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The racial regime of international cultural heritage law

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ABSTRACT

This article examines the interaction between race, cultural heritage and law. To this end, it provides an overview of how race manifests itself when it comes to cultural heritage, with reference to the restitution of colonial cultural objects, statues related to slavery and colonialism, intangible cultural heritage but also its protection during armed conflict. It puts forward the argument for the existence of a racial regime of international cultural heritage law, by pointing out that there is no monolithic way in which these three parameters interact with each other. Forms and manifestations it takes include its confirmation in an explicit manner, reaching its apogee with the concept of *cultura nullius* introduced in this paper, its negotiation in various directions, its disregard or its indirect confirmation. This exposition instigates a series of critical reflections within the domain of international cultural heritage law and heritage studies concerning the conceptualisation of cultural heritage and its concomitant narratives. While this paper acknowledges the existence of a more nuanced picture, it still suggests that the racial regime of international cultural heritage law is whiter than is usually surmised or acknowledged.

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1. Introduction

Race talk has gained prominence across the fields of heritage studies and international cultural heritage law in recent years, from demonstrations about the toppling of monuments related to slavery and colonialism, to what is permissible for feted intangible cultural heritage. Debates about how race factors into the restitution[1] of colonial cultural objects as well as the protection of cultural heritage[2] during armed conflict rage on. The Black Lives Matter (henceforth: BLM) movement was instrumental in bringing the issue of race to the fore in both disciplines. Commencing in 2013 but rising to prominence largely after the tragic killing of George Floyd on 25 May 2020, in Minneapolis, United States of America (henceforth: US) at the hands of a police officer, the movement challenges often quick assumptions about race, law and cultural heritage.

Notable contributions have emanated from critical heritage studies (Ashley and Stone 2023; Littler 2016; Littler and Naidoo 2005), museum studies (Bunning 2020), archaeology (Gosden 2006; Greenberg and Hamilakis 2022; Niedermüller 1999), heritage

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tourism (Jackson 2020), anthropology (Chio 2021) and philosophy (Appiah 2018, Ch. 4), critical race theory (Delgado and Stefancic 2023) and Whiteness studies' (Harris 1993) focus on the (after)lives of race. International cultural heritage law has not seen a comparable re-evaluation, as few studies address race, cultural heritage and law in a holistic and coherent manner. The exceptions are few and far between. Lixinski explores the issue more holistically yet cursorily (Lixinski 2024, 154–155) and most scholars confine their attention to one aspect or another such as statues and monuments related to slavery and colonialism (Lixinski 2018), intangible cultural heritage (Wissmann 2024), colonial cultural objects (Cuyler and Patterson 2024) or cultural heritage protection during armed conflict (Keane 2024). There is room for more comprehensive analyses of race and the role it is assigned in international cultural heritage law.

The term 'race' defies easy terminological definitions. Indeed, there seems to be no single definition of the term, and there are at least three different ways to perceive it. Considered as a biological phenomenon, its most extreme manifestation was the degrading treatment of Jews by Nazi Germany. As a cultural phenomenon, 'race' has been equated to ethnicity. 'Race' may also be understood as a social phenomenon (Adebisi 2021, 177).

As a social construct, depictions of 'race' – 'White', 'Black', 'Red', 'Yellow' and so on – exert considerable influence. These depictions are fluid and should not be perceived as fixed or homogeneous (López 2006, 26). To exemplify the many shades of Whiteness, consider the experiences of Irish and Italian migrants in the US. Both groups were called upon to prove their Whiteness, which was taken for granted across the Atlantic (Ignatiev 2009; Rattansi 2007, 43).

This paper explores the relationship between race, cultural heritage and law at the international level and probes the many unaccounted ways in which race, cultural heritage and law interact. The 'racial regime' of international cultural heritage law can be interrogated through five key segments that correspond to a different interaction of race, cultural heritage and law. This article starts with the ways in which international cultural heritage law (re)produces, affirms and solidifies race (Section 2). Next it ponders how this branch of law negotiates (Section 3) and challenges race (Section 4). How does the same respond to feted accounts of race follows (Section 5). This exposition prompts a series of critical reflections in the context of international cultural heritage law and heritage studies about ways of thinking about cultural heritage and its accompanying narratives (Section 6). The concluding remarks underline that race, cultural heritage and law interact in varying ways that tend to prioritise Whiteness despite the seemingly polychromic appearance of contemporary international cultural heritage law (Section 7).

2. International cultural heritage law: an agent of Whiteness

International cultural heritage law has frequently celebrated racial mentalities. Nowhere does the white colour of international cultural heritage law predominate more than in the protection and restitution of colonial cultural objects, where discussions intensified in recent years.

Emblematic of this colour is the legal distinction between 'civilised' and 'uncivilised' states. In the early colonial encounters of the late fifteenth century, differences

in religion separated the 'Old' from the 'New World'. From roughly the mid-eighteenth century onwards, these differences (e.g. Christians versus Heathens) passed the torch to those of colour (McCarthy 2009, 24). People were no longer distinguished by their religion, but by the colour of their skin. Labelled as 'Red', 'Black', 'White' and 'Yellow', these were their new names (Keevak 2011; Quijano 2007, 171; Shoemaker 2004, 129). From then on, the colour prefixes became the new dividing line between the 'Self' and the 'Other'.

These racial ideas were informed by the taxonomical classifications of Swedish naturalist Carolus Linnaeus (1707–1778), as expressed in his work *'Systema Naturae'* (1735), which divided nature into three parts: minerals, vegetables and animals. The animal category included humanity under the name of 'Anthropomorpha'. In the first nine out of twelve editions of his book, Linnaeus classified humanity into four 'varieties of man': 1) 'Europaeus Albus' (European White), 2) 'Americanus Rubescens' (American Reddish), 3) 'Asiaticus Fuscus' (Asian Tawny) and 4) 'Africanus Niger' (African Black) (Charmantier 2020). This taxonomy had considerable influence on younger generations of scholars in the nineteenth century, perhaps most notably exemplified by the English Charles Darwin (1809–1882). In his 1859 infamous work *'On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life'*, Darwin underlined the continuing 'struggle' between species 'for existence' (C. Darwin 1859, 5). These ideas were subsequently elaborated upon by various scholars, including the social Darwinist Herbert Spencer (1820–1903). Spencer proposed the theory of the 'survival of the fittest' races (Spencer 1864, 444). Darwin's subsequent work hypothesises that the triumph of 'civilised nations' was attributable to the fact that 'savages . . . cannot, or will not, change their habits' (C. R. Darwin 1871, 238).

These classifications had a remarkable influence on international lawyers of the time (see, for instance, United Nations General Assembly, Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, 21 August 2019, A/74/321, par. 18). It was during this period that international law developed remarkable parallelisms with certain ideas of race based on the rather amorphous legal standard of 'civilisation'. One of the most notorious instances is the objectionable distinction drawn by the Scottish international lawyer James Lorimer (1818–1890). His *'The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities'* (Lorimer 1883) distinguishes between 'civilised humanity' at the top of the world's pyramid, 'barbarous humanity' immediately below and 'savage humanity' occupying the lowest position. Application of international law was only confined to the top category (Lorimer 1883, 101). To be White was synonymous with being 'civilised'. Conversely, individuals racially constructed as non-White meant that they had no international agency. Lines imposed by Whiteness determined whose cultural heritage could be counted as such, protected during armed conflict and which could be restituted. A striking illustration of this phenomenon can be observed in the case of the 11 Ethiopian Tabots. During the 1867/8 Abyssinian Expedition, these highly sacred objects representing the Ark of the Covenant and the Ten Commandments given by God to Moses were looted in the aftermath of the storming of the rock fortress of Maqdala (today Amba Mariam). The 1868 British Military Regulations prohibited looting only in instances where the opponent was racially and culturally 'civilised' enough (Queen's Regulations and Orders for the Army 1868,

186). In British eyes Ethiopia (then known as Abyssinia) was uncivilised (Giorgallis 2025, 75). The colour line found application alongside other factors, including religion (Christianity), culture and physical characteristics, in instances where difficulties arose (Virdee 2014, 34–35).

Chromophobia, based on racial difference, strongly influenced museums in colonial metropoles (Federal Ministry Republic of Austria Arts, Culture, Civil Service and Sport 2023, Recommendations of the Advisory Committee for Guidelines for Collections in Austrian Federal Museums from Colonial Contexts, 11 and 23). Aided by anthropology and archaeology, cultural heritage was frequently mobilised under the guise of pseudo-scientific studies to demonstrate and offer proof of Europe's racial superiority (Roodt 2024, 15). This process operated in at least three steps.

Firstly, when supposedly speaking about the common origin of humanity, Europeans positioned them all in a single evolutionary lineage. This step phenomenically made no discernible distinction. Within this evolutionary paradigm, certain groups lagged behind culturally compared to the hierarchical 'superior' European ones (Fanon 1964, 32). The cultural agency, ability and dignity of non-White people were denied and this objectification dehumanised them. Studying the physiology of crania of people of African descent and comparing them with Greco-Roman statues, Dutch anthropologist Petrus Camper (1722–1789), suggested that these proved 'scientifically' European 'superiority' (Gossett 1997, 70). Craniometric studies in the Americas (for example Morton 1839) are among a plethora of further examples.

A striking consequence of objectification was that non-European cultural heritage was no longer identified and considered as such. Instead, it was fantasised as *'cultura nullius'* or cultural heritage supposedly belonging to no one. 'Nullius' (meaning something that belongs to no one) with reference to land is employed in the term '*terra nullius*', with reference to the sea it is '*mare nullius*', with reference to science it is '*scientia nullius*' and with reference to language is '*lingua nullius*'. Phillipson refers to '*cultura nullius*' in the field of linguistics in the context of the projection of American capitalist consumerism as universally relevant. He also refers to English as a universal language that supposedly belongs to no one (Phillipson 2017, 316). Even though he makes brief references to the concept of '*cultura nullius*' on occasion (317, 319–321), he does not expand upon its mechanism which this paper develops.

Cutting the ties between people and their cultural heritage, landscape and origins, the fiction of *cultura nullius* was employed to justify the acquisition of 'Other's' cultural heritage including its intangible manifestations by various means. Contradictory justifications were employed, including that these objects were simply fetishes and/or curiosities, part of an obsolete and/or dying culture or that the Europeans could better appreciate and shed light on than the native populations.[3] Even human remains fell into this category. A remarkable illustration of the 1867/8 Abyssinian Expedition is provided by the remains of Prince Alemayehu (1861–1879), the seven-year-old son of Emperor Tewodros II (1818–1868). In the aftermath of the demise of his parents, the Prince was escorted to England under the guardianship of Captain Tristram Charles Sawyer Speedy (1836–1910). He passed away 11 years later and was buried near St George's Chapel in Windsor. Despite numerous appeals for the restitution of his remains for a reburial in Ethiopian soil, this has not occurred (Heavens 2023, 242).

Collectors, museums, missionaries, commercial, scientific and military expeditions employed comparable discourses. For example, Richard Rivington Holmes (1835-–1911) was tasked by the Trustees of the British Museum to collect antiquities for the institution (Henty 1868, 279).

Even in instances where African cultural heritage was worthy of admiration in the European eyes, this approach held the position that this cultural heritage was not the outcome of their creation. Instead, influential 'scientific' studies, despite on occasion different opinions, offered various explanations for this supposed paradox. Commonest were that this cultural heritage had White European origins or that it was the outcome of the interaction of non-White people with Europeans (Ahrndt et al. 2021, 26; González-Tennant 2014, 27). The Benin Bronzes, long claimed by Nigeria, serve as a good illustration of these racial signifiers. In this racist framing, the dominant correspondence of the time reveals how inexplicable the situation of these objects was: being too admirable to be the creation of coloured instead of White people. The German ethnologist and archaeologist Leo Frobenius (1873–1938) illustrates this point well. In his work '*The Voice of Africa: Being an Account of the Travels of the German Inner African Exploration Expedition in the Years 1910–1912*', he argues that earlier White presence in Africa, referring to the Platonic story of the lost city of Atlantis, contributed to its creation (Frobenius 1913, 98; for a similar approach ascribing these cultural objects not to Greece but to Egypt see; Petrie 1914, 84. For a contrary view see; Von Luschan 1898, 153). The example of the Benin Bronzes is of course not unique. Comparable dynamics of denial of non-White agency of cultural heritage and communities are to be found if one looks southwards at the case of the architectural complex of Great Zimbabwe (González-Tennant 2014, 27) but also in India (Díaz-Andreu 2007, 242).

Supposedly 'rejected' by their people, landscape and origins, this cultural heritage found itself in a zone of being no one's heritage. As a mode of cultural appropriation, the racist framing of *cultura nullius* suggested that this heritage lacked ownership and consequently could be freely appropriated by anyone. The powers that 'happened' to do so were the racially 'superior' European ones projecting themselves as its 'appropriate' guardians. Treating these objects much like a foreign body in the land that needed extraction and self-identifying themselves as the intellectual and cultural inheritors of Greeks and Romans, former colonial powers justified their interest in appropriating such cultural heritage (Saini 2019, x). Supposedly as its 'true' heirs and custodians, they had a duty to preserve it for the benefit of the future generations (Giorgallis 2024, 19–20). One such example of collecting classical antiquities from Algeria and Tunisia on the basis of Roman ancestry is France during the mid-late nineteenth century (Díaz-Andreu 2007, 366). These classical Greco-Roman antiquities, which were seen as the apogee of human 'civilisation', could not have any other colour rather than 'pure' white. A notorious example of this obsession with white flesh is the figures depicted in the Parthenon Sculptures. Even up until 1937–1938, their coloured patina was removed by the British Museum to make them look whiter than they truly were, thus denying their coloured nature (Roodt 2024, 18). These notions of Whiteness and race assumed a pivotal role in the definition of 'Aryanism' and the evaluation of 'degenerate art' by Nazi Germany in ensuing years (Link 2024, 737). And once this idea of lacking cultural agency dominated, the dispossession and later the circulation of cultural heritage as cultural commodities became normalised.[4]

With time, this discourse adapted and reinvented itself. In the same moment when this discourse commenced shifting from race-centred arguments, other justifications came into play. Entering the collection, colonial cultural objects were no longer seen or framed as the remnants of a vanishing race (Stahn 2023, 242). Rather, they became a tool for understanding the racial 'Other'. A common way to achieve this is under the notion of the 'Universal' and/or 'Encyclopaedic Museums'. For instance, former British Museum Director, Neil MacGregor, claims that the

> Benin bronzes ... when they arrived in London, they completely transformed the way people in Europe thought about Africa. It was the presence of the Benin bronzes and the extraordinary sophistication of making that made it completely impossible for Europeans to go on thinking of Africa as not having its own culture and a very great culture. (Malik 2004)

However, this is not necessarily the case. The presence of universalist ideology and a salvage mentality does not necessarily imply that such biases were not prevalent at the time, even within the circles of the British Museum's publications (e.g. Braunholtz 1929). Furthermore, these biases do continue today in different forms through the concept of intertemporal law, as elaborated in Section 5, through its mainstream operation in reproducing racial divides.

3. International cultural heritage law as a negotiator of colour

In the second paradigm, international cultural heritage law functions to negotiate race in a certain way. Three tendencies emerge from the different examples that follow, from across the world, spanning from monuments associated with slavery and colonialism to intangible cultural heritage. These tendencies either continue to confirm racial connotations, encourage states to disregard them or are located currently in an intermediate phase subject to review or a decision. It is for this reason that a tripartite subcategorisation is herein proposed.

3.1. Negotiation that continues to confirm racial connotations

An illustration of the negotiation paradigm in its negative form comes from Australia. In a complaint lodged to the United Nations Committee on the Elimination of Racial Discrimination (henceforth: CERD), a group of five Aboriginal People – Slim Parker, Kado Muir, Dr. Anne Poelina, Clayton Lewis and Dr. Hannah McGlade – asserted that the Western Australian Aboriginal Cultural Heritage Act (2021) runs against Australia's obligations as a signatory to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (henceforth: 1965 ICERD) ever since 1975 when the country ratified and incorporated the convention through the Racial Discrimination Act 1975 (Cth). More specifically, the group argued that this heritage legislation fell short of protecting in an adequate fashion the rights of Aboriginal People violating in this way, along with 1965 ICERD, the 1966 International Covenant on Civil and Political Rights (henceforth: 1966 ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (henceforth: 1966 ICESCR) and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (henceforth: 2007 UNDRIP) (Parker et al. 2021, 1). Even in instances where

Aboriginal cultural heritage could be affected, damaged or destroyed Section 18 of the Western Australian Aboriginal Cultural Heritage Act (2021), against the general prohibition of such activities, allowed mining activities to proceed with the discretionary authorisation of the Minister of Aboriginal Affairs. Proof of this discrimination is illustrated by the fact that all applications up to that point were approved. None of the 463 applications made since 2010 was ever deemed to have a negative impact on Aboriginal cultural heritage (CERD, Letter by the Committee on the Elimination of Racial Discrimination to the Permanent Representative of Australia to the United Nations Office, 26 April 2024, CERD/EWUAP/112th Session/2024/CS/cs/ks 2024, 2). The scale of desecration reached perhaps its zenith with the destruction of the sacred 46,000-year-old Juukan Gorge caves, which were destroyed by the company Rio Tinto, who had been granted a mining licence before (Parliament of the Commonwealth of Australia, Joint Standing Committee on Northern Australia, A Way Forward: Final Report Into the Destruction of Indigenous Heritage Sites at Juukan Gorge, October 2021, par. 1.2). Other previous legal attempts in the domestic setting to challenge such discriminatory measures have already been rejected on the basis that members of the Government, in this instance the Minister for the Environment, have the discretion to decide about such issues according to Section 10 (1) (d) of the 1984 Aboriginal and Torres Strait Islander Heritage Protection Act (Talbott v Minister for the Environment 2020; FCA 1042, par. 44).

In a letter to the Australian Government, CERD expressed its concerns regarding the Act chastising its 'structural racism' against Aboriginal People, calling it incompatible with international race discrimination treaties. This is due to the legislation affording the Minister of Aboriginal Affairs excessively wide discretion over decisions concerning development activities (CERD, Letter by the Committee on the Elimination of Racial Discrimination to the Permanent Representative of Australia to the United Nations Office, 26 April 2024, CERD/EWUAP/112th Session/2024/CS/cs/ks 2024, 2). Faced with growing dissatisfaction, the Act was eventually repealed on 15 November 2023.

However, this change was only short-lived. The Western Australian Government decided instead of adopting new specific legislation to alter the already existing legislation. In amending the Western Australian Aboriginal Heritage Act (1972), not only did the Government reaffirm the previous powers of the Minister for Aboriginal Affairs (Section 18 (3) of the Western Australian Aboriginal Heritage Act (1972)), but did so without the consultation, free, prior and informed consent of Aboriginal People (CERD, Letter by the Committee on the Elimination of Racial Discrimination to the Permanent Representative of Australia to the United Nations Office, 26 April 2024, CERD/EWUAP/112th Session/2024/CS/cs/ks 2024, 2). However, the amended legislation introduced a subsection that regulates instances where new information becomes available. In such an event, the Minister is required to confirm or revoke the licence. Ironically, ever since 15 November 2023, the date of the repeal of the original legislation, a new licence was given to Rio Trinto (CERD, Letter by the Committee on the Elimination of Racial Discrimination to the Permanent Representative of Australia to the United Nations Office, 26 April 2024, CERD/EWUAP/112th Session/2024/CS/cs/ks 2024, 1). In a follow-up letter, CERD urged the Government to duly review or revoke licences granted after 15 November 2023 in light of 1965 ICERD and other international human rights law instruments (CERD, Letter by the Committee on the Elimination of Racial

Discrimination to the Permanent Representative of Australia to the United Nations Office, 26 April 2024), (CERD/EWUAP/112th Session/2024/CS/cs/ks 2024, 3).

A rather paradoxical way in which confirmation of associations of race with slavery and colonialism takes place is evidenced by the Haitian Joumou Soup. This dish, made from pumpkin ('joumou' in Creole), meat, vegetables, pasta and spices, was the first to be inscribed on the Representative List of the Intangible Cultural Heritage in 2021 following the ratification of the Convention by Haiti in 2009 (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: 16. COM 19). Consumed every 01 January of each year on the anniversary of Haiti's Independence Day from France in 1804, Joumou Soup is a symbol of Haitian identity. This is because, in its original form, Joumou Soup was exclusively consumed by slave owners, despite being cultivated by enslaved individuals within plantations (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: 16. COM 19). In post-independent Haiti, Joumou Soup is no longer seen as a dish of oppression but it was transformed into a symbol of resistance against slavery and racial discrimination.[5]

3.2. Negotiation that encourages states to disregard racial connotations

A negotiation of a different kind can be observed once again within the realm of intangible cultural heritage. Celebrated in Belgium between March 02 and 05, the well-known Aalst Carnival with origins dating back to the Middle Ages takes place annually in the homonymous city of Aalst in East Flanders. Attracting thousands of people every year, Belgium inscribed the Aalst Carnival on the Representative List of Intangible Cultural Heritage in 2010 (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: 5.COM 6.3. Belgium accepted the Convention on 24 March 2006). However, soon after the festival's inscription on the list, accusations of anti-Muslim, anti-Semitic and racial discrimination emerged, culminating during its 2019 March edition (Van Damme and Jacobs 2022, 117).

These complaints were described as a matter that requires discussion during the next meeting of the Bureau of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, which was held in Bogotá in December 2019 (UNESCO, Decision of the Bureau of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: 14.COM 1.BUR 4, par. 9). Taking place around the same time, at a meeting organised by various stakeholders responsible for the organisation of the event, more than half of those voted against the continual inclusion of the Carnival on UNESCO's Representative List of Intangible Cultural Heritage (Leeman and D'Haese 2019, 5). A letter addressed to the Director General of the Flemish Department of Culture, Youth and Media followed, who in turn forwarded it to the Belgian Government. An affirmative decision by UNESCO to delete the inscription from the relevant list soon arrived (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: 14.COM 12). Although the Aalst Carnival met the necessary criteria for inscription in 2010, the Committee suggested that this was no longer the case almost a decade later. In explaining why the Aalst Carnival no longer fulfils the criteria and contradicts Article 2 (1) of the 2003 UNESCO Convention

for the Safeguarding of the Intangible Cultural Heritage (henceforth: 2003 UNESCO Convention), the Committee stressed that the festival

> on several occasions displayed messages, images and representations that can be considered . . . as encouraging stereotypes, mocking certain groups and insulting the memories of painful historical experiences including genocide, slavery and racial segregation. (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: 14.COM 12, par. 7 R.1)

The portrayal of the figure of 'Le Sauvage' or the 'The Savage' in the La Ducasse D'Ath Carnival, which takes place annually in August, followed a similar course. Because of its racial and discriminatory messages against people of colour, in 2019, it was asserted that it violated the 2003 UNESCO Convention. After 2 years of suspension of the festival due to the COVID-19 pandemic, the character of 'Le Sauvage' was removed in 2022 from the relevant list of UNESCO following a request for delisting from Belgium after intense pressure (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: 17.COM 8.a). Removal from the list did not mean that changes in the festival occurred. For a while, the character was preserved intact. In 2023, a Commission composed of citizens was established to commence discussions for its replacement with a new character. On 25 August 2024, the Belgian city of Ath elected to permanently remove and replace the character of 'Le Sauvage' with another character named 'Le Diable de Gavatao' or 'The Devil of Gavatao'. While the new character preserved some of his old characteristics, most notably part of his black face, his black hands and his costume, a new red face colouration and small horns were introduced (Anonymous 2024). The potential for a more nuanced picture is examined in Section 5 in the context of intangible cultural heritage.

A similar controversy arose in the Netherlands over the figure of 'Zwarte Piet' or 'Black Pete'.[6] Corresponding to a figure of dark skin who has frizzy hair, thick red lip and golden earrings in addition to a special costume, Zwarte Piet was historically depicted as a slave who subsequently transformed into an assistant to Sinterklaas (Saint Nicholas) during the celebrations for the Christmas period, taking place from mid-November to early December of each year. The festival was inscribed, after much controversy which included among other contradictory legal proceedings from lower (Court of Amsterdam, 03 July 2014, ECLI:NL:RBAMS:2014:3888, par. 15.11.1–2 acknowledging its racial connotations) and higher Courts (Council of State, 12 November 2014, ECLI:NL:RVS:2014:4117, par. 6.6. reversing the earlier ruling. For a commentary see; Lemmens 2017), in January 2015 on the National Inventory of Intangible Cultural Heritage. Nonetheless, just like the Alst and D'Ath Carnivals, protests followed about the festival's contribution to negative racial stereotypes for people of African descent. A few months after its inscription, the CERD criticised the Netherlands for the racial undertones of the figure and recommended the Dutch Government to reconsider its decision (CERD, Concluding Observations on the Nineteenth to Twenty-First Periodic Report of the Netherlands, 24 September 2015, CERD/C/NLD/CO/19–21, par. 17).

Notwithstanding the fact that the Committee did not call for the ban of the festival, it did urge the Dutch Government to take steps towards 'the elimination of those features of the character of Black Pete which reflect negative stereotypes and are experienced by many people of African descent as a vestige of slavery' through among other things 'a

different portrayal of Black Pete' (CERD, Concluding Observations on the Nineteenth to Twenty-First Periodic Report of the Netherlands, 24 September 2015, CERD/C/NLD/CO/19–21, par. 18). The same recommendation followed at least once again in 2021 (CERD, Concluding Observations on the Twenty-Second to Twenty-Fourth Periodic Reports of the Kingdom of the Netherlands, 16 November 2021, CERD/C/NLD/CO/22–24, par. 27 and 28 (d)). Constituting an additional spark for negotiation within the Dutch national setting, the Government decided to remove the festival from the national inventory after a recommendation by the Assessment Committee for the Inventory of Intangible Cultural Heritage Netherlands. In its reasoning, the Committee noted that Zwarte Piet

> no longer complied with (the ethical principles of) the international UNESCO Convention for Intangible Heritage. An inscribed heritage must not discriminate against population groups and must respect cultural diversity and ethnic identity. (Kenniscentrum Immaterieel Erfgoed Nederland 2023)

Case law pertaining to statues associated with slavery and colonialism originating from the US exemplifies the same kind of negotiation of race. A notable example of this process is the case of *Taylor v. Northam (2021)* (Taylor v. Northam, 300 Va. 230, 257 862 S.E.2d 458 (Va. 2021)). The case decided the fate of the statue of General Robert E. Lee (1807–1870) in Richmond, Virginia. Following the BLM Movement, negative public sentiment against figures associated with slavery, including Lee's position on enslaved people, heightened. Faced with growing public dissatisfaction, Ralph Shearer Northam, the Governor of Virginia, ordered the removal of the statue in June 2020 from the square. However, this decision further ignited controversy. Litigants in their complaint against the removal of the statue raised the argument of public policy that takes the form of preservation of cultural heritage as exemplified in the 1889 Joint Resolution ensuring that 'the state . . . will hold the said [Lee Monument] perpetually sacred to the monumental purpose to which it has been devoted' (Taylor v. Northam, 300 Va. 230, 257 862 S.E.2d 458, 461–462 (Va. 2021)).

However, the Supreme Court of Virginia disagreed. In agreeing with Northam, the Court ordered the removal of the statue suggesting that '[v]alues change and public policy changes too' (Taylor v. Northam, 300 Va. 230, 257 862 S.E.2d 458, 471 (Va. 2021)). Differently put, what was previously considered acceptable and in accordance with the public policy may no longer qualify as such. And what was once run against public policy might not qualify anymore. The removal of the statue occurred a few days after the ruling.

3.3. Subjecting 'race' to review

Finally, in other instances, negotiation is subject to review. A recent example discussing the relationship between race, cultural heritage and law took place before CERD with regard to Germany. On 27 October 2023, a coalition of five organisations, associations and/or companies – Decolonize Berlin e.V., Berlin Postkolonial e.V., Flinn Works, Initiative Schwarze Menschen in Deutschland Bund e.V. (ISD) and the European Center for Constitutional and Human Rights e.V. (ECCHR) – submitted an alternative report about the country's compliance with 1965 ICERD. The

coalition advanced that Germany violates Articles 1, 2, 5 and 6 of 1965 ICERD based on colonial crimes committed by Germany and more specifically in respect of its 'handling of human remains/Ancestors from colonial contexts' (Decolonize Berlin e. V., Berlin Postkolonial e.V., Flinn Works, Initiative Schwarze Menschen in Deutschland Bund e.V. (ISD) and the European Center for Constitutional and Human Rights e.V. (ECCHR) (ECCHR 2023), 2). The CERD recognised some positive steps from Germany's side, like the 2021 Joint Declaration between Germany and Namibia[7] and the apology of the German President to Tanzania, but urged Germany to

> [a]dopt a comprehensive policy for the restitution and repatriation of colonial objects and cultural artifacts, in particular the restitution and repatriation of human remains of ancestors (CERD, Concluding Observations on the Combined Twenty-Third to Twenty-Sixth Reports of Germany, December 21, 2023, CERD/C/DEU/CO/23–26, par. 48 (c)).

Germany's response, the Committee continues, should be submitted for the purposes of the next periodic review by 15 June 2027 (CERD, Concluding Observations on the Combined Twenty-Third to Twenty-Sixth Reports of Germany, 21 December 2023, CERD/C/DEU/CO/23–26, par. 59). During a recent discussion of the Proposed General Recommendation Regarding Reparations for the Historical Injustices from the Chattel Enslavement of Africans, and the Ensuing Harms and Crimes to People of African Descent currently being prepared by CERD, Germany highlighted ICERD's non-retroactive temporal character and its territorial limits. It also drew attention to actions taken to return human remains with reference to the relevant German Guidelines on colonial cultural objects (German Federal Foreign Office, German Comments Regarding the Call for Input to CERD General Recommendation on Reparations for the Historical Injustices From the Chattel Enslavement of Africans, and the Ensuing Harms and Crimes to People of African Descent, 14 February 2025, 1–2).

4. International cultural heritage law: (missed) opportunities to challenge the notion of 'race'

In the aftermath of the ashes of the World War II, UNESCO was established in Paris in 1945. With the Holocaust being recent in memory, one of its areas of priority was to address ideologies about race that were prevalent during the existence of the Nazi regime (Duedahl 2016, 5). To do so, UNESCO's very own Constitution asserts that 'peace and security' are the set goals 'without distinction of race' (Article I (1) of UNESCO's Constitution. See also Recital 3 of the Preamble and Article I (2) (b) of UNESCO's Constitution and Article 1 (3), 13 (1) (b) and 55 of the 1945 United Nations Charter).[8] Over the subsequent two decades, UNESCO's endeavours to tackle the issue of race intensified. Four Statements on the question of race have been adopted since – the 1950 'Statement on Race', the 1951 'Statement on the Nature of Race and Race Differences', the 1964 'Proposals on the Biological Aspects of Race' and the 1967 'Statement on Race and Racial Prejudice' (UNESCO (1969), 30–56) – with the aid of some leading figures such as the French ethnographer Claude Lévi-Strauss (1908–2009), the US sociologist Edward Franklin Frazier (1894–1962) and the British-US anthropologist Ashley Montagu (1905–1999) (Duedahl 2022, 804). However, this is not to say that the UNESCO policy is

beyond criticism. The process of 'reeducation' and its child-centredness focus on non-European peoples are seen to replicate past distinctions between the 'civilised' 'Self' and the 'Other' (Thakkar 2023, 52).

In the subsequent years, the subject of race appeared in numerous instruments confirming UNESCO's aspirations. For instance, the 1965 ICERD understands 'racial discrimination' as

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Article 1 (1) of the 1965 ICERD).

Cultural life is explicitly recognised. Article 4 of the same instrument underlines the need for '[s]tates Parties … to adopt immediate and positive measures'. Similar sentiments with respect to culture can be found at international[9] and regional levels.[10] Constituting a peremptory norm of international law ('*jus cogens*') (International Court of Justice (henceforth: ICJ), Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Judgement of 5 February 1970, par. 33–34), the prohibition of racial discrimination allows no derogation from states and all of them have an interest in it ('*erga omnes*'). As part of a broader international legal framework, the field of international cultural heritage law is subject to the same considerations. Any potential discrimination on the basis of culture, even if it is claimed to amount to cultural heritage, must comply with this general obligation. *Jus cogens* norms render any such measures null and void.

These instruments have found judicial expression at the international level as well. Adjudicated before the ICJ, the dispute between Armenia and Azerbaijan over the conflict of the Second Nagorno-Karabakh War (September–November 2020) is a good illustration of how race, cultural heritage and law intermingle. In its claim lodged before the world's Court in September 2021, Armenia put forward the argument that Azerbaijan was responsible for denying Armenians

> the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by inter alia terminating, preventing, prohibiting and punishing their vandalisation, destruction, or alteration, and allowing Armenians to visit places of worship (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, par. 5).

In its counter-response, Azerbaijan rejected the aforementioned claims, asserting that heritage sites were not accessible, regardless of national or ethnic origin, due to the presence of landmines. The Azeri legislation that prohibits vandalism and the destruction of cultural and religious heritage was also highlighted and the position that all measures were taken for the investigation of such allegations was expressed (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, par. 54). Upon hearing the case, the ICJ considered 'plausible' the 'discrimination against persons of Armenian national or ethnic origin … through vandalism and desecration affecting

Armenian cultural heritage' (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, par. 61. On this point see more generally International Criminal Court, Policy on Cultural Heritage, June (2021), par. 28). In doing so, it further ordered Azerbaijan to take all requisite measures to prevent and punish the desecration and vandalism of Armenian sacred and historical cultural heritage (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, par. 92).

Despite the fact that such unsuccessful complaints had been made previously before the ICJ (ICJ, Application (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011 and ICJ, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Application Instituting Proceedings, 16 January 2017), it was the first time that the ICJ reached a favourable ruling, recognising the nexus between race, cultural heritage and law and ordering its protection.

However, the ICJ's decision was not unanimous, with two out of its fifteen Judges – Judge Yusuf and Judge Ad Hoc Keih – expressing their disagreement. Their different opinion emanated from the fact that Article 5 (e) (vi) of 1965 ICERD guarantees the right to equal participation in cultural activities and not the destruction of cultural heritage. Such an approach, in Judge Yusuf's own words, overstretched the meaning of the provision with the result being that '[t]he Court has thrown wide open the gates of . . . CERD . . . to all kinds of claims that have nothing to do with its provisions or with its object and purpose' (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 07 December 2021, Dissenting Opinion of Judge Yusuf, par. 1). He added that '[c]onsiderations of race and racial discrimination cannot and do not apply to monuments, groups of buildings, sites and artifacts' and pinpointed the relevant international humanitarian law framework such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (henceforth: 1954 Hague Convention) and its First and Second Protocols (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 07 December 2021, Dissenting Opinion of Judge Yusuf, par. 13–14. On the same points see ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 07 December (2021c), Declaration of Judge Ad Hoc Keith, par. 4–6. For a general commentary see Kirchmair (2022)). Interestingly, the reason that drove the proceedings under 1965 ICERD seems to be the lack of compulsory dispute settlement mechanisms under the 1954 Hague Convention that both countries accepted in 1993 (Keane 2024, 214). This case confirms that the lack of effective dispute resolution mechanisms is still a defining feature of international cultural heritage law.

A softer tone was used in one of the subsequent orders of November 2023 regarding Armenia's call on Azerbaijan to avoid any alteration or destruction of monuments associated with the 1915 Armenian Genocide or any other monuments, sites or artefacts

(ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Indication of Provisional Measures, Order of 17 December 2023, par. 15 (8)). The majority of the Court appeared to be satisfied with Azerbaijan's response to the provisional measures (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Indication of Provisional Measures, Order of 17 December 2023, par. 19–20). In their Dissenting Opinions, both Judge Yusuf and Judge Ad Hoc Koroma have articulated the issue with greater clarity (ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Indication of Provisional Measures, Order of 17 December 2023, Dissenting Opinion of Judge Yusuf, par. 14 and Dissenting Opinion of Judge Ad Hoc Koroma, par. 1 and 10). At the time of writing, no final decision regarding the merits of the case has been reached.

The interplay between race, cultural heritage and law has made its appearance in two other cases currently under consideration before the ICJ: the first instance is the case between South Africa and Israel concerning the question of Genocide in the Gaza Strip. In its Memorial submitted to the Court, South Africa, documented various instances of destruction of cultural and religious heritage (ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Application Instituting Proceedings and Request for the Indication of Provisional Measures, 29 December 2023, par. 91–93). That claim was made with the intention of substantiating that the destruction of cultural heritage can be regarded as an indicator of *mens rea* (intention or knowledge of wrongdoing) for the crime of Genocide. This assertion aligns with already existing case law of the International Criminal Tribunal for the Former Yugoslavia (henceforth: ICTY) (ICTY, Prosecutor v. Kordić & Cerkez, Case No. IT-95–14/2-T, Judgment of 26 February 2001, par. 207). The Court made little effort to address these issues. The only exception was the Dissenting Opinion of Judge Sebutinde; whereas she referred to cultural heritage elements she argued against the order of measures (ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order of 26 January 2024, Dissenting Opinion of Judge Sebutinde, par. 13 and 19). Nothing was said about the cultural heritage of Palestine in any detail. Overall, the ruling remains far from Raphael Lemkin's (1900–1959) original conception of Genocide, which was not incorporated into the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In accordance with the Lemkian conception of the crime, cultural heritage elements were included (Lemkin and Schabas 2008, 84–85, 95). From the standpoint of international cultural heritage law, this is regrettable, as cultural heritage as a social construct is predicated on the relationship between what is considered cultural heritage and human beings. The second case corresponds to Ukraine's allegations concerning the destruction of the Palace of the Crimean Khans and other Crimean Tatar cultural heritage at the hands of the Russian occupation of Crimea. These allegations under Articles 2 (1), 5 (e) (vi) and 6 were rejected by the ICJ on the basis that the Court was satisfied with the Russian arguments (ICJ, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgement of 31 January 2024, par. 337).

At the national level, important developments in soft law instruments have taken place in recent years with respect to the restitution of colonial cultural objects. Although not legally binding, they can aid the interpretation of hard law and demonstrate the potential for contention and transformation at the intersection of race, cultural heritage and law. A notable example is the guidelines published across Europe concerning the restitution of colonial cultural objects. The German Guidelines (2021) do recognise, for instance, 'objects that reflect colonialism' as those that 'actively or passively reflect colonial thinking or convey stereotypes that underlie colonial racism'. Even worse, the same category includes objects 'openly' utilised to 'pursue propagandistic intentions' (Ahrndt et al. 2021, 75). They further note that such

> defamatory racist ways of thinking or portrayals of colonial contexts found their way into product advertising or commercial art advertising, especially in relation to colonial goods or the travel industry. (39)

Similarly, with respect to the practices of display, the Belgian Guidelines (2021) seem to favour, as a matter of policy, 'new labelling practices with deepened provenance, inclusive and critical displays, and self-reflexive approaches to the histories of colonialism and racism' (Boele et al. 2021, Display Practices and Collection Management). To this end, they urge that 'discriminatory or racist terms, are to be avoided in museum publications and exhibitions texts'. In the rare instance where a term is retained 'in quotations', clarifications between brackets or in footnotes are required (Boele et al. 2021, par. 5.3). Furthermore, where human remains are concerned, engagement with the broader ethics and historical legacies of the 'scientific' racism is necessary (Boele et al. 2021, par. 5.7). The Working Group of Experts on People of African Descent's comments from February 2019 concerning the reopening of the Royal Museum for Central Africa (RMCA), in which it asserted that despite the museum's efforts 'to include critical, postcolonial analysis' it did 'not gone far enough' might be instrumental for the inclusion of these references. The reason for this was that it failed 'to provide adequate context and critical analysis' (Statement to the Media by the United Nations Working Group of Experts on People of African Descent, on the Conclusion of its Official Visit to Belgium, 04–11 February 2019, par. 15). More recently, in 2023 the Belgian Advisory Committee on Bioethics made a recommendation that was intended to address among others the display of human remains in museums. The committee recognised the contribution of racial science in the collection of human remains and recommended the cessation of such displays (Belgian Advisory Committee on Bioethics 2023, 38). Racial connotations are also recognised by, among others, the relevant Scottish (Recommendations 2 and 5 of the Empire, Slavery and Scotand's Museums Steering Group Recommendations 2022) and Austrian Guidelines (Federal Ministry Republic of Austria Arts, Culture, Civil Service and Sport 2023, Recommendations of the Advisory Committee for Guidelines for Collections in Austrian Federal Museums from Colonial Contexts, 10–11 and 23). In March 2025, AFFORD released a policy brief with the title 'Laying Ancestors to Rest' which not only acknowledges the racial undertones of African collections of human remains in the United Kingdom (henceforth: UK) but also calls for the ban of sale of human remains and the end of their public display (AFFORD (2025), 2, 5, 7 and 12–13).

5. International cultural heritage law as polychromic only in appearance?

The hypothesis that the age of colours came to an end roughly from the end of the World War II onwards did not materialise in the termination of the influence of 'colour'. A more critical examination of euphemistic discourses inspired by critical race theory and post-race ideology reveals that they are in fact more sinister in nature since the law remains complicit in perpetuating racial biases. The liberal polychromic premise posits that the more we acknowledge colour-blindness through anti-racist commitments and affirmative action, the more chances there are to eliminate race. This section demonstrates, however, that attempts to tackle race, cultural heritage and law in this rhetorical fashion might be akin to using a different brush to apply the same white tin of paint to existing structures.

This section discusses two indicative categories where the phantasms of racial distinctions continue to inform contemporary debates about the restitution of colonial cultural objects and the safeguarding of intangible cultural heritage. Many others could, of course, be cited. However, a detailed elaboration is beyond the scope of this paper.

Significant developments have taken place across Europe ever since November 2017, with the initial spark being a speech delivered by French President Emmanuel Macron at the University of Ouagadougou in Burkina Faso. In his address, he expressed his desire to see significant colonial cultural objects returned within the subsequent 5 years. To this end, President Macron appointed Felwine Sarr, a Senegalese economist, and Bénédicte Savoy, a French art historian, to prepare a comprehensive study. What is widely known today as the Sarr-Savoy Report, published in 2018, recommended the unconditional return of Sub-Saharan African cultural objects in three main phases (Sarr-Savoy Report 2018, 62). Subsequent to the release of this report, a series of developments occurred across Europe, with the adoption of guidelines in several countries, including Germany, Belgium, the Netherlands, England, Scotland and Austria (for an overview see Roodt (2024); Roodt (2025)), general pieces of legislation such as in Belgium (2022, Recognising the Alienability of Goods Linked to the Belgian State's Colonial Past and Determining a Legal Framework for Their Restitution and Return, 28 September 2022, No. 2022042012) as well as Colonial Collections Committees (e.g. the Netherlands).[11] More recently, Switzerland announced the establishment of an Independent Committee for Cultural Property with a Burdened Past, with the task to hear cases of cultural objects looted during both the colonial and the Nazi eras (Ordinance on the Independent Commission for Cultural Heritage with a Burdened Past, 22 November 2023, No. 444.21; Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, KGTG) Amendment of 21 March 2025).

Nevertheless, the legal situation remains complex. The colour zones distinguishing between the 'civilised' 'Self' and the 'uncivilised' 'Other' have not disappeared; they re-emerge in contemporary debates largely due to the international law principle of intertemporal law. In its mainstream operation, this principle allows the prevailing racial legal standards of the time to be applied (Island of Palmas Case (Netherlands v. United States of America), 04 April (1928), Reports of International Arbitral Awards, Volume II, par. 845). It comes, thus, as no surprise that this legal principle, for instance in the case of the 11 Ethiopian Tabots, invites the application of ostensibly bygone colour spheres established by the 1868 British Military Regulations, which prohibited looting only in

instances where the opponent was racially and culturally 'civilised' enough (Giorgallis 2025, 75). Regarded as racially inferior to the British and European eyes, Ethiopia's sacred cultural objects were fantasised as *cultura nullius* and as such potential candidates for looting and collecting. This constitutes one of the reasons for which the British Museum seems to insist on the legality of their looting, along with other objects taken from the plunder of the rock fortress of Maqdala. Previous efforts by various states to negotiate a retroactive application of the contemporary international legal framework such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (henceforth: 1970 UNESCO Convention) and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (henceforth: 1995 UNIDROIT Convention) bore no fruit due to the opposition of former colonial powers and art market nations (Roodt 2024, 79). Even in cases where the restitution of cultural objects is desired, for a segment of a people that relies on racial capitalism theories restitution of such objects is not enough. Centuries of colonial exploitation and the subsequent merchantalisation of these objects have led to calls for reparations, with particular emphasis on the income generated by museums that have historically benefited economically from the display of these artefacts (Lixinski 2024, 146 and 168). Input for instance from Nigeria for the purposes of CERD's Proposed General Recommendation Regarding Reparations for the Historical Injustices from the Chattel Enslavement of Africans, and the Ensuing Harms and Crimes to People of African Descent underline this economic dimension (National Human Rights Commission (NHRC), Nigeria Inputs to the Committee on the Elimination of Racial Discrimination (CERD) Regarding Reparations for Historical Injustices From Chattel Enslavement and the Continuing Harms to People of African Descent, 14 February (NHRC 2025), 2). The very title of the African Union Year of Justice for Africans and People of African Descent Through Reparations 2025 too does not skirt the issue of economics. Former colonial powers are demonstrating considerable resistance. The UK is an example of a country that has rejected restitution of its colonial collections at a national scale, let alone reparations.

How racial connotations have the potential to become an important factor in judicial proceedings over Indigenous Peoples' human remains repatriation can be seen in the infamous case of *Bonnichsen v United States (2004)*. In the litigation concerned with the fate of a human skeleton, known as the 'The Ancient One' or the 'Kennewick Man' and going back in time around 8,400 years old, the Ninth Circuit Court of Appeals reached the conclusion that the 1990 Native American Graves Protection and Repatriation Act (henceforth: 1990 NAGPRA) is inapplicable. Favouring the views of anthropologists that no substantiated connection could be established between the Native American groups and the human remains, the Court noted that the skeleton does not fall within 1990 NAGPRA's definition of 'Native American'. Notwithstanding the oral traditions and histories provided by Indigenous Peoples, the Court dismissed the case on the grounds that the 'cultural affiliation' criterion had not been met on the basis of lineal discontinuity (Bonnichsen v. United States, 367 F.3d 864, 882 (9th Cir. 2004)). Imagining Native Americans as fixed and unchanging categories, the Court prioritised 'science' over supposedly inferior oral traditions and histories adopting a quasi-civilisational perspective, delineating a divide between the 'civilised' 'Self' and the 'uncivilised' 'Other'. Following the pass of legislation (H.R. 4131–114th Congress (2015–2016), A Bill to

Direct the Chief of Engineers to Transfer an Archaeological Collection, Commonly Referred to as the Kennewick Man or the Ancient One, to the Washington State Department of Archeology and Historic Preservation), the remains were reburied on 18 February 2017, at an undisclosed location near the Columbia River.

A final illustration where race proves remarkably resilient in the domain of intangible cultural heritage are the figures of Las Negritas Puloy de Montecristo as part of the Carnival of the Colombian city of Barranquilla. This Carnival, taking place annually on the Caribbean shores of Colombia, was inscribed on the Representative List of Intangible Cultural Heritage in 2008 (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage 3.COM. The Carnival had already been accorded protection at the national level under Law No. 706 of 2001). The Carnival is celebrated as a platform through which historically marginalised groups, such as the Creole community, can participate and it is regarded as a manifestation of the multi-cultural nature of the city, which was once the meeting place of European settlers, Indigenous Peoples and people of African descent brought through the Trans-Atlantic Slave Trade (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage 3.COM). However, theory and practice do not always dovetail neatly. Arguments of racial tokenism have made their appearance in relation to the festival. Promises of racial inclusivity can be betrayed at the first hurdle. When governments operate within the broader framework of Authorized Heritage Discourse (AHD) (Smith 2006), they determine what this heritage should be and even how long this celebration of 'racial integration and black pride' will last (Gontovnik 2019, 662 and 665). Consequently, biases in the form of marginalisation and tokenism are entering by the back door once again, resulting in a perpetuation of exclusion rather than true inclusivity outside the Carnival's limited temporal context. Racial categorisations are revived.

6. Taking 'race' seriously: implications for International cultural heritage law and heritage studies

Placing the notion of race right at the very centre of analysis has the potential to influence and transform the prevailing understandings of international cultural heritage law as well as broader heritage studies and their narratives. Based on the illustrations, the following critical reflections are proposed outlining both their potential but also limitations for redistribution.

The first of these aspects pertains to the very definition of cultural heritage. The idea of race, albeit present, is paradoxically rarely acknowledged as a significant one as one might expect in authorising the allocation of the status of cultural heritage (Lixinski 2023, 1361). By centring such an approach, it can question whose cultural heritage is represented and constructed as having an 'inherent' value and consequently is visible and whose lies in the shadows (Lixinski 2024, 155). This is non-White humanity (Lixinski 2024, 155). Resisting so requires nothing less than reimagining non-hegemonic forms of cultural heritage that have long been considered as 'less credible, less worthy and less valuable' (Ruska and Nielsen 2024, 14). Examples both historical and contemporary ones have been provided that confirm these dynamics of inclusion and/or exclusion by what is meant cultural heritage.

Related to this on another level, apart from acknowledging the role of racial grammars and imprints in defining what is and what is not cultural heritage, it can prompt a re-evaluation of historical knowledge for its very own sake but also with ramifications that may extend to the present and the future of how structures of international cultural heritage were and are in their dominant operation 'designed to protect, at the expense of non-white emancipation and redistribution' (Lixinski 2024, 155). One such example is the concept of *cultura nullius*, a term introduced in this article.

The concept of *terra nullius*, which can be translated as to 'no one's land', has been widely discredited by international (see for instance ICJ, Western Sahara, Advisory Opinion of 16 October 1975, par. 80; Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, U.N. Doc. E/CN.4/1989/22, HR/PUB/89/5, 1989, para. 40 (b), 10)[12] and national fora (see for Australia: High Court of Australia, Mabo v Queensland (No 2) ('Mabo Case') [1992] HCA 23; (1992) 175 CLR 1 (03 June 1992) and for Canada: Recital 9 of the Preamble of the United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, C. 14).

An analogous explicit denial of the racist conception of *cultura nullius* and its potential for present and future redistribution has not yet taken place. This is largely because of the replication of the legal standard of 'civilisation' via the dominant operation of the international law principle of intertemporal law. Such an approach would involve the rejection of such racial constructions that denied cultural agency of non-White people and paved the way to transform cultural heritage into cultural commodities ready to be appropriated under its umbrella of legitimacy. Through its normative commitment, this concept can encourage cultural recognition of previously subaltern groups; and may open the door for redistributive justice in relation to 'human remains/Ancestors from colonial contexts'. Race, cultural heritage and law have the potential to effect redistribution. In the case of the *Quilombolas*, the Afro-descendant communities in Brazil conceive of land as central; the Supreme Court recognised it as constituting cultural heritage in 2018 (Articles 68, 215–216 of the Constitution of the Federative Republic of Brazil 1988). While this response is encouraging, it does not go far enough. Control and recognition of territory as cultural heritage are two distinct things (Engle and Lixinski 2021, 869).

At the same time, such an approach has the capacity to interrogate the 'authorised' assumptions that are presented as neutral and objective by offering a degree of scepticism regarding discourses of cultural heritage in international cultural heritage law and heritage studies. Notable examples of this phenomenon affect participation, inclusivity and consultation, as was exemplified by the case of Las Negritas, Puloy de Montecristo. Approaches such as these call for caution, since tokenistic performances – no matter how well-intentioned – necessitate increased scrutiny.

7. Making a fresh start

The present paper has sought to shed light on the relationship between race, cultural heritage and law by providing an overview without any illusion of completeness of what has been termed as the racial regime of international cultural heritage law. Distancing itself from previous approaches that have largely worked in isolation, this article has sailed

through various manifestations of cultural heritage, ranging from the restitution of colonial cultural objects to intangible cultural heritage and monuments associated with slavery and colonialism as well as the protection of cultural heritage during armed conflict.

The preceding discussion has revealed that the interaction between race, cultural heritage and law is not a monolithic phenomenon. Rather, it has been demonstrated that race has historically been explicitly confirmed, with the invention of *cultura nullius* serving as its unquestioned champion. Moving to the contemporary era, the next section illustrated how race is being negotiated today in diverse directions, while the following section underlined how race is disregarded today. Adopting a more critical reading, the last section questioned whether the influence of race is not ongoing in the mind and praxis of international cultural heritage law. Instead, it was submitted that a specific colour is more pervasive than others, with white occupying a pivotal position in the nexus between race, cultural heritage and the law even today.

This is not to say that important developments have not taken place. Caution, however, is needed. True polychromic international cultural heritage law and heritage studies are not yet in sight. To think anew about how these three parameters interact with each other without replicating racial biases is a long overdue challenge. It is hoped that by gaining a more comprehensive understanding of where things currently stand, processes of reimagining post-racial futures will be facilitated. It is submitted that a reorientation of the focus by taking the idea of 'race' seriously can have important implications for both international cultural heritage law and heritage studies. These may pertain to the way cultural heritage is defined, its modes of appropriation as well as discourses around participation, inclusivity and consultation. It is for this reason that this contribution should not be regarded as a conclusion, but a step in the direction of a fresh start.

Notes

1. For the purposes of this paper, the terms 'restitution', 'repatriation' and 'return' are employed interchangeably. For the differences in terminology see further Prott (2009).
2. In this article, the terms 'cultural heritage', 'cultural objects' and 'cultural property' are used interchangeably. For the differences in terminology see further Blake (2000).
3. Reasons given during the 1867/8 Abyssinian Expedition included the Greek and Roman connections of sites of antiquarian interest and the study of early Christian writings and manuscripts – for an overview see Giorgallis (2025), 52–53.
4. A rather similar process has already been noted in the relevant literature, albeit under a different name ('museum effect') (Alpers 1991, 25–26).
5. When it comes to food, examples of mainstream confirmation of White preferences for critics include the 'Gastronomic Meal of the French', which was inscribed on UNESCO's Representative List of Intangible Cultural Heritage in 2010 (UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, November 19, 2010, 5.COM. 6.14) – for a commentary see Cohen (2021), 41–43.
6. In Belgium's French-speaking part, a somewhat similar figure is known as the '*Le Père Fouettard*'.
7. Interestingly, a related case is pending before Namibian Courts over the question of the legitimacy of this Joint Declaration. The claimants, acting on behalf of Nama and Herero, asserted that the Joint Declaration replicates colonial biases due to the exclusion of these groups running as such against Articles 40 (1) and 63 (2) (i) of the Namibian Constitution of 1990 (Swartbooi MP et al. v Speaker of the National Assembly et al., HC-

MD-CIV-MOT-REV-2023/00023, January 20, Swartbooi et al. 2023). The case is still pending before the High Court of Namibia (2024, NAHCMD 602, October 07, 2024; Roodt 2025, 43).

8. It is noteworthy that the draft Preamble of UNESCO's Constitution, in its early stages as formulated during the negotiations, made no explicit reference to racial discrimination. This element was subsequently incorporated (Schabas 2023, 170).
9. See, among others, Article 27 of the 1966 ICCPR, Article 15 of the 1966 ICESCR, Article 1 and 5 of the 1978 Declaration on Race and Racial Prejudice, Article 2, 30 and 31 of the 1989 Convention on the Rights of the Child, Article 17 (1) and 31 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 6, 34, 40 and 76 of the 2001 Durban World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Recital 4 of the Preamble of the 2005 UNESCO Convention Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 30 of the 2006 Convention of People with Disability, Recital 4 and 5 of the Preamble and Article 8 (2) (e) and Article 15 (2) of the 2007 UNDRIP and Recital 4 and 11 of the Preamble of the 2013 CARICOM 10-Point Plan for Reparatory Justice.
10. For the European Union, see the European Parliament Resolution of March 08 (2022), on the Role of Culture, Education, Media and Sport in the Fight Against Racism (2021/2057 (INI)) and for the African Union see Article 22 of the 1981 African Charter on Human and Peoples' Rights (Banjul Charter).
11. As of June 08, 2025, the Dutch Colonial Collections Committee issued advisory recommendations with regard to Indonesia, Sri Lanka, the US (Ysleta del Sur Pueblo, a federally recognised Native American tribe) and Nigeria. Accessed: June 08, 2025: https://committee.kolonialecollecties.nl/publications?size=n_10_n&filters%5B0%5D%5Bfield%5D=information_type&filters%5B0%5D%5Bvalues%5D%5B0%5D=Advice&filters%5B0%5D%5Btype%5D=all.
12. Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, U.N. Doc. E/CN.4/1989/22, February 08, 1989, para. 40 (b), 10: '[t]he concepts of "terra nullius", "conquest", and "discovery" as modes of territorial acquisition are repugnant, have no legal standing, and are entirely without merit or justification to substantiate any claim to jurisdiction or ownership of Indigenous lands and ancestral domains, and the legacies of these concepts should be eradicated from modern legal systems'.

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