning the responsibilities each party had in the construction of this history."²³² Indeed, the traumatic effects of colonialism and scarce cultural heritage have been studied on several communities across the world. In their research on the long-term psychological effects of colonialism over Canada's First Nations, Professors Michael Chandler and Christopher Lalonde of the University of British Columbia found that Aboriginal peoples reported suicide rates 800

²²⁵ Clara Cassan, *The Sarr-Savoy Report & Restituting Colonial Artifacts*, CENTER FOR ART LAW BLOG (Jan. 31, 2019), <https://itsartlaw.org/2019/01/31/sarr-savoy-report/> [<https://perma.cc/DG5X-R2HQ>].

²²⁶ SARR & SAVOY, *supra* note 5.

²²⁷ *Id.* at 63.

²²⁸ Laurence Caramel, *Patrimoine africain : « Les musées occidentaux sont entrés dans l'âge de l'intranquillité »*, LE MONDE (Oct. 13, 2020), https://www.lemonde.fr/afrique/article/2020/10/13/patrimoine-africain-les-musees-occidentaux-sont-entres-dans-l-age-de-l-intranquillite_6055885_3212.html [<https://perma.cc/AAP7-V5BQ>].

²²⁹ SARR & SAVOY, *supra* note 5.

²³⁰ *See supra* note 13.

²³¹ SARR & SAVOY, *supra* note 5, at 36.

²³² *Id.*

times above national average.²³³ This, they believe, is the result of cultural “discontinuity,” a phenomenon where a community’s sense of identity and functionality is destroyed by colonialism, putting its individuals’ sanity at risk.²³⁴ On the other hand, cultural continuity within Aboriginal communities in British Columbia seems to have drastically lowered their suicide rates, sometimes dropping them to zero.²³⁵

In their study, Chandler and Lalonde used “culture” in a very general sense, extending it to government functionality, education, and civic duties.²³⁶ Yet it also included the material establishment of “cultural facilities to help preserve and enrich their cultural lives.”²³⁷ This study demonstrates the necessity for a community to own its heritage entirely. Schools and museums are essential to a healthy, functional government. Similarly, Sarr has explained that even though new African generations did not experience colonialism, they can feel its effects. They are, he said, the descendants of an amnesic past.²³⁸ Some “communities have even begun to lose any remaining knowledge of [their] cultural heritage or recognize the depth of the loss that has been suffered.”²³⁹ One could argue in favor of forgetting about unfortunate historical events but this would be a denial of history that, pushed to an extreme, could lead to the end of heritage altogether. The longer this “amnesia” perpetrates within communities, the more likely it becomes for these communities’ cultural heritage to be entirely forgotten. This is especially true in Africa where 60% of the continent’s population is under age 25, making it the youngest in the world.²⁴⁰ The Sarr-Savoy Report also quotes Karima Lazali who studied the consequences of French

²³³ Michael J. Chandler & Christopher Lalonde, *Cultural Continuity as a Hedge Against Suicide in Canada’s First Nations*, 35 *TRANSCULTURAL PSYCHIATRY*, at 2 (1998).

²³⁴ *Id.* at 7.

²³⁵ *Id.* at 18.

²³⁶ *Id.* at 14–15.

²³⁷ *Id.* at 13.

²³⁸ SARR & SAVOY, *supra* note 5, at 31.

²³⁹ *Id.*

²⁴⁰ Fred Dews, *Charts of the Week: Africa’s Changing Demographics*, *BROOKINGS* (Jan. 18, 2019), <https://www.brookings.edu/blog/brookings-now/2019/01/18/charts-of-the-week-africas-changing-demographics/> [<https://perma.cc/9LDL-UWWV>].

colonialism on contemporary Africa.²⁴¹ She found that “the part of History refused by politics is transmitted from generation to generation and fabricates psychic mechanisms that keep the subject within a position of shame for existing.”²⁴² France is held to the UDHR’s international duties²⁴³ and, as such, it must participate in the realization of African countries’ cultural development and help promote individuals’ human right to culture.²⁴⁴ As demonstrated in Professors Chandler and Lalonde’s psychological study, lack of cultural continuity can affect an individual’s “free development of his personality.”²⁴⁵ Thus, from an international law perspective, France arguably has an obligation to help develop Sub-Saharan African culture through international cooperation.²⁴⁶

When it opened in 2006, the Quai Branly Museum inherited the collections of Paris’s former museum of Mankind and National Museum of African and Oceanian Art.²⁴⁷ According to its website, it now holds almost 370,000 works originating from Africa, the Near East, Asia, Oceania, and the Americas.²⁴⁸ It describes itself as “a bridge between cultures.”²⁴⁹ It has also become Sarr and Savoy’s main target-institution for restitution requests.²⁵⁰ The authors report that the museum houses around 70,000 Sub-Saharan African objects.²⁵¹ In fact, when asked to comment for the French newspaper *Le Figaro* on Macron’s address to the University of Ouagadougou, Director of the Quai Branly museum Stéphane Martin agreed that the international community “cannot have [Africa] deprived of

²⁴¹ SARR & SAVOY, *supra* note 5, at 36 (quoting KARIMA LAZALI, *LE TRAUMA COLONIAL. UNE ENQUETE SUR LES EFFETS PSYCHIQUES ET POLITIQUES CONTEMPORAINS DE L’OPPRESSION COLONIALE EN ALGERIE* (2015)).

²⁴² *Id.*

²⁴³ *See supra* notes 178–179.

²⁴⁴ *See* Universal Declaration of Human Rights, *supra* note 178, at art. 27(1).

²⁴⁵ *See id.* at art. 22.

²⁴⁶ Comm. on Econ., Soc. and Cultural Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social & Cultural Rights*, UN. Doc. E/E/C.12/2000/13, at Part I.B.30 (2000).

²⁴⁷ *History of the Collections*, QUAI BRANLY MUSEUM, <http://www.quaibranly.fr/en/collections/all-collections/history-of-the-collections/> [<https://perma.cc/A492-DCP7>].

²⁴⁸ *Id.*

²⁴⁹ *Missions*, QUAI BRANLY MUSEUM, <https://www.quaibranly.fr/en/missions-and-operations/the-musee-du-quai-branly/> [<https://perma.cc/H7G3-WEBU>].

²⁵⁰ SARR & SAVOY, *supra* note 5, at 4.

²⁵¹ *Id.* at 48.

testimonies of its past and plastic genius this way.”²⁵² The *Figaro* article’s title also quotes Martin directly: Africa cannot be deprived from witnesses of its past.²⁵³ Yet must France’s support to African culture necessarily entail radical restitutions and the eradication of French legal principles?

III. A PROPOSAL TO SHAPE PERMANENT ART TRANSFERS AND CIRCULATIONS

A. *The Report’s Legal Inaccuracies*

Sarr and Savoy argue that restitutions must occur “in a swift and thorough manner without any supplementary research regarding their provenance or origins, of any objects taken by force or presumed to be acquired through inequitable conditions.”²⁵⁴ The laborious legislative process that took place at the end of 2020 to transfer twenty-seven artifacts²⁵⁵ demonstrates that, while the Report prompted the revival of an important conversation that had been placed on the French government’s legislative back-burner, the authors proposals have not offered realistic solutions.

The Report’s primary legal flaw is to presume that all artworks held in French collections were either stolen or acquired through abusive means. This presumption is expressed in the mere use of the legal term “restitution” in the title and throughout the Report, which, as explained earlier in this Note, implies a prior theft.²⁵⁶ During the Senate’s cultural commission’s discussions around the Government’s latest legislative project on transfer of objects to Benin and Senegal,²⁵⁷ the Senate criticized the Report’s assumption that, even

²⁵² Éric Biétry-Rivierre, *Stéphane Martin: « L’Afrique ne peut pas être privée des témoignages de son passé »* [Stéphane Martin: “Africa Can No Longer Be Deprived of Testimonies to Its Past”], LE FIGARO (Dec. 6, 2017), <https://www.lefigaro.fr/culture/2017/12/06/03004-20171206ARTFIG00280-stephane-martin-l-afrique-ne-peut-pas-etre-privée-des-temoignages-de-son-passe.php> [<https://perma.cc/H344-97AJ>] (Fr.).

²⁵³ *Id.*

²⁵⁴ SARR & SAVOY, *supra* note 5, at 61.

²⁵⁵ *See supra* Section II.C.1.b.

²⁵⁶ *See generally* SARR & SAVOY, *supra* note 5.

²⁵⁷ *See* Loi n° 2020-1673 due 24 décembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal [Law 2020-1673 of Dec. 24, 2020 relating to the restitution of cultural objects to the Republic of Benin and the Republic of

when Frenchmen bought the artifacts, they systematically did so under duress and much below market price.²⁵⁸ The result of the Report's presumption is that it violates the French and international standard of the presumption of innocence. In French law, this presumption is doubly protected. It was included in the 1789 Declaration of the Rights of Man and of the Citizen,²⁵⁹ which was itself incorporated into the French Constitution in 1958.²⁶⁰ In addition, Article 6.2 of the European Convention on Human Rights ("ECHR") provides that "[e]veryone charged with a criminal offense shall be presumed innocent until proven guilty according to law."²⁶¹ Thus, by assuming that France must restitute African objects to Africa without a prior demonstration that the objects in question were stolen, the Report ignores an important principle of criminal defense.

As of today, Article 6.2 of the ECHR does not apply to corporations or legal entities but the French Criminal court has reversed several lower courts' decisions that had concluded, without sufficient proof, that a corporation was guilty of criminal charges.²⁶² On the other hand, Sarr and Savoy describe French museums as 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."²⁶³ They argue that the massive departure and persistent absence of objects from their countries of origin have created a painful legacy that is just as important as the

Senegal] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O] [Official Gazette of France], Dec. 26, 2020.

²⁵⁸ *Rapport d'information n°239 de MM. Max BRISSON et Pierre OUZOULIAS, fait au nom de la culture, de l'éducation et de la communication (1) par la mission d'information sur les restitutions des biens culturels appartenant aux collections publiques (2)* [Report No. 239 of Ms. Max Brisson and Pierre Ouzoulias made in the name of culture, education, and communication by the mission of information on restitution of cultural objects in public collections], at 38, SENAT (Dec. 16, 2020), <https://www.senat.fr/rap/r20-239/r20-2391.pdf> [<https://perma.cc/6BAE-VGCW>] (Fr.) [hereinafter Brisson & Ouzoulias Rapport].

²⁵⁹ Declaration of the Rights of Man and of the Citizen art. 9, Aug. 26, 1789 (Fr.).

²⁶⁰ 1958 CONST. pmb. (Fr.).

²⁶¹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 6.2, Nov. 4, 1950, 213 U.N.T.S. 221.

²⁶² *See* Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., June 19, 2013, Bull. crim., No. 12-82827 (Fr.).

²⁶³ SARR & SAVOY, *supra* note 5, at 15.

spectacular cultural production they sparked in Europe.²⁶⁴ They view destruction and collection as “the two sides of the same coin.”²⁶⁵

There is a logical connection between a party’s presumption of innocence and the opposite side’s burden of proof. In French criminal and civil law, it is the plaintiff’s or the government’s responsibility to provide the court with sufficient proof that the defendant is guilty as charged.²⁶⁶ Even in litigations regarding the restitution of Nazi looted art where the abuse, theft, and terror that surrounded the takings are undeniable, French courts require victims to provide some proof that the work(s) they are claiming belonged to their family at the time the looting occurred.²⁶⁷ Yet regarding Subsaharan artifacts, the Sarr-Savoy Report recommends to:

. . . respond favorably and grant restitutions concerning objects collected in Africa during . . . scientific expeditions, unless there is explicit evidence or information witnessing to the full consent on the part of the owners or initial guardians of the objects at the moment when the objects were separated from them.²⁶⁸

As pointed out by French art lawyers Amélie Tripet and Laura Bertilotti, proof of the owners’ or initial guardians’ “full consent” is nearly impossible to provide for events that occurred over a century ago.²⁶⁹

²⁶⁴ *Id.* at 14.

²⁶⁵ *Id.*

²⁶⁶ Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AMERICAN J. OF COMP. L. 243, 246 (2002).

²⁶⁷ Commission pour l’indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l’Occupation, *Rapport public d’activité de la CIVS 2019*, at 50 (Nov. 15, 2019), http://www.civs.gouv.fr/images/pdf/Rapport_civs_2019.pdf [<https://perma.cc/C5KT-WVDH>].

²⁶⁸ SARR & SAVOY, *supra* note 5, at 57–58.

²⁶⁹ Amélie Tripet & Laura Bertilotti, *Restitution d’œuvres d’art à l’Afrique : un casse-tête juridique*, L’OPINION (Dec. 10, 2018, 5:45 PM), <https://www.lopinion.fr/edition/international/restitution-d-oeuvres-d-art-a-l-afrique-casse-tete-juridique-170856> [<https://perma.cc/KGM8-3JLU>] (Fr.).

B. The Report's Unrealistic Requests

“Within five years I want the conditions to exist for temporary or permanent returns of African heritage to Africa.”²⁷⁰ President Macron’s promise in Ouagadougou on November 28, 2017 was unclear. The Report justifiably points out that the expression “temporary restitutions” functions as an oxymoron.²⁷¹ Indeed, to return a piece of property is to admit that the property belongs to someone else. To take the returned property back would amount to a theft. Yet, instead of attempting to understand Macron’s intentions, Sarr and Savoy decided to define temporary returns as “a transitory solution, allowing for the proper time to create the juridical [conditions] allowing and assuring the definitive return, without any other stipulations or conditions, of cultural heritage objects of sub-Saharan Africa back onto the African continent.”²⁷² The authors refuse to envision a future that would include permanent art transfers and circulations. They solely consider “the path toward permanent restitutions.”²⁷³

This uncompromising solution can be saluted for its bravery and ambition. Yet, from a practical standpoint, it is also unworkable. During the European Council’s discussions around the restitution debate in December 2020, the President of the Senate’s cultural commission, Catherine Morin-Desailly, reminded the participants that every Subsaharan object has a different story that raises singular legal issues.²⁷⁴ In fact, as explained earlier, all artifacts in French museum collections now legally belong to France, which makes the idea of hundreds of permanent restitutions impracticable.

At times—most likely in anticipation of the art world’s fear that restitutions will “empty” French museums²⁷⁵—Sarr and Savoy state

²⁷⁰ Emmanuel Macron, President of France, Speech at University of Ouagadougou (Nov. 28, 2017) (transcript available at <https://www.elysee.fr/front/pdf/elysee-module-829-fr.pdf> [<https://perma.cc/D5N8-8SCH>]).

²⁷¹ SARR & SAVOY, *supra* note 5, at 28.

²⁷² *Id.* at 29.

²⁷³ *Id.* at 28.

²⁷⁴ See *Restitution de biens culturels au Bénin et au Sénégal*, SENAT (Dec. 15, 2020), <http://www.senat.fr/cra/s20201215/s20201215.pdf> [<https://perma.cc/N8EE-BFPR>].

²⁷⁵ Kate Brown, ‘The Idea Is Not to Empty Museums’: *Authors of France’s Blockbuster Restitution Report Say Their Work Has Been Misrepresented*, ARTNET (Jan. 24, 2019),

that: “. . . no one in France or Africa foresees the return of the entirety” of the collections currently held in France.²⁷⁶ Yet when the Report elaborates a three-phased “Timeline for a Program of Restitutions,” the last phase starts in November 2022 and is open-ended.²⁷⁷ According to the authors, the process of restitution should not be limited in time.²⁷⁸ The Timeline’s first phase (2018-19) was meant to include “the formal restitution of several largely symbolic pieces whose return has been requested for a long time by various African nations or communities, so as to show and demonstrate the true wish for restitution on the part of the French State.”²⁷⁹ The authors’ choice of words gives the impression that France is under strict scrutiny. Without meaningful progress, will France be deemed to have lied about its intention to discuss the transfer of certain artworks? The Report itself was published in 2018, the same year this second phase was expected to begin. While its authors could not have anticipated that a global pandemic would cause legislative delays,²⁸⁰ it is obvious that legal results would take more than a few months considering the delicacy with which the question of ownership of objects acquired during colonialism must be approached. In fact, the French Parliament has only adopted one law on the subject over the course of two years;²⁸¹ one that applies to twenty-seven objects out of the hundreds, if not thousands, Sarr and Savoy hope to see sent to Africa.

The Report recalls that France has operated its previous art restitutions in one of two ways:²⁸² through punctual “laws of

<https://news.artnet.com/art-world/restitution-report-critics-1446934> [<https://perma.cc/43L8-8FXT>].

²⁷⁶ SARR & SAVOY, *supra* note 5, at 43.

²⁷⁷ *Id.* at 69.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 63.

²⁸⁰ Jacques Bouyssou, *The Impact of Covid-19 on Legal Procedures in France*, ALERION AVOCATS (May 18, 2020), <https://www.alerionavocats.com/en/impact-covid-19-legal-procedures-france/> [<https://perma.cc/XY5C-AZJV>].

²⁸¹ Loi 2020-1673 du 24 decembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal [Law 2020-1673 of Dec. 24, 2020 Relating to the Restitution of Cultural Property to the Republic of Benin and Republic of Senegal], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], last modified Dec. 26, 2020.

²⁸² *See* SARR & SAVOY, *supra* note 5, at 73.

exception” or by considering that the objects in question were acquired illicitly and thus never belonged to the public domain.²⁸³ The authors then correctly point out that neither of these solutions can satisfy the Franco-African debate. Yet Sarr and Savoy also mention that Subsaharan artifacts were acquired at a time when colonialism was “largely acceptable.”²⁸⁴ To this day, these takings cannot be “legally quantifiable as crimes under international law,” as opposed to Nazi-looted art.²⁸⁵ This Note proposes a law that would allow two different processes for the transfer of artifacts to Subsaharan Africa.

C. *A Long-Term Legislative Proposal for Transfers and Cooperation*

1. A Commission for Permanent Transfers

The Sarr-Savoy Report argues that the French Cultural Heritage Code should be amended to include a broad exception to the inalienability of France’s public domain in favor of African art restitutions.²⁸⁶ The authors’ suggested law—which would be based on a bilateral cultural agreement between formerly colonized countries, protectorates, or territories managed under French mandate—would create a joint commission of experts designated by France and the requesting States that would study each restitution request.²⁸⁷

This Note agrees with the relevancy of creating a legislative commission for several reasons. As discussed earlier,²⁸⁸ the previous French restitution laws have only been partly relevant to the advancement of the cultural heritage debate. While these laws have enabled the restitution or return of certain objects, if the Parliament must reconvene and go through an entire legislative process for each individual transfer, the Franco-African debate might linger for years before any significant progress is reached. The Report partly defends its proposal on the basis that Africa has a right to reparations

²⁸³ *Id.* at 74.

²⁸⁴ *See* SARR & SAVOY, *supra* note 5, at 75.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 62.

²⁸⁷ *Id.* at 78, 80.

²⁸⁸ *See supra* Part II.

for acts committed more than a century ago,²⁸⁹ which, partly due to the fundamental principles of nonretroactivity and the presumption of innocence,²⁹⁰ has no legal basis. Under this Note's proposal, the legislative commission's creation would be based on France's aforementioned international expectation to cooperate and develop other countries'—in this case, Sub-Saharan Africa's—culture. Since the late 1980s, international legal scholars have developed the idea that States might have a right and a duty to help endangered populations.²⁹¹ France's international duty to cooperate would be based on the UDHR and a desire to contribute to Africa's cultural renaissance.²⁹² Because France holds tens of thousands of objects originating from Africa,²⁹³ this Note argues that France has a moral, if not legal, duty to help these countries develop their cultural heritage. In addition, the social and psychological consequences of the absence of a cultural heritage are now accepted by the scientific and medical community.²⁹⁴ Whether a State's right to intervene can also apply when a population faces important psychological disarray has not been openly discussed by the international community.

The commission would be created through a single law. Instead of drafting circumstantial texts for each restitution, the Parliament would adopt a unique law on the commission's mission, composition criteria, and operation, all of which would apply to every transfer procedure. Unlike the Report's, this Note's legislative commission would be composed of professionals selected by the French Parliament, the Ministry of Culture, and national museums. Indeed, one of the fundamental legal issues this proposal must work around is the inalienability of the public domain, and France's own

²⁸⁹ See SARR & SAVOY, *supra* note 5, at 40–41.

²⁹⁰ See *supra* Part III.A.

²⁹¹ *Qu'appelle-t-on "droit d'ingérence"?*, VIE PUBLIQUE (Oct. 16, 2019), <https://www.vie-publique.fr/fiches/271180-quappelle-t-droit-dingerence> [https://perma.cc/ZYA4-CLZA].

²⁹² See generally *Aft. Union Charter for African Cultural Renaissance*, <https://au.int/en/treaties/charter-african-cultural-renaissance> [https://perma.cc/W46Y-2D97].

²⁹³ SARR & SAVOY, *supra* note 5, at 44.

²⁹⁴ See Chandler & Lalonde, *supra* note 233. See also Geneviève Vinsonneau, *Le développement des notions de culture et d'identité: un itinéraire ambigu*, 14 *Carrefour de l'éducation*, 2 (2002).

institutions should decide on the objects' faith. Sarr and Savoy were criticized for failing to consult important actors of the art world and legal experts.²⁹⁵ The commission would be composed of art historians, lawyers, historians, anthropologists, scientists, and archeologists. These members would change based on the requesting countries and objects in question. The idea is not to create a commission solely composed of French professionals. On the contrary, this Note insists on the essential presence of Africans and Africophones in the decision-making process. The diversity of the commission's members would allow broader discussions than those that are solely internal to museums. The commission would enable transfers to follow a rigorous method based on African requests, and on the arguments in support of these transfers.

According to Senator Pierre Ouzoulias, restitutions must be studied with a long-term scientific approach.²⁹⁶ They must also follow a legal reasoning. This Note's legislative proposal would avoid any possibility of violating the French constitutional principle of the presumption of innocence. Requesting countries would have to argue that the objects in question are necessary to help their national cultural heritage and economic growth. The Report hoped that French museums would create online inventories of every African object held in their collections from which African countries would then select their desired objects. This Note's proposal invites requesting countries to work directly with these museums in order to obtain the information they need to argue for object transfers. While France can cooperate and support African culture's development, the preliminary work must be spearheaded by the requesting countries themselves.

2. Mandatory Museum Cooperation for Circulations

Sarr and Savoy claim that the problem begins when a museum "no longer becomes the site for the affirmation of national identity, but . . . is seen rather as a museum of the Others; when the museum conserves objects procured from somewhere else and assumes the right to speak about these Others (or in the name of

²⁹⁵ See, e.g., PIERRAT, *supra* note 34, at 14.

²⁹⁶ See Brisson & Ouzoulias Rapport, *supra* note 258, at 19.

the Others) and claims to declare the truth concerning them.”²⁹⁷ In other words, the authors argue against the concept of universal heritage and museums that is promoted by most international organizations, including UNESCO.²⁹⁸ Universal culture is not the antithesis of local heritage. Countries that have had the opportunity and financial means—mostly in the Northern hemisphere—to maintain and develop their local culture also benefit from universal museums. This is the case in France, which has over 1,200 museums including one of the largest universal institutions in the world and where, in 2019, Paris was found to host the largest number of museums in a capital city.²⁹⁹ Sarr and Savoy believe museums allow “for European powers to stage their aptitude for the absorption and classification of the world.”³⁰⁰ Art historian and director France’s National Institute of Art History Éric de Chassey explains that once objects belong to a museum, art becomes both local and universal and, in that sense, museums do cut objects and artworks from their initial context.³⁰¹ Yet, he adds that they also offer the best preservation environments for artworks and magical spaces to learn about the world.³⁰² This explains why Subsaharan African countries have started opening their own institutions. In 2018, Dakar inaugurated its Museum of Black Civilizations with financial support from China, which spent \$30 million to fund the Museum’s 150,000 square feet building.³⁰³ The next year, Togo reclaimed ownership of a formerly occupied palace that hosted German and French governors during colonial rule (1884-1960) and opened the Palais de

²⁹⁷ See SARR & SAVOY, *supra* note 5, at 37.

²⁹⁸ *World Heritage*, UNESCO, <https://whc.unesco.org/en/about/> [<https://perma.cc/92FS-9G4R>].

²⁹⁹ *Découvrez les plus beaux musées de France*, LES MUSEES DE FRANCE, <https://www.les-musees-de-france.fr> [<https://perma.cc/ADZ7-JTSU>].

³⁰⁰ See SARR & SAVOY, *supra* note 5, at 37.

³⁰¹ Éric de Chassey, *La France accuse un retard inacceptable dans le domaine de l’histoire de l’art africain*, LE MONDE (Nov. 28, 2018, 5:07 PM), https://www.lemonde.fr/idees/article/2018/11/28/la-france-accuse-un-retard-inacceptable-dans-le-domaine-de-l-histoire-de-l-art-africain_5390001_3232.html [<https://perma.cc/85ZW-59XY>].

³⁰² *Id.*

³⁰³ Kate Brown, *Senegal Unveils a Vast Museum That Raises the Stakes in Africa’s Campaign to Reclaim Its Art*, ARTNET NEWS (Dec. 7, 2018), <https://news.artnet.com/world/museum-of-black-civilizations-1409911> [<https://perma.cc/YE3E-BSAG>].

Lomé, transforming a symbol of lingering colonialism and dictatorship into a cultural sanctuary in its capital.³⁰⁴

This Note's proposal invites African countries to defend the reasons why they believe certain objects should be transferred to their territory. The Sarr-Savoy Report required French museums to create inventories of all African works in their collections to allow their African counterparts to select the ones they desired. In this sense, the Report gave African countries the autonomy to choose the objects "based on justification of their interest by the country making the request."³⁰⁵ Some might argue that this Note perpetrates African countries' dependency on France's ultimatum, as the legislative commission will have the final say on which objects can be transferred. The Sarr-Savoy Report encouraged the restitution to occur "in a swift and thorough manner without any supplementary research regarding their provenance or origins."³⁰⁶ Instead, this Note rejects the assumption that all African objects were spoiled or looted.

This standpoint may be morally unsettling but it is justified by this Note's prioritization of the presumption of innocence.³⁰⁷ African countries and their museums will have the possibility to argue in favor of the works they wish to transfer and, just like a court of law, the legislative commission will deliver a verdict on whether the objects should be extracted from French collections. Again, this commission will include professionals specialized in the requesting country's history, politics, and culture, as well as art historians with relevant backgrounds. The Report was inscribed in a morally pleasant logic of compensation and reparations in favor of African countries.³⁰⁸ Instead, this Note requires that Subsaharan African governments and museums argue why France should accept the transfer of certain objects. While art thefts undeniably occurred during colonialism, the objects in question are now intrinsically part of France's public domain. As the objects' current proprietor, France has the

³⁰⁴ See generally *Our Project*, PALAIS DE LOMÉ, <https://palaisdelome.com/en/le-palais/presentation/> [https://perma.cc/WWJ7-X443].

³⁰⁵ See SARR & SAVOY, *supra* note 5, at 62.

³⁰⁶ *Id.* at 61.

³⁰⁷ See *supra* Part III.A.

³⁰⁸ See SARR & SAVOY, *supra* note 5, at 40–41.

final say on how to share or transfer them. The nonretroactivity of international conventions³⁰⁹ and the inalienability rule³¹⁰ compel the design of legal solutions that can work within these constraining international and national principles.

Additionally, those in favor of strict permanent restitutions will certainly find this Note's call for circulations to be unsatisfactory. Sarr and Savoy recall that Director of the National Museum of Mali Samuel Sidibé expressed "[m]ixed feelings in regard to the mere *circulation* of cultural property" if it excluded restitutions.³¹¹ The Report defends "the outlining of the moral responsibility that is tied to the term *restitution*."³¹² According to its authors, "a preference for the option of *circulation* avoids legal questions around a veritable restitution" such as the modification of the inalienability law.³¹³ The limited number of permanent restitutions that have occurred since the Report's publication in November 2018 reveals that permanent restitutions will not adequately resolve the Franco-African debate. French legislators have already expressed their resistance to modifying the inalienability law. The Report's obstination to modify a sacred French law leads the debate into stagnation.

Regardless of this Note's reserves towards inalienability's rigidity, the urgency lies in the development and support of Subsaharan Africa's cultural development. Compromises must be found where changes can be made. If circulations are accepted, this Note encourages African museums to also borrow objects from foreign cultures alongside those from their countries of origin to avoid "cultural nationalism."³¹⁴ Priority rests in national heritages' reconstruction but, as members of the international community, France and its Subsaharan counterparts must encourage the simultaneous development of local and universal heritages.

³⁰⁹ See *supra* Part III.C.1.

³¹⁰ See *supra* Part I.C.

³¹¹ FELWINE SARR & BÉNÉDICTE SAVOY, *General Consultation of Mali*, in THE RESTITUTION OF AFRICAN CULTURAL HERITAGE (2018).

³¹² See SARR & SAVOY, *supra* note 5, at 28 (emphasis added).

³¹³ *Id* (emphasis added).

³¹⁴ See PIERRAT, *supra* note 34, at 162.

CONCLUSION

The restitution debate expands beyond France's geographic borders; other former colonial powers on the European continent have been faced with similarly complex issues.³¹⁵ For example, following the Report's publication, King Philippe of Belgium expressed "profound regrets" for Belgium's actions during colonialism.³¹⁶ While Brussels' Royal Museum for Central Africa ("RMCA")³¹⁷ is entirely devoted to African art, Belgium's colonial presence in Africa was much more modest than that of France and the United Kingdom's,³¹⁸ and its African art collections include fewer origins. Still, the RMCA's website devotes an entire section to the subject of restitutions.³¹⁹ After acknowledging the restitution debate and the fact that "its collections were acquired in part during the colonial period in the context of a policy of legal inequality,"³²⁰ the museum's Restitution Policy stresses that, legally, "the collections of the RMCA are the inalienable property of the federal state and belong to federal heritage."³²¹

Several countries are faced with inalienability's legal challenges. In December 2020, the RMCA added a paragraph to its Restitution Policy informing its readers that "a working group" was recently created to develop a legal framework for future restitutions.³²² "Priority was to be given to collections of great symbolic value or

³¹⁵ See, e.g., Gareth Harris, *New Guidelines for UK Museums Will Kickstart Nation's Long-Overdue Restitution Debate*, ART NEWSPAPER (Mar. 20, 2020, 12:09 PM), <https://www.theartnewspaper.com/news/arts-council-england-wades-into-restitution-debate-with-pledge-to-publish-guidance> [https://perma.cc/88EF-9VPP].

³¹⁶ Marlène Panara, *Restitution du patrimoine africain : la Belgique presse le pas*, LE POINT AFRIQUE (Oct. 25, 2020, 5:16 PM), https://www.lepoint.fr/afrique/restitution-du-patrimoine-africain-la-belgique-presse-le-pas-25-10-2020-2397950_3826.php [https://perma.cc/94ST-HKED].

³¹⁷ See generally AFR. MUSEUM, <https://www.africamuseum.be/en> [https://perma.cc/DU4M-6GQU].

³¹⁸ See *Belgian Colonial Empire*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/belgian_colonial_empire [https://perma.cc/4KZ4-63UQ].

³¹⁹ *Restitution Policy of the Royal Museum for Central Africa*, AFR. MUSEUM, https://www.africamuseum.be/en/about_us/restitution [https://perma.cc/N85S-9AZ8].

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

acquired through looting or theft, and to the return of human remains.”³²³ Belgium’s Special Commission will study its colonial past in Congo, its impact, and consequences.³²⁴ The Belgian working group will “further research on the colonial past, on the accessibility of archives and on the development of a policy for the restitution of works of art and human remains.”³²⁵ These initiatives were made around the time of the Sarr-Savoy Report’s publication and Belgium might have anticipated future requests. The hope is that France’s example can continue to urge its neighbors to find solutions to the restitution question.

If circulations are made possible, the next difficulty will concern the financing of Sub-Saharan African museums. As noted by several scholars, African museums currently have disparate means to house potential transferred objects. Felwine Sarr and Bénédicte Savoy argued that financing will follow the arrival of objects and assured that the EU should provide financial support if needed.³²⁶ This raises the question of the necessary intensity of France and Europe’s implication in Africa’s cultural development. An overbearing European presence could revive memories of colonial times and prevent African countries from fully owning the works that are loaned or gifted to them. On the other hand, just like France has a moral and political duty to support African countries through circulations, this responsibility might extend to financial support. Europe’s involvement in African museums’ affairs could also be justified by the international community’s duty to preserve universal heritage.

President Macron’s 2017 speech followed by the Sarr-Savoy Report reflected a bilateral desire to see the Franco-African debate progress. In order to do so, the debate must be freed from excessive emotional reactions on both sides, whether pro and anti restitution. As expressed by Emmanuel Pierrat, our anger towards past colonial acts tend to lead us towards a repentance that sacrifices art.³²⁷ These responses, however, will always collide with political and legal practicalities. The solution to the restitution debate lies in govern-

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See SARR & SAVOY, *supra* note 5, at 81.

³²⁷ See PIERRAT, *supra* note 34, at 162.

ments'—both African and European—ability to reach a reasonable compromise between overly moral considerations and relentless conservatism.