

SYMPOSIUM ON WHAT CAN INTERNATIONAL LAW REPAIR?

REPATRIATION AS REPARATIONS

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Introduction

Formerly colonized peoples and their governments have long sought repatriation of cultural heritage taken under the auspices of colonialism. Increasingly, states and museums are acknowledging ethical obligations to undertake such returns.¹ This essay argues that, unless combined with other measures, repatriation represents incomplete reparation of the harms caused by the loss of such heritage. But repatriation alone does serve some reparative function. It can also operate as a necessary initial step enabling further reparative measures. The U.S. Native American Graves Protection and Repatriation Act (NAGPRA) illustrates these dynamics.²

Acquiring cultural heritage was an inherent part of the colonial enterprise. Cultural objects were systematically extracted from colonized communities in a wide variety of ways, places, and times. Colonial authorities seized iconic cultural relics. Anthropologists purchased and stole sacred objects. Military officers looted battlefields. Traders bartered for and bought heritage items. Settlers robbed graves. Museums and private collectors actively sought out cultural heritage from all of these sources.³

The harm done by these cultural takings was both immediate and enduring. Just as the violence of colonialism destroyed cultures and communities, so too did the loss of sacred, political, historical, and ritual objects, contributing to the breakdown of traditions and identities. Museums' continued possession and exhibition of these items can perpetuate these losses, systematically separating formerly colonized peoples from their heritage and extending colonial power dynamics into the present.⁴

Two preliminary notes: In this symposium, Tendayi Achiume, Antony Anghie, and Steven Ratner discuss the availability of international legal claims to reparations for colonialism and related wrongs.⁵ This essay addresses a related but non-identical topic: it takes the possibility of reparations for a particular harm of colonialism—lost cultural heritage—as its jumping-off point and focuses on the effectiveness of repatriation in serving as such reparations.

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¹ Smithsonian Ethical Returns Working Group, *Shared Stewardship and Ethical Returns Policy* 1 (Apr. 29, 2022); Routes to Return, *Understanding the European Museum Landscape*.

² Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–13); Elena Baylis, *Looted Cultural Objects*, 128 COLUM. L. REV. F. 183 (2024).

³ CARSTEN STAHN, *CONFRONTING COLONIAL OBJECTS: HISTORIES, LEGALITIES, AND ACCESS TO CULTURE* (2023).

⁴ Victor Ehikhamenor, Opinion, *Give Us Back What Our Ancestors Made*, N.Y. TIMES (Jan. 28, 2020); DAN HICKS, *THE BRITISH MUSEUMS: THE BENIN BRONZES, COLONIAL VIOLENCE AND CULTURAL RESTITUTION* (2020).

⁵ Tendayi Achiume, *Race, Reparations, and International Law*, 119 AJIL 397 (2025); Antony Anghie, *Some Reflections on Reparations: Or the Injustices of Reparations*, 119 AJIL 423 (2025); Steven Ratner, *Reparations for Colonialism Beyond Legal Responsibility*, 119 AJIL 507 (2025).

Also, while the use of these terms in the literature varies,⁶ this essay uses “restitution” to refer to a legal category of reparations and “repatriation” and “return” to denote restoring items to their original communities or states.

Evolving Concepts of Reparations

In one sense, the loss of cultural heritage is a loss of property. Through this lens, repatriation of cultural heritage to formerly colonized peoples is the most direct and complete form of reparations for the wrongful taking of that heritage.⁷ Restitution of property to its original owner has traditionally been recognized as the preferred form of reparations, when possible.⁸ It most fully achieves the core aim of reparations as originally formulated by the Permanent Court of International Justice in the *Chorzów Factory* property expropriation case: to “reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁹

However, the value of cultural heritage is not predominantly in its function as property, but rather in its cultural function for a community. As such, the harm done by taking cultural heritage is not primarily a loss of property, but rather a loss of culture and community identity. Further, this harm was not inflicted solely at the time of the original taking, but has been ongoing since, extended by the continued possession of this heritage over the objections of those affected. This can be understood as an infringement of a community’s human rights to access its culture and engage in cultural life.¹⁰

For such losses, restitution is still often a desired form of reparations. Formerly colonized peoples have regularly demanded repatriation as their desired redress. However, while restitution is an important reparations measure for cultural losses, it is often an insufficient one. The losses caused by the acquisition and retention of cultural heritage over the objections of formerly colonized peoples are multifaceted, complex, and intergenerational.

Addressing these harms requires a more expansive concept of reparations than one focused on redressing monetary or property harm. Instead, reparations must be understood expansively in four senses: (1) as consisting of robust and varied measures; (2) as pursuing a future-oriented aim as well as addressing the past and present; and (3) as integrated into a directed, comprehensive process; with (4) a central role for the affected formerly colonized peoples.

- (1) *Robust and varied measures*: Traditional forms of reparations like restitution and monetary compensation serve as effective compensation for some harms.¹¹ But grave violations of international human rights can cause non-monetary and collective harms that require multifarious forms of reparations.¹² Accordingly, human rights reparations have come to encompass an extensive set of measures including rehabilitation services; guarantees of non-repetition such as government reforms; and a sweeping category of satisfaction, which includes apologies, truth-telling, and other collective, non-material mechanisms.¹³ This

⁶ Ciraj Rassool & Victoria Gibbon, *Restitution Versus Repatriation: Terminology and Concepts Matter*, 184 AM. J. BIOLOGICAL ANTHROPOLOGY e24889 (2023); German Lost Art Foundation, *Returns*.

⁷ But see Pierre Losson, *Reparation or Perpetuation? Physical and Symbolic Violence in Restitutions of Cultural Heritage*, ITEMS (June 7, 2022).

⁸ *Factory at Chorzów* (Ger. v. Pol.), *Judgment, Merits*, PCIJ (Series A) No. 17, at 47 (Sept. 13, 1928).

⁹ *Id.*

¹⁰ PATTY GERSTENBLITH, *CULTURAL OBJECTS AND REPARATIVE JUSTICE: A LEGAL AND HISTORICAL ANALYSIS* 251 (2023).

¹¹ *Factory at Chorzów*, *supra* note 8, at 47.

¹² Theodoor van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4.Sub.2/1993/8 (1993).

¹³ GA Res. 60/147, *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, at 7, para. 18 (Dec. 16, 2005); see also *Articles on Responsibility of States for Internationally Wrongful Acts*, Arts. 34–38 (2001).

offers a comparatively robust toolkit for addressing collective and non-monetary harms more directly and fully than restitution or monetary payments alone.¹⁴

- (2) *Future-oriented aims*: The human rights context also demands a transformed, future-oriented purpose. The core aim established in the *Chorzów Factory* case of reinstating the situation that would otherwise have existed is rarely feasible for human rights violations, many of which are by their nature irreparable.¹⁵ Instead of taking the past, pre-harm situation as the touchstone, a “forward-looking perspective”¹⁶ instead takes the present situation with its irreparable harm as the starting point. It aims to “ameliorat[e]” and “rebuild[]” and thereby to benefit present and future generations.¹⁷ It thus undertakes a repair, rather than an erasure, of the harm.

For systemic violations affecting entire communities, like loss of cultural heritage under colonialism, the focus of reparations must pivot from focusing on particular injuries to particular victims, to attending also to public, collective harms, both within the affected community and in the broader society.¹⁸ Addressing such harms requires a shift from thinking of reparations as an immediate outcome to thinking of reparations measures as part of an ongoing process. It also requires a central role for the affected community.

- (3) *Integration into directed, comprehensive processes*: Scholars have argued for integrating reparations measures into processes such as transitional justice,¹⁹ restorative justice,²⁰ and social healing through justice.²¹ Through such processes, the several kinds of reparations measures discussed above can be purposefully sequenced and linked so that, for example, the non-material and collective components (such as truth-telling, apologies, and structural changes to ensure non-recurrence) can provide meaning to the material components (tangible benefits like restitution or compensation). In turn, the tangible benefits can concretize and implement the immaterial and collective components.²² Such processes can also identify and address the harms that systemic human rights violations impose on society-wide civic trust and rule of law.²³
- (4) *Central role for affected communities*: As Marie-Louise Fehun Aren, Nina Bries Silva, and Tamara Thermitus discuss in this symposium, reparations processes also require meaningful engagement among the beneficiary communities, government, and society. This engagement facilitates mutual understanding, promotes reform and reconciliation, and enables development of tailored reparations initiatives.²⁴ In the

¹⁴ ERIC K. YAMAMOTO, *HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY* 68 (2021).

¹⁵ OHCHR, *Rule of Law Tools for Post Conflict States: Reparations Programs*, at 10, UN Doc. HR/PUB/08/1 (2008); van Boven, *supra* note 12, para. 131.

¹⁶ Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS*, 451, 465–66 (Pablo de Greiff ed., 2006).

¹⁷ YAMAMOTO, *supra* note 14, at 66–67.

¹⁸ *Id.* at 64–66.

¹⁹ Fabián Salvio, *Transitional Justice Measures and Addressing the Legacy of Gross Violations of Human Rights and International Humanitarian Law Committed in Colonial Contexts*, at 1, UN Doc. A/76/180 (July 19, 2021); Alessandro Chechi, *The Return of Cultural Objects Displaced During Colonialism: What Role for Restorative Justice, Transitional Justice and Alternative Dispute Resolution?*, 6 INT’L J. RESTORATIVE JUST. 95 (2023).

²⁰ GERSTENBLITH, *supra* note 10, at 249–52; Chechi, *supra* note 19.

²¹ YAMAMOTO, *supra* note 14, at 30.

²² *Id.* at 9; de Greiff, *supra* note 16, at 461.

²³ De Greiff, *supra* note 16, at 460–67.

²⁴ YAMAMOTO, *supra* note 14, at 49–71; Marie-Louise Fehun Aren, *Advancing Legal Recognition and Community-Led Reparations for Indigenous Rights in Combating Climate Change and Environmental Degradation*, 119 AJIL UNBOUND __ (forthcoming 2025); Nina Bries Silva, *Territory as*

cultural heritage context, scholars and policymakers have focused on the need to shift the balance of power toward beneficiary communities, so as to avoid replicating colonial power dynamics.²⁵

Thus, in the cultural heritage context, restitution is necessary to but less than full reparations for the intergenerational harms of lost culture and community. A more complete form of reparations would integrate repatriation and other measures into reparative processes centering the perspectives of the affected communities and aimed at their future well-being.

The NAGPRA Example

NAGPRA offers a valuable case study of how repatriation serves as reparations in practice. It affirms that restitution alone is indeed too limited a remedy to address all the harms produced by loss of cultural heritage. But it also suggests that even a reparations program consisting solely of restitution has some reparative effect and may enable additional reparative initiatives.

NAGPRA requires U.S. federal agencies and federally funded institutions to repatriate Native American human remains (“ancestors”) and cultural objects to associated descendants, federally recognized tribes, and Native Hawaiian organizations.²⁶ As in other contexts, cultural heritage has been illicitly acquired from Native communities in many ways, including grave robbing, salvage anthropology, unconsented archaeological digs, theft, and unauthorized sales. Congress enacted NAGPRA in 1990 in response to decades of advocacy by Native leaders. As in other contexts, the primary redress sought by the affected communities was repatriation.²⁷

NAGPRA was not characterized as reparations. Instead, it was designed to function predominantly as a standalone restitution measure to remedy illicit takings of cultural property and ancestors. But it also aspired to achieve some broader social reparative effects by improving the relationships between museums and Native communities.²⁸

Assessed solely as a form of restitution, NAGPRA has achieved significant success in returning cultural property and ancestors to source communities. More than two million cultural objects have been returned, as well as more than 100,000 ancestors.²⁹ Even so, there are fundamental gaps in its framework and implementation. The way that eligible claimants and regulated collectors are defined excludes some significant collections and communities.³⁰ While Congress intended NAGPRA to be fully implemented within five years, compliance is still in progress thirty-five years later.³¹

When considered as reparations for all the relevant losses, NAGPRA repatriations do resolve the continued disassociation of tribes and Native Hawaiian organizations from their cultural heritage and ancestors, which is

Victim: Rethinking the Right to Reparation Through Awá Indigenous Territories, 119 AJIL UNBOUND 140 (2025); Tamara Thermitus, *A Canadian Experience of Reparations: Indian Residential School Settlements*, 119 AJIL UNBOUND — (forthcoming 2025).

²⁵ Advisory Committee on the National Policy Framework for Colonial Collections, *Colonial Collection: A Recognition of Injustice* (2021); STAHN, *supra* note 3, at 525.

²⁶ *Native American Graves Protection and Repatriation Act*, *supra* note 2, § 3005.

²⁷ KATHLEEN S. FINE-DARE, *GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA* 47–118 (2002).

²⁸ Senate Select Committee on Indian Affairs, *Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony*, S. Rep. No. 101-473 (1990) [hereinafter Senate Report].

²⁹ National NAGPRA Program, National Park Service, *Fiscal Year 2023 Report*, at 2–3 (2023).

³⁰ *Native American Graves Protection and Repatriation Act*, *supra* note 2, §§ 3001, 3005(a).

³¹ Chip Colwell-Chanthaphonh, *The Work of Repatriation in Indian Country*, 71 HUM. ORG. 278, 285–86 (2012).

significant to their cultural and community well-being. But NAGPRA repatriations do not redress all the associated intergenerational cultural and communal harms, like loss of interrelated intangible cultural heritage, diminished community interconnection, and spiritual harms from disinterment of ancestors and mishandling of sacred items. A survey of tribal repatriation representatives indicated diverse perspectives on whether NAGPRA repairs cultural harms. Some considered that repatriation corrected a wrongdoing but served no further reparative function. Others reported that repatriations provided some additional remedy, for example, by “reconnect[ing] broken cultural links by bringing together potlatch songs and objects.”³² Finally, NAGPRA’s repatriation process itself has also imposed new harms on its intended beneficiaries, such as suffering at witnessing the desecration of ancestors and heritage³³ and disclosure of confidential cultural information to support repatriation requests.³⁴

Many of these limitations on NAGPRA’s effectiveness are inherent in its design. As considered against the four characteristics of a comprehensive reparations mechanism identified above, NAGPRA only partially fulfills some of these elements:

NAGPRA’s reparations measures: NAGPRA’s core measure is restitution. It also offers limited guarantees of non-recurrence by protecting cultural items and ancestors on federal and tribal land.³⁵ It does not offer any other forms of reparations, such as satisfaction or monetary compensation.

NAGPRA’s aims: In addition to its core purpose of righting past and present-day wrongs through restitution, NAGPRA has the forward-looking aim of facilitating better understanding and relationships between museums and Native communities.³⁶ Notably, this aim is focused on American society broadly, not on improving the well-being of Native communities themselves. In practice, participants have reported both negative and positive interactions and relational impacts from engaging in NAGPRA repatriation processes.³⁷

NAGPRA’s lack of integration into reparative processes: NAGPRA repatriations are not embedded in a broader public process reckoning with the looting of Native ancestors and cultural heritage or the associated failures of rule of law. While Congress held legislative hearings, there was not a comprehensive public factfinding or report.³⁸ The law itself does not include a statement of purpose or findings of fact.³⁹ Nor are NAGPRA repatriations integrated in a directed, purposefully sequenced process with other reparations measures.

Role of Native communities in NAGPRA: One of the intended functions of NAGPRA’s consultation requirement is a shift of power from museums to Native communities. Museums are required to consult with communities, defer to their knowledge, and return regulated heritage upon request.⁴⁰ However, museums retain decision-

³² Chip Colwell, *Can Repatriation Heal The Wounds Of History?*, 41 PUB. HISTORIAN 90, 107–08 (2019); Colwell-Chanthaphonh, *supra* note 31, at 282b–84.

³³ Eric Hemenway, *Finding Our Way Home*, in ACCOMPLISHING NAGPRA 83 (Sangita Chari & Jaime M.N. Lavalley eds., 2013); Colwell-Chanthaphonh, *supra* note 31, at 281; Colwell, *supra* note 32, at 95, 105–06.

³⁴ Chip Colwell, *Curating Secrets: Repatriation, Knowledge Flows, and Museum Power Structures*, 56 CURRENT ANTHROPOLOGY S263, s270 (2015).

³⁵ Native American Graves Protection and Repatriation Act, *supra* note 2, §§ 3002, 3005.

³⁶ Senate Report, *supra* note 28, at 4.

³⁷ Hemenway, *supra* note 33, at 88–93; D. Rae Gould, *NAGPRA, CUI and Institutional Will*, in THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 135, 141–46 (Jane Anderson & Haidy Geismar eds., 2017).

³⁸ Senate Report, *supra* note 28.

³⁹ Native American Graves Protection and Repatriation Act, *supra* note 2, §§ 3001–13.

⁴⁰ *Id.*, §§ 3003–05.

making authority. In practice, museums sometimes use that authority to protect their collections. This aspect of NAGPRA has been strongly criticized by tribal and Native Hawaiian organization representatives.⁴¹

Thus, as designed and in practice, NAGPRA repatriations represent considerably less than a complete, comprehensive reparations mechanism. But while NAGPRA returns are not sufficient, they are nonetheless characterized by participants as necessary. They end the ongoing cultural harm of the separation of ancestors and cultural objects from their communities. And addressing other associated cultural and community harms requires repatriation as a first step.⁴²

As implemented, NAGPRA has catalyzed additional reparative processes and outcomes beyond those mandated by the statute. Repatriation of cultural heritage has enabled tribes and Native Hawaiian organizations to pursue social healing by reburying repatriated objects, reintegrating them into community activities, and using them for education or memorialization.⁴³ Some statutorily mandated interactions between museums and communities have led to voluntary collaborations in education, tribal museums, and non-tribal museum exhibits.⁴⁴ NAGPRA repatriations have also shifted other museum practices, for example, by inspiring best practices for repatriation of archival materials⁴⁵ and transforming museum standards of care for other Indigenous items.⁴⁶

Conclusion

As illustrated by NAGPRA, repatriation of cultural heritage taken under the auspices of colonialism to formerly colonized peoples functions as appropriate but incomplete reparations for the loss of that heritage. Restitution is the most effective way of remedying a loss of property. However, the harms caused by the taking and continued holding of cultural heritage from formerly colonized peoples are not only or even primarily the loss of property, extending to harms to culture and community identity. Repatriation does not directly or fully redress these harms. Instead, this requires adopting a more expansive approach to reparations. But repatriation of cultural heritage can also enable other reparative processes, offering the opportunity for communities to effect social repair, for museums to reimagine their roles, and for positive transformation of interrelated practices and relationships.

⁴¹ Hemenway, *supra* note 33, at 89; Courtney Cottrell, *NAGPRA's Politics of Recognition*, 44 AM. INDIAN Q. 59, 75–78 (2020); Gould, *supra* note 37, at 144–47.

⁴² Colwell, *supra* note 32, at 104–06.

⁴³ *Id.* at 93, 107.

⁴⁴ Jan Bernstein, *The Impact of NAGPRA on Communities*, in *ACCOMPLISHING NAGPRA*, *supra* note 33, at 278–79; Wendy Giddens Teeter, Desiree Martinez & Dorothy Lippert, *Creating a New Future: Redeveloping the Tribal-Museum Relationship in the Time of NAGPRA*, 28 INT'L J. CULTURAL PROP. 201, 205–06 (2021).

⁴⁵ *Protocols for Native American Archival Materials* (2007).

⁴⁶ Teeter, Martinez & Lippert, *supra* note 44, at 205.