

# COUNTRY REPORTS

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## Austria Approaches Its Colonial Past: Prospects of a New Restitution Law for Cultural Objects

**Abstract:** In January 2022 the Austrian government established an expert committee to study the colonial heritage in its federal museums. Although Austria is a country not considered to have an extensive colonial past, Austrian museums hold large collections of ethnographic objects and human remains that they acquired during the heydays of colonialism. This country report introduces the current restitution debate in Austria through a legal lens. It discusses the legal situation of cultural objects from colonial contexts and the instruments available to museums and the federal government to organize restitutions and formulate rules. From a comparative law perspective, the specific history of Austria might turn the currently-evolving Austrian approach into an interesting example for other countries with public holdings of cultural objects from colonial contexts but without a history of direct colonialism.

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## Introducing Austria's Colonial History

The Habsburg Empire possessed oversea colonies for a relatively short time, but it is not perceived as a colonial power in the same way as France, Great Britain, Spain, Portugal, Germany, the Netherlands, or Belgium. Nevertheless, the debate on the restitution of cultural property from colonial contexts has also reached Austria, as the main successor of the empire, in recent times.<sup>1</sup> Although most ethnographic and cultural objects from other continents in the collections of Austrian museums originate from private donations, purchases on the art market, and state exploration trips – such as the Novara expedition of 1857-1859 or the Brazil expedition between 1817 and 1835 – awareness of the omnipresence of the colonial context in its collections has risen lately.<sup>2</sup> For a long time, the very fact of these expeditions has reinforced Austria's self-image as merely scientifically interested in foreign countries and cultures, and not politically or economically involved in their exploitation. This rationale goes back to the heyday of colonialism and also helped the Habsburg Empire to distinguish itself from other European colonial empires and legitimize its expansion plans in Central, Eastern, and Southern Europe. While the broader public still largely holds to this belief, historical research in recent years has increasingly challenged this image.<sup>3</sup>

It is against this background that on 20 January 2022 the Austrian Secretary for Cultural Affairs, Andrea Mayer, formed a new expert committee to study the “colonial heritage in Austrian federal museums in a focused scientific manner”.<sup>4</sup> The committee aims to formulate recommendations and principles for dealing with Austrian museums' colonial holdings. The task for this expert group is ambitious, as it concerns not only the drafting of guidelines for the restitution of objects from co-

<sup>1</sup> For the legal questions about the state succession of Austria in the cultural property of the Habsburg Empire, see A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015, pp. 69-79; Y. Huguenin-Bergenat, *Kulturgüter bei Staatensukzession. Die internationalen Verträge Österreichs nach dem Zerfall der österreichisch-ungarischen Monarchie im Spiegel des aktuellen Völkerrechts*, De Gruyter, Berlin 2010.

<sup>2</sup> For the colonial history of Austria, see W. Sauer (ed.), *k. u. k. kolonial. Habsburgermonarchie und europäische Herrschaft in Afrika*, Böhlau, Wien-Köln-Weimar 2002; S. Meisterle, *Von Coblon bis Delagoa. Die kolonialen Aktivitäten der Habsburgermonarchie in Ostindien*, PhD dissertation, University of Vienna, 2014; S. Loidl, „Europa ist zu enge geworden“. *Kolonialpropaganda in Österreich-Ungarn 1885 bis 1918*, Promedia, Wien 2017; B. Bachinger, W. Dornik, S. Lehnstaedt (eds.), *Österreich-Ungarns imperiale Herausforderungen. Nationalismen und Rivalitäten im Habsburgerreich um 1900*, Vandenhoeck & Ruprecht, Göttingen 2020. A comprehensive bibliography on the relations between Austria and Africa was compiled by W. Sauer, *Österreich-Afrika. Eine interdisziplinäre Bibliographie*, [https://homepage.univie.ac.at/walter.sauer/Afrikanisches\\_Oesterreich-Da-teien/Biblio\\_erg%C3%A4nzt.pdf](https://homepage.univie.ac.at/walter.sauer/Afrikanisches_Oesterreich-Da-teien/Biblio_erg%C3%A4nzt.pdf) [accessed: 08.07.2022].

<sup>3</sup> W. Sauer, *Habsburg Colonial: Austria-Hungary's Role in European Overseas Expansion Reconsidered*, “Austrian Studies” 2012, Vol. 20, pp. 5-23.

<sup>4</sup> Austrian Ministry for Arts, Culture, Civil Service and Sports, *Austrian Federal Museums in Colonial Contexts: State Secretary for Arts and Culture Andrea Mayer Establishes New Expert Committee*, 20 January 2022, [https://www.bmkoes.gv.at/dam/jcr:7a3c8b97-db3f-425d-9a3f-03aa4ea6cae3/Austrian%20muse-ums%20in%20colonial%20contexts\\_new%20expert%20committee.pdf](https://www.bmkoes.gv.at/dam/jcr:7a3c8b97-db3f-425d-9a3f-03aa4ea6cae3/Austrian%20muse-ums%20in%20colonial%20contexts_new%20expert%20committee.pdf) [accessed: 08.07.2022].

lonial contexts, but also the broader question of how postcolonial museology could be implemented in Austrian federal museums. An issue that also touches upon the integration of colonial contexts in core events concerns the Habsburg Empire's constitutional history, such as the Pragmatic Sanction of 1713. This document, issued by Charles VI, established the indivisibility and inseparability of all Habsburg hereditary kingdoms and lands and provided for a uniform order of succession. It was recognized diplomatically by other European powers in exchange for terminating the operation of the rapidly-growing Austrian colonial Ostend Company.<sup>5</sup>

Today, the main part of objects from colonial contexts are held in Austria by the Weltmuseum Wien (formerly known as Museum für Völkerkunde), which possesses 200,000 ethnographic objects, over 100,000 photographs, and 146,000 texts from different parts of the world. In addition, the Naturhistorisches Museum Wien is currently conducting a survey of its anthropological collection in order to document the potential colonial acquirement contexts of human remains in its holdings.<sup>6</sup>

Restitution claims have been addressed to the Austrian government and museums already in earlier decades.<sup>7</sup> The objects that have been most exposed to such claims were the Benin Bronzes and the ancient Mexican feather head dress (commonly referred to as the "crown of Moctezuma"). Regarding the Benin Bronzes, the Weltmuseum takes part in the Benin Dialogue Group, which is engaged in a conversation between the Nigerian government, the Royal Court of Benin, and Museums holding artefacts that were plundered from Benin during the so-called Benin expedition of 1897. The new director of Weltmuseum, Jonathan Fine, stated that the Benin Bronzes and the dialogue group will be a focus topic for him, especially given his own research.<sup>8</sup> The feather head dress has been an object of restitution claims since the 1990s. The authorities have repeatedly named an inherent transport risk as the reason why Austria still refuses to loan the object to Mexican museums.<sup>9</sup> In contrast, human remains have been restituted lately by the Naturhistorisches Museum. The most recent return concerned skulls which were returned to Hawaii. The legal reasoning in the press release made reference to international

<sup>5</sup> S.M. Spitra, *Wie kolonial ist Österreichs Rechtsgeschichte? Annäherungen an ein wenig erschlossenes Forschungsfeld*, "Juridikum" 2021, Vol. 33(4), pp. 494-502.

<sup>6</sup> Naturhistorisches Museum Wien, *Kolonialer Erwerbkontext im Naturhistorischen Museum Wien*, [https://www.nhm.at/forschung/projekt\\_koltext](https://www.nhm.at/forschung/projekt_koltext) [accessed: 08.07.2022]. Also see S. Eggers et al., *Maori and Miori Human Remains in the Natural History Museum in Vienna. Exhumed, Shipped, Traded and Inventoried*, in: P. Schönberger (ed.), *Das Museum im kolonialen Kontext*, Czernin, Wien 2021, pp. 281-303.

<sup>7</sup> See e.g. B. Savoy, *Afrikas Kampf um seine Kunst. Geschichte einer postkolonialen Niederlage*, C.H. Beck, München 2021.

<sup>8</sup> J.D.M. Fine, *The Throne from the Grassfields: History, Gifts, and Authenticity in the Bamum Kingdom, 1880-1929*, PhD dissertation, Princeton University, 2020, <http://arks.princeton.edu/ark:/88435/dsp01wh246w08n> [accessed: 08.07.2022].

<sup>9</sup> The Austrian Parliament might soon debate a proposal to reassess the transport risk; see Austrian Parliament, *Rückgabe der Federkrone (2189/A(E))*, 26 January 2022, [https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A\\_02189/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A_02189/index.shtml) [accessed: 08.07.2022].

ethical standards, including in particular Article 12 of the United Nations Declaration on the Rights of Indigenous Peoples of 2007.<sup>10</sup>

## Political Background of the Restitution Debate in Austria

As in many European countries, the speech of Emmanuel Macron in 2017 and the following 2018 report of Felwine Sarr and Bénédicte Savoy on the restitution of cultural heritage to African countries sparked a debate – although of modest size and hardly acknowledged by the broader public – about the holdings and collections in Austrian museums.<sup>11</sup> In the autumn of 2019, the Federal Chancellery organized a workshop in cooperation with ICOM Austria on the question of “The Museum in a Colonial Context”.<sup>12</sup> This event, the contributions of which were mostly published in an anthology, started the formal Austrian debate on how to deal with holdings from colonial contexts and postcolonial epistemologies in federal museums.<sup>13</sup> It was a significant event, because many officials and stakeholders of the museums were involved and they recognized the importance of the topic. Due to Austria’s federal structure however, this initiative does not include every Austrian museum and in particular leaves out provincial, regional, or city collections.

Further efforts and considerations of the issue were slowed down after the publication of the conference volume, because of both the COVID-19 pandemic as well as several political corruption scandals and the Austrian Parliamentary re-election campaign. The new coalition government of the Green Party and the conservative Austrian People’s Party included the development of postcolonial provenance research and dealing with human remains only as a minor point in their coalition program and governance agenda.<sup>14</sup> At the moment, the chief of the Green Party and Vice-Chancellor, Werner Kogler, is the responsible minister for culture, and in May 2020 he installed Andrea Mayer as acting state secretary for cultural affairs. The appointment of the lawyer and art historian Jonathan Fine as director of the Weltmuseum Wien in 2021, and the creation of the new expert com-

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<sup>10</sup> Naturhistorisches Museum Wien, *Natural History Museum Vienna Returns Ancestral Remains to Hawaii*, 14 February 2022, [https://www.nhm-wien.ac.at/en/press/press\\_releases2022/repatriation\\_hawaii](https://www.nhm-wien.ac.at/en/press/press_releases2022/repatriation_hawaii) [accessed: 08.07.2022]; see also H. Mückler, *Die Sache nimmt Fahrt auf...! Anmerkungen zur Restitution und Repatriierung von sensiblen Museumsobjekten in Österreich*, “Österreich Journal” 2022, Vol. 202, pp. 64-66.

<sup>11</sup> Présidence de la République, *Emmanuel Macron’s Speech at the University of Ouagadougou*, 28 November 2017, <https://www.elysee.fr/en/emmanuel-macron/2017/11/28/emmanuel-macrons-speech-at-the-university-of-ouagadougou> [accessed: 08.07.2022]; F. Sarr, B. Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*, November 2018, [http://restitutionreport2018.com/sarr\\_savoy\\_en.pdf](http://restitutionreport2018.com/sarr_savoy_en.pdf) [accessed: 08.07.2022].

<sup>12</sup> <http://icom-oesterreich.at/kalender/das-museum-im-kolonialen-kontext> [accessed: 08.07.2022].

<sup>13</sup> P. Schölnberger (ed.), *Das Museum im kolonialen Kontext*, Czernin, Wien 2021.

<sup>14</sup> Austrian Federal Chancellery, *Aus Verantwortung für Österreich. Regierungsprogramm 2020-2024*, Wien 2020, <https://www.bundeskanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf> [accessed: 08.07.2022].

mittee in early 2022 are the latest signs that the federal government now intends to engage more deeply in the discourse on the restitution of cultural objects with colonial provenance, and is relying on expert opinions to address the matter. The political and diplomatic dimensions of the issue are also a topic for the foreign relations committee of the Austrian Parliament, which currently considers the issue of restitutions to African countries as a part of Austria's new foreign policy strategy towards Africa.<sup>15</sup>

## The Legal Situation of Cultural Objects from Colonial Contexts

The mandate of the expert committee, as formulated in the press release of the ministry of culture, is to draft “recommendations for cultural objects in museums which were acquired in colonial contexts and which are the subject of demands for repatriation”<sup>16</sup>. This section briefly introduces the current rules on ownership and export for cultural objects from colonial contexts in Austrian federal museums.

### Restitution as export

Unlike in other federal States, such as Germany, the protection of cultural objects is exclusively a federal competence in Austria. However, this does not preclude municipalities or regions from owning cultural property or opening their own museums. The main federal law that regulates the protection of cultural objects is the Monuments Protection Act.<sup>17</sup> According to the Act, protection mainly refers to preservation from destruction, alteration, or being dispatched abroad. Colonial looted cultural objects in the collections of federal, regional museums or owned by other public law entities are by definition monuments under the Monuments Protection Act. Therefore, a special legal regime for their export applies to these objects.

The Bundesdenkmalamt (Federal Monuments Office) is the agency in charge of executing the Monuments Protection Act and consequently is entrusted to decide whether the public and national interest requires a certain cultural object to remain within the borders of the Republic of Austria. Protected cultural objects, such as the collections of federal museums, may only be exported if “serious reasons” (which are not further specified in the law) can be demonstrated in an appli-

<sup>15</sup> Austrian Parliament, *Restitution von afrikanischen Kulturgütern als Teil einer umfassenden Afrikastrategie (1955/A(E))*, 18 October 2021, [https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A\\_01955/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A_01955/index.shtml) [accessed: 08.07.2022].

<sup>16</sup> Austrian Ministry for Arts, Culture, Civil Service and Sports, op. cit.

<sup>17</sup> *Bundesgesetz betreffend den Schutz von Denkmalen wegen ihrer geschichtlichen, künstlerischen oder sonstigen kulturellen Bedeutung* [Federal Act on the Protection of Monuments Due to Their Historic, Artistic or Other Cultural Significance], 18 June 2013, Bundesgesetzblatt für die Republik Österreich 2013, I. No. 92, <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10009184/DMSG%2c%20Fassung%20vom%2003.08.2022.pdf> [accessed: 08.07.2022]; an English version is available at [https://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1923\\_533/ERV\\_1923\\_533.pdf](https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1923_533/ERV_1923_533.pdf) [accessed: 08.07.2022].

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cation. The Federal Monuments Office has to weigh and decide whether the public interest or the reasons for export prevail.

This system applies both to objects that are held privately and by the public. Therefore, in the case of a restitution from a federal collection, the museum and the responsible minister have to apply for the export permission. Such a procedure indicates the public interest, and the likelihood of the agency to grant the permission might be considered as relatively high. In addition, Austria has been a State Party of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>18</sup> since 2015. It is worth noting however that Austria only became a State Party to the Convention after being increasingly isolated among the EU Member States by its earlier non-ratification, and Austria has still not signed or ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,<sup>19</sup> despite pressure to do so.<sup>20</sup> Thus it would be desirable if, in the course of the discussions on the restitution of cultural objects from colonial contexts, this current gap in legal protection would be addressed by the expert committee in order to help focus attention on the current problems of illicit trafficking, resulting in large part from the perpetuation of colonial practices in postcolonial societies.

## Owning and de-owning cultural objects

Different from the question of export licenses is the issue of ownership. The Austrian Federal Museums Act<sup>21</sup> governs this matter with regard to federal museums, including the Weltmuseum Wien and its collections. The Federal Museums Act states that the museum collections are owned by the Republic of Austria, however, they are entrusted to the museums to participate in a permanent public discourse, which includes the collection, conservation, documentation, research, and the public display of objects. According to the law, growing and preserving the collections are at the core of the museums' tasks. Restitutions are not specifically addressed in the Austrian Federal Museums Act, but it allows the State to withdraw objects from the museums' collections for imperative state policy interests, which legally opens the door to carry out restitutions, as has been the case with Nazi-looted artworks.

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<sup>18</sup> 14 November 1970, 823 UNTS 231.

<sup>19</sup> 24 June 1995, 2421 UNTS 457.

<sup>20</sup> An elaborate call for the signing of the agreement from a Global South perspective can be found in F. Shyllon, *The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration*, "Uniform Law Review" 2000, Vol. 5(2), pp. 219-241.

<sup>21</sup> *Bundesmuseen-Gesetz 2002* [Federal Museums Act 2002], 8 January 2002, Bundesgesetzblatt für die Republik Österreich, 2002, I. No. 14, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001728> [accessed: 08.07.2022].

The Federal Museums Act also foresees that further particularities may be regulated in a separate statute (*Museumsordnung*) for each museum, which has to be issued by the competent minister. Such a statute is the document specifying the tasks and the organization of each institution. In the case of the Weltmuseum, its statute is included in the regulation of the Kunsthistorisches Museum Wien that was announced by the Federal Minister for Education, the Arts and Culture in 2009.<sup>22</sup> The very first paragraph of the statute states that the museum has to respect internationally-recognized ethical standards in the execution of its scientific and cultural tasks. The main tasks are defined in the statute as education, collection, preservation, documentation, research, and exhibition (§§ 2-7).

However, despite the first paragraph of the statute the Weltmuseum has no mandate to restitute cultural objects. The statute only allows the museum to formulate transparent rules for the process and method of acquiring and disposing of single pieces of its collection (§ 3 para. 2). Restitutions are not explicitly mentioned, but this provision might act in future as a basis for internal museum guidelines regarding the restitution of looted colonial cultural objects. Changes in the ownership of monuments also have to be reported and approved by the Federal Monuments Office.

Consequently, the Weltmuseum and other museums do not have any competence on their own to dispose of or restitute objects from their collections.<sup>23</sup> At the moment, there are mainly two legal norms that act as a basis for de-accessions of museum pieces: The Art Restitution Law,<sup>24</sup> which deals with Nazi-looted art; and a guideline by ICOM Austria that sets the standards for the de-accessioning of museum objects (*Entsammeln*). The ICOM guideline was commissioned by the Federal Chancellery and acts as a soft law instrument for museums.<sup>25</sup> Most notably it covers human remains and requires a reasoned statement by the museum management, authorities, or an ethics committee as the basis for their restitution.

<sup>22</sup> *Verordnung der Bundesministerin für Unterricht, Kunst und Kultur betreffend die Museumsordnung für das Kunsthistorische Museum mit Museum für Völkerkunde und Österreichischem Theatermuseum* [Regulation of the Federal Minister for Education, the Arts and Culture concerning the Museum Statute for the Kunsthistorisches Museum with the Museum für Völkerkunde and the Austrian Theatre Museum], 1 December 2009, Bundesgesetzblatt für die Republik Österreich 2009, II. No. 395, <https://www.ris.bka.gv.at/eli/bgbl/II/2009/395> [accessed: 08.07.2022].

<sup>23</sup> M.-T. Glück, *Rechtsfragen der Kunstmuseen mit Schwerpunkt auf dem Verkauf von Sammlungsbeständen anhand ausgewählter europäischer Sammlungen*, PhD dissertation, University of Vienna, 2017, p. 82.

<sup>24</sup> *Bundesgesetz über die Rückgabe von Kunstgegenständen und sonstigem beweglichem Kulturgut aus den österreichischen Bundesmuseen und Sammlungen und aus dem sonstigen Bundeseigentum* [Federal Act on the Restitution of Objects of Art and Other Movable Cultural Property from Austrian Federal Museums and Collections and from Other Federal Property], 4 December 1998, Bundesgesetzblatt für die Republik Österreich, 1998, I. No. 181, [https://www.ris.bka.gv.at/Dokumente/BgblPdf/1998\\_181\\_1/1998\\_181\\_1.pdf](https://www.ris.bka.gv.at/Dokumente/BgblPdf/1998_181_1/1998_181_1.pdf) [accessed: 08.07.2022].

<sup>25</sup> ICOM Austria, *Deakzession entsammeln. Ein Leitfaden zur Sammlungsqualifizierung durch Entsammeln*, Wien 2016, [http://icom-oesterreich.at/sites/icom-oesterreich.at/files/attachments/de\\_akzession\\_2016\\_final\\_03032016.pdf](http://icom-oesterreich.at/sites/icom-oesterreich.at/files/attachments/de_akzession_2016_final_03032016.pdf) [accessed: 08.07.2022].

## Instruments to Organize Restitutions

The ownership and export system of cultural objects in collections of Austrian federal museums requires the establishment of a legal framework to organize the process of restitution of cultural objects. Taking into account the current legal situation, the restitution of looted colonial cultural objects can be legally addressed in Austria on three different levels. It will be most likely a hybrid mechanism that combines various elements of the following instruments.

### A specific law

The restitution of cultural objects from colonial contexts in Austria will presumably be settled by passing a specific federal law. The obvious model for such a law would be the Art Restitution Law from 1998, which regulates the restitution of Nazi-looted art.<sup>26</sup> On a political level, enacting a similar law for looted colonial artworks might send a stronger international signal than the enactment of guidelines only. At the same time, such a law can be formulated open enough so as to delegate the authority to decide or recommend the restitution of cultural objects from colonial contexts to a panel, the composition of which might ensure that both the State's and museums' interests are sufficiently reflected. Particularly, the institutionalization of colonial provenance research could be a potential benefit of such a law, by allocating funding which would contribute to the professionalization of this specific area of provenance research.

### Guidelines

Similar to the ICOM Austria's guidelines on de-accession, soft law guidelines might complement, or even substitute, a specific law dealing with the issue of restitution. Particularly in Germany, such guidelines reflect scientific expert opinions and contain ethical commitments of the museums themselves. For Austria, the question is if the guidelines already authored by the newly installed expert committee shall receive such *soft law* normativity.<sup>27</sup> The mandate of the expert committee is to draft "recommendations for cultural objects in museums which were acquired in colonial contexts and which are the subject of demands for repatriation".<sup>28</sup> If such recommendations act as *soft law* guidelines for federal museums in their handling of restitution claims, the federal government and the museums will have to subscribe to them as a next step.

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<sup>26</sup> For an overview of restitution laws in Austria, see A.M. Brunbauer-Ilić, *Kulturgut und Provenienzforschung im Fokus nationalen und internationalen Kunstrechts*, Böhlau, Wien 2019, pp. 197-242.

<sup>27</sup> For more on the significance of soft law norms for cultural property law, see H. Strobl, *Kulturgüterrelevante Verhaltenskodizes. Bestand, Analyse und rechtliche Bedeutung*, Nomos, Baden-Baden 2018; A. Taşdelen, *The Return of Cultural Artefacts. Hard and Soft Law Approaches*, Springer, Heidelberg 2016.

<sup>28</sup> Austrian Ministry for Arts, Culture, Civil Service and Sports, op. cit.



An argument for the enactment of guidelines would be that updating them to reflect the latest state of the debate is procedurally easier than passing a new law. However, this might also have a negative implication. As the restitution of Nazi-looted art is regulated in its own law, such a solution might create the impression that the restitution of cultural objects from colonial contexts is politically not considered of a similar priority. Such an impression could already arise with respect to human remains, whose restitution procedure is currently regulated in the guidelines on the de-accession of collection pieces.

### Autonomy of the museums

Within the framework agreement between the federal chancellery and the museum according to § 5 (7) of the Federal Museums Act, or on the basis of the statute for the Weltmuseum, the organization of the restitution might also be institutionally delegated to the museum. An agreement between the federal chancellery, the ministry of culture, and the museum could set medium-term and long-term targets for the restitution and the provenance research process of the institution. It might also authorize the museum to carry out restitutions on its own. This approach would strengthen the autonomy of the museums in these matters. At the same time, the government would still, under the Federal Museums Act, maintain its own authority to claim objects from the collections for restitution if the national interest requires this. This would be an important step to ensure the autonomy of the museums and avoid politicized restitution decisions, which might depend on the opinions of the current federal government in office. At the same time, however, involving government representatives in the process is an important part of facing and dealing with colonial injustice and its traces in the collections of federal museums.

### Prospective Content of the Restitution Rules

Similar to other countries, Austria has not given any indication that it will rely on civil or international litigation to carry out restitutions. The prospective regulation of the restitutions of cultural objects originating from colonial contexts should precisely prevent such court litigation and the associated hurdles for claimants that come with it. Therefore, separate from the question how the restitution process might be institutionally organized it will be crucial to define which objects shall be subject to restitutions, when they should be restituted, and to whom restitutions should be addressed.<sup>29</sup>

<sup>29</sup> See also S.M. Spitra, *Rechtsdiskurse um die Restitution von Kulturerbe mit kolonialer Provenienz*, in: P. Dann, I. Feichtner, J. von Bernstorff (eds.), *(Post-)Koloniale Rechtswissenschaft*, Mohr Siebeck, Tübingen 2023 (forthcoming).

## What to restitute

This is a multi-layered question, because it encompasses not only the scope of objects that might be the subject of restitutions, but also the requirements that need to be fulfilled to consider the object as originating from a colonial context and, what follows, the requirements that need to be met to establish a legal obligation to restitute a cultural object.

## Scope

Either the guidelines or the legislator could apply various categorizations to describe the objects that are considered for restitutions. Each definition will be based on different aims and interests and it will be particularly interesting to observe whether all federal museum collections will become subject to restitutions under the new rules. This is important for the Republic of Austria as successor of the Habsburg Empire, because certain definitions of a colonial context or looted colonial cultural objects might also apply to pieces from other collections than the Weltmuseum, such as objects from Central, Eastern, or Southern Europe or from territories of the former Ottoman Empire.<sup>30</sup> While the regulation of such issues might not be the aim of the committee, nevertheless a different treatment might be hard to justify in the long run. At the same time, an abstract legal formulation could bear the potential to raise awareness of other imperial forms of domination and their implications for museum collections in Austria.

## Requirements for restitutions

Which requirements should be fulfilled to establish that an object needs to be restituted? Prospective norms for restitution may be linked to the factual and legal context of the acquisition. It is commonly acknowledged that appropriations accompanied by the use of force or violence create a moral obligation to restitute the cultural object today.<sup>31</sup> This is certainly the case for objects whose provenance can be established based on archival documentation, oral history, or other historical sources. However, there are more than just a few objects with an uncertain history in Austrian collections. At the same time, definitions that work for former empires with oversea colonies might not be fitting for States that did not possess colonies, or did so only for a short while. As a State that in the main did not loot cultural objects from its own colonies, but rather came to possess its collection pieces

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<sup>30</sup> See e.g. S.M. Spitra, *Die Verwaltung von Kultur im Völkerrecht. Eine postkoloniale Geschichte*, Nomos, Baden-Baden 2021, pp. 161-179; R. Okey, *Taming Balkan Nationalism. The Habsburg 'Civilizing Mission' in Bosnia 1878-1914*, Oxford University Press, Oxford 2007; J. Feichtinger, U. Prutsch, M. Csáky (eds.), *Habsburg post-colonial. Machtstrukturen und kollektives Gedächtnis*, StudienVerlag, Innsbruck-Wien-München-Bozen 2003.

<sup>31</sup> This is acknowledged in the restitution guidelines of several countries; see e.g. Deutscher Museumsbund, *Leitfaden: Umgang mit Sammlungsgut aus kolonialen Kontexten*, Berlin 2021, <https://www.museumsbund.de/wp-content/uploads/2021/03/mb-leitfanden-web-210228-02.pdf> [accessed: 08.07.2022].

indirectly, often through donations or purchases on the art market, provenance research proves to be particularly challenging in many cases.

One way to address this problem would be to conceptualize the contexts of acquisition during colonialism in terms of structural violence. Colonial contexts were marked by an inequality in the distribution of power; including when it came to the acquisition of cultural objects.<sup>32</sup> Consequently, this proposition would arrive at a similar point as Sarr's and Savoy's approach, which advocates a comprehensive restitution of cultural objects with a colonial provenance, excluding mainly objects that were acquired with the free consent of the original owner.<sup>33</sup> The problematic corollary of this perspective is not only that it uses the terms "free consent" and "original owner" – two legal categories from Western legal systems that might not reflect Indigenous normative understandings of the time – but also that it questions the potential of colonized peoples to be agents in history. It does not reflect the many complexities that existed in the colonial realm.

Given that Austria's colonial history is not much present in the public perception, one possible task of provenance research could be to highlight these complexities. This also includes the legal situation and framework in which the objects were acquired.<sup>34</sup> However, it is not only important to highlight the discriminatory international legal order in the construction of the colonial legal space, but also the Indigenous normative knowledge and legal framework at the time of acquisition in order to understand the provenance of an object.

A second way to resolve the issue could be to focus on the significance and value of the cultural objects for the societies and peoples from where the objects originated. This significance can be estimated both at the time of the acquisition of the object in the past, as well as today. An example of such an approach is laid down in the rules of procedure of UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (Rule 34 b).<sup>35</sup> It includes two aspects: the circumstances of the acquisition and the significance of the cultural object.

<sup>32</sup> An eminent definition of structural violence can be found in J. Galtung, *Violence, Peace, and Peace Research*, "Journal of Peace Research" 1969, Vol. 6(3), p. 175.

<sup>33</sup> F. Sarr, B. Savoy, op. cit., pp. 57-59.

<sup>34</sup> M. Goldmann, B. von Loebenstein, *Alles nur geklaut? Zur Rolle juristischer Provenienzforschung bei der Restitution kolonialer Kulturgüter*, in: T. Sandkühler, A. Eppe, J. Zimmerer (eds.), *Geschichtskultur durch Restitution? Ein Kunst-Historikerstreit*, Vandenhoeck & Ruprecht, Göttingen 2021, pp. 347-385.

<sup>35</sup> UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, *Rules of Procedure*, 2022, UNESCO Doc. ICPRCP/21/23.COM/14.FINAL: "The requesting Member State or Associate Member must prove that the cultural property in question has a fundamental significance, which may be historical, cultural, religious or scientific in nature or a combination of several of these elements and/or that the object in question may be a 'missing link' of a determined cultural tradition and/or national collections of the requesting State. The requesting Member State or Associate Member must also prove that the object left its country of origin through, inter alia, illicit trade, illicit acquisition, colonial or foreign occupation, exchange, gift, loan or loan for repair and/or reproduction, archaeological excavations, temporary export license for scientific purposes (including conservation or exhibition)".

The result of translating such a structure into the Austrian domestic legal framework could be a dynamic system that mediates between the degree of certainty which the provenance research can establish an unjust or violent acquisition context for a cultural object and the meaning of the object for the society of Indigenous peoples in the past and today. Such a process could be similarly designed to fit into the Austrian Art Restitution Law by institutionally separating the provenance research from the body that evaluates the reports and issues recommendations on restitution matters. If different opinions between Austria and a claimant persist after such a domestic procedure, a prospective law could also integrate the possibility to appeal to international institutions, such as the aforementioned UNESCO Intergovernmental Committee or arbitration tribunals in order to finally resolve the matter and incorporate their decision in the Austrian domestic legal system. For cases in an alternative dispute resolution process, the sharing of the heritage by sharing property rights, the granting of loans, and other forms of cooperation could also be used to mediate between the parties involved.

## Restitute to whom?

Following the restitution of the Bible and whip that once belonged to Nama-Kaptein Hendrik Witbooi from Germany to Namibia in 2019, a legal discussion emerged in German academia over whether under international law only States or also Indigenous peoples might legally claim and receive restitutions of cultural objects from colonial contexts by States. In their elaborate contribution on the topic, Jochen von Bernstorff and Jakob Schuler argued for an international legal obligation that includes States as well as Indigenous communities in the negotiation process about restitutions.<sup>36</sup> International human rights law and laws concerning Indigenous rights, such as the UN Declaration of the Rights of Indigenous Peoples (UNDRIP),<sup>37</sup> particularly affirm the legal interest to include representatives of Indigenous peoples if objects with a significant value for them are concerned.<sup>38</sup>

In Austria, there has not been a genuine debate as to whether and to what extent representatives of Indigenous peoples, who have their own interests in the restitution of a cultural object, should be involved in the process. Restitution agreements concluded with receiving States and/or Indigenous peoples could be an instrument for Austria to ensure compliance with the requirements of international law and contribute to the participation of Indigenous communities and ensure that their cultural rights are protected.

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<sup>36</sup> Most notably, see J. von Bernstorff, J. Schuler, *Wer spricht für die Kolonisierten? Eine völkerrechtliche Analyse der Passivlegitimation in Restitutionsverhandlungen*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht" 2019, Vol. 79, pp. 553-577.

<sup>37</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, UN Doc. A/RES/61/295.

<sup>38</sup> For more on restitution and Indigenous peoples, see A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006, pp. 228-260.

## Conclusion: Complexity as an Opportunity

This brief review of the Austrian legal situation has shown that there are numerous ways of organizing and implementing restitution. The various decisions that still have to be made on the path to achieving a fair and just solution will be interesting to observe, as they each involve a balancing of different interests. At the time of this writing, the outcome of the expert committee is still unknown. This country report is therefore also a deliberation about possible outcomes of the process and their legal implications.

Despite the possession of large collections from colonial contexts, Austria's colonial history does not have a lasting impact on today's political or historical discourses. The case of Austria shows, however, that colonialism goes far beyond the possession of formal colonies. Not only States acted in colonial environments through their officials, military, or diplomats, but also companies, the church, and individuals had a share in constructing the colonial space. These indirect forms of colonialism also come with a whole range of uncertainties and complexities. Although the experience of dealing with Nazi-looted art is useful, cultural objects from colonial contexts give rise to a different set of issues and difficulties.

This involves not only the historical sources for provenance research, but also the global scale of the colonialization,<sup>39</sup> the length of time the events in question date back to, and the varying complexities in the legal and factual circumstances. Considering how to legally standardize these matters in a fair and balanced process will be a significant challenge. Therefore, the approach that is currently being developed by the expert committee and the Austrian authorities might become of broader international significance. It could constitute an example for other countries that might not hold such sizeable collections or have an ambivalent position vis-à-vis their colonial past, but still encounter the problem of how to deal with the colonial objects in their collections.

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<sup>39</sup> B. Gaudenzi, A. Swenson, *Looted Art and Restitution in the Twentieth Century – Towards a Global Perspective*, "Journal of Contemporary History" 2017, Vol. 52(3), pp. 491-518.

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