



The Task Force on Cultural Property, chaired by Bill Griswold (Cleveland Museum of Art), and the African Art Working Group, chaired by Karol Wight (Corning Museum of Glass), joined together to draft this guidance for the membership to address objects in museum collections that derive from a colonial context. The guidance should be helpful for institutions that are considering a potential acquisition, display, interpretation or deaccession of works of art from colonized areas. This document represents the work of many hands, museum directors, staff, in house counsel and shepherded by Josh Knerly, AAMD's Special Counsel.

It starts with the acknowledgement that the membership of our association is so broad and diverse that, for the document to be successful, it would have to strike a delicate balance. Its basic premise is that many objects from colonized areas changed hands under circumstances that were perhaps legal at the time, but may be contrary to that which would be considered normative behavior today. It offers a method to evaluate these issues and possible course of action – it is not a policy or a set of guidelines. While the guidance presented in this document may continue to evolve, it is the hope of the many who devoted considerable time to its presentation that it will prove useful to AAMD directors and staff.

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ASSOCIATION OF ART MUSEUM DIRECTORS
GUIDANCE ON ART FROM COLONIZED AREAS

I. Introduction.

The Association of Art Museum Directors (“AAMD”) provides this paper as guidance for its members whose institutions are considering the potential acquisition, display, interpretation, or deaccession of works of art from colonized areas.¹ The long history of colonial occupation in certain parts of the world, coupled with the colonizing powers’ ability to make and enforce their own rules, argues for particular scrutiny of objects of this type. Furthermore, many objects from colonized areas changed hands under circumstances that, while perhaps legal at the time, may have been contrary to what today we would consider normative behavior.

For the purposes of this paper, “art” or “objects” “from colonized areas” means works of art or other cultural objects² that were transferred from a local or indigenous context to a possessor (person, entity, or country), usually European, that was not local or indigenous, during a period of colonial rule, whether that rule was official or *de facto*. Colonial periods differ from place to place and include different forms of control over time, even within the same area.³ While individual museums may choose to define colonialism to include different periods in different geographical areas, the focus of this guidance is the 19th century, which saw the most significant colonial expansion.

¹ While there are examples to the contrary, the majority of such works in U.S. museums did not come from direct colonial rule by the United States, but rather through the art market, either by purchase or donation.

² Cultural object is a term used in the 1954 Hague Convention; earlier conventions used for example “property of . . . religious, charitable, and educational institutions, and those of arts and science.” 1899 Hague Convention, Article 56.

³ For an excellent analysis of colonialism and the creation of museum collections, see “American Museums and Colonial-Era Provenance: A Proposal”, *International Journal of Cultural Property* (forthcoming), by Victoria Reed.

In addressing issues that pertain to art from colonized areas, museums should, as with any work in their collections, research the history (including the provenance) of each object, be transparent with the public about the museum's findings, and act responsibly in addressing any claims that may arise. This paper is intended to provide guidance on each of these topics.

II. Education and Research.

Museums are fundamentally places of education. In that capacity, they should research and document the objects from colonized areas in their collections and be transparent about their findings. Such transparency extends not only to an object's materials and methods of creation, but also to placing the object in its local, historical, and traditional contexts, and to explaining the meaning and original function of the object. Museums should also explain the manner and context of the object's transfer of ownership during a period of colonial rule and how it came to be part of the museum's collection.

In order to gain a deeper understanding of the object, museums should look not just to traditional sources of research and understanding, but also to indigenous communities in the object's source country and in some cases to relevant communities in their own country – much as museums have done under the Native American Graves Protection and Repatriation Act (NAGPRA). In conducting this research, museums may find that certain objects (*e.g.*, sacred or ritual objects that have not been deconsecrated) require special attention. An object may not be appropriate for display; may necessitate special handling; or it may be inappropriate for an object to be photographed or displayed on museum websites. The goal is to build an object biography that can be shared, as appropriate, with the public.

Ascertaining the history of objects from colonized areas may be difficult. Museums often do not know the full history of an object, particularly the circumstances of its removal from its

source country. Museums should be transparent about their lack of knowledge.⁴ Museums also should avoid a rush to judgment based on the absence of information. They should continue to research the object and pursue conversations with those familiar with traditions pertaining to similar objects that can expand the museum's knowledge and its ability to share that knowledge with the public.

III. Methodology.

The evaluation of art from colonized areas should include an analysis of the function(s) the object served within its indigenous and transcultural context(s). Set forth below are some object types and functions that may be helpful:

- Sacred – the object possesses (or preserved until the time of its transfer from its local owner(s)) a sacred quality or function.
- Ritual – the object served (or preserved until the time of its transfer from its local owner(s)) a ritual, tribal or community function.
- Deconsecrated – a sacred or ritual object that has been deconsecrated or lost its sacred or ritual character either before or after its transfer to a non-local person.
- Archival – the object preserves the history of a local tribe or group.
- Artisan – the object was created for trade or sale.
- Weapon – the object is a weapon used in battles or other types of armed conflict.
- Colonial influenced – the object is heavily influenced by Colonial or Western concepts rather than being of or consistent with local traditions.
- Common – the object, while artistically or anthropologically significant, never had a sacred or ritual character or archival function.
- Unknown – the object cannot be classified based on currently available information.

⁴ Museums may consider creating a special section on their websites to provide information about colonial-impacted objects with an incomplete provenance.

Some objects may fall into multiple categories (*e.g.*, artisan and weapon, or ritual and colonial influenced).

Research on the object should also seek to determine the way in which it was transferred from its local culture/context.⁵ While the circumstances of such transfers will vary greatly, the following list (though certainly not exhaustive) may be useful in characterizing the circumstances of an object's removal:

- Private gift – the object was a gift from its local owner to a non-local person, *e.g.*, a colonial administrator, diplomat or governmental official, in their private capacity, or another non-local national.⁶
- Diplomatic gift – the object was a gift from its local owner to a non-local person or entity during a diplomatic visit or other similar engagement.
- Sanctioned armed conflict – the object was transferred by official colonial power sanction, but involuntarily during armed conflict, whether a military expedition or occupation.
- Unsanctioned armed conflict – the object was transferred without official sanction and involuntarily during armed conflict, whether a military expedition or occupation, *e.g.*, looting.
- Theft – the object was removed from the possession of its local owner without their consent, whether from a private collection, a public building, etc.
- Forced alienation – the object was taken from its local owner by an act of removal that involved threat of, or actual, physical harm, coercion, fraud, or other intentional deprivation of property, *e.g.*, objects taken during forced religious conversion.
- Treaty – the object was acquired pursuant to the terms of a treaty.
- Other government authority – the object was removed by permission of a local government or governing authority, *e.g.*, a firman issued by a sultan.
- Partage – the object was acquired under an agreement between local government officials and explorers, archaeologists, or missionaries.

⁵ “Local context” means the possession of a work by people who are native to an area that was at some point subject to either direct or indirect rule by a colonial power.

⁶ As is the case with a number of transfers that can fall into multiple categories, private and diplomatic gifts can also be considered forced alienations notwithstanding the characterization of the transfer as a gift.

- Bona fide purchase – the object was purchased by a buyer from a seller, neither of whom was under compunction.
- Unknown – the method of transfer cannot be classified based on currently available information.

IV. Retention and Acquisition - Evaluating an Object.

After determining the facts about an object, the museum should undertake an analysis to determine if its continued possession or acquisition complies with legal considerations, professional guidelines, the museum's own policies, and applicable ethical standards. Factors that should be considered in this context include:

A. Legal Considerations.

Analysis should be made to determine if a museum's potential acquisition or continued possession of an object would comply with applicable laws⁷. The legal considerations for objects from colonized areas are no different from those which govern objects from other parts of the world. An object generally should not be acquired if it was illegally imported into the country where the museum is located; if it was stolen, whether from an individual or an entity, or because it was removed in violation of a foreign cultural patrimony law⁸; or, in certain circumstances, if it was illegally exported. Retention, as opposed to acquisition, of such an object requires more complex analysis, as additional legal considerations and defenses may apply, such as a statute of limitations.

One of the most challenging topics concerns cultural objects taken during times of armed conflict. For centuries, the removal of such objects by one country from another during armed conflict, assuming certain conditions were met, was legal, based on then customary international

⁷ Applicable laws generally means those that are in effect in the jurisdiction(s) in which the museum is located, but those jurisdictions may recognize that foreign laws, *e.g.*, cultural patrimony laws are applicable as well.

⁸ Resources for some of the foreign laws are noted in Appendix A.

law⁹. During the 19th and 20th centuries, concepts of legality with respect to the taking of cultural objects during armed conflict began to change, impacting customary international law and leading to the promulgation of treaties. Scholars are not in agreement as to when that evolution reached a point where the removal of cultural objects from a nation, person, or entity, without their consent, during a time of armed conflict, absent certain extraordinary circumstances, became illegal as a matter of customary international law.

Various suggestions have been made as to when this legal turning point should be set. These include, but are not limited to: 1) the 1815 Congress of Vienna, which required the repatriation of art taken by the French, but resulted in little agreement among 19th c jurists as to precedent set; 2) the Lieber Code of 1863, an American pronouncement on rules of warfare applicable to U.S. troops that contained provisions on the protection of cultural property, and provided that the ultimate ownership of seized artwork be settled by a peace treaty; 3) the Brussels Conference of 1874, which also set out rules of warfare that included provisions on the protection of cultural property, but was not ratified by the European powers; 4) the Hague Convention of 1899; or 5) the Hague Convention of 1907 (both conventions set out rules of warfare and included provisions on protection of cultural property). During the Nuremberg Trials, judges declared that certainly by 1939 a legal norm prohibiting such actions had been established.

Given these uncertainties, museums should evaluate carefully the legal status of objects removed from a colonized area during a period of armed conflict. In addition, as with any analysis of an object in a legal context, due diligence should be exercised to evaluate other potential legal considerations, such as import and export, prior ownership, etc.

⁹ Customary international law derives from general practices of nations accepted as law and is binding on all nations. Conventional international law is based on treaties or other agreements and generally is binding only on signatories.

B. AAMD Guidelines.

The acquisition of objects from colonized areas may also be subject to AAMD guidelines that apply to other, similar, categories of objects. One example is the Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945) as works from colonized areas could have been in Europe between 1933 and 1945 and spoliated by the Nazis. Another example are objects from colonized areas that may also be classified as archaeological material or ancient art which should be acquired only in accordance with the AAMD Guidelines on the Acquisition of Archaeological Material and Ancient Art. Because those Guidelines only relate to objects created in antiquity, the phrase “in antiquity” must be defined. Those Guidelines leave the definition of “antiquity” to each museum but provide guidance for some, although not all, parts of the world impacted by colonialism. Guidance exists, for example, for the definition of antiquity as it relates to cultures in South Asia, Southeast Asia, and the Americas. The AAMD has not yet provided guidance with respect to the definition of antiquity for objects from sub-Saharan Africa. Any object from a colonized area that may be classified as archaeological material or ancient art and meets the definition of antiquity should only be acquired in accordance with the AAMD Guidelines.

C. Ethical Considerations and Works Taken in Armed Conflict.

Even when an object may be or has been acquired legally and in accordance with AAMD guidelines, a museum may determine that other issues should preclude its acquisition or retention. Indeed, many scholars and ethicists have argued that the removal of cultural objects from colonized areas during periods of armed conflict violated ethical norms of conduct even before customary international law had evolved to the point of declaring such removals illegal. As with the evolution of legal strictures on this issue, there is no universally accepted date for the widespread adoption

of ethical norms that would prohibit the acquisition or retention of such objects, making specific guidance especially challenging.

Museums are encouraged to determine the ethical criteria and chronological turning points relevant to making ethical determinations on the status of objects from colonized areas removed during times of armed conflict, whether they are prospective acquisitions or works already in the museum's collection. For example, a museum may conclude either that removal of the object from its local or indigenous possessor violated ethical norms at the time that it was taken; or that its removal was done in a manner that violates today's ethical norms. In making these determinations, museums should be transparent about their decision and should consider whether the same "rule" should apply to similar transfers resulting from armed conflict that occurred after the turning point identified by the museum and outside of a colonial context.

V. Claims.

Museums may be presented with claims for or about objects from colonized areas from individuals, entities, U.S. authorities, or foreign governments. In the course of research, museums themselves may obtain facts that identify an object as having a problematic history of removal from its source country during a period of colonial rule.

The museum should acknowledge any claim, evaluate it, and respond in a timely manner, taking into account the facts and circumstances of each claim. Decisions regarding objects that the museum itself determines have a problematic provenance should be approached in much the same manner as those for which a specific claim has been made. In deciding on the appropriate action for such an object, the museum may consider contacting those countries, entities, or persons who may have a particular interest in the future of the object.

If there is a cognizable legal claim, the process can be relatively straightforward. For objects that changed hands, not in violation of the law, but in ways that may be construed as unethical, the process can be much more challenging. The museum will need to decide which type of alienation marks an inflection point that renders holding the object without further action untenable. Applying an ethical rather than strictly legal approach to art from colonized areas, while not required, can be consistent with the fiduciary duty of the governing board of a museum, but requires specific legal advice as the issue of fiduciary duty is usually a state specific legal consideration.

In determining the ethical inflection point after which the spoliation of art was against customary norms of behavior, the classifications identified above in Section III may be helpful. Because these are qualitative decisions based on specific facts and circumstances, and open to significant debate, the museum's decision will inevitably turn on judgment and a fair reading of the historical record. At one end of the spectrum, deciding that a sale of goods made for the trade is not problematic may be relatively easy. On the other hand, clear evidence of the taking of ritual objects as part of a forced religious conversion may raise serious ethical (and possibly legal) concerns over continued possession. The point at which the scales dip from voluntary alienation to forced alienation that renders holding the object without further action untenable is also a matter of judgement. For now, uniformity of approach and result is simply not possible – any more than is the case for other difficult periods in history. As each museum makes its decisions, the precedent of informed resolutions will aid those who follow in the process – provided that those who make the initial decisions are transparent about their decision and reasoning.

If a museum decides that a claim has legal merit, or that an object was alienated under circumstances the museum believes, as an ethical matter, renders holding the object without further

action untenable, the museum should seek to arrive at an equitable resolution. The resolution of a claim or independent determination by the museum may take many forms. For example, a resolution might include: 1) an acknowledgement of the facts and circumstances surrounding the removal of the object from its source country; 2) a shared stewardship agreement; 3) revolving loans between the museum and the claimant; 4) restitution or repatriation of an object¹⁰; or 5) some combination of the above. As museums address these objects in a proactive and collaborative manner, no doubt other creative solutions will emerge.

¹⁰ Museums should be cautious about restituting or repatriating an object if multiple claimants either have come forward or are likely to do so. Any decision that results in the museum transferring possession of an object to a third party where others may make a claim to the same object can expose the museum to potential liability as well as reputational risk.

APPENDIX A

RESOURCES FOR LAWS

- IFAR – some African countries.
- UNESCO Website.
- UNESCO Handbook of National Regulations (print).
- UNESCO Protection of Movable Cultural Property – limited (print).