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"*Restitution of Cultural Property by Former Colonial Powers to Previous Colonies under International Law*"

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- підтверджую, що надана мною електронна версія роботи є остаточною і готовою до перевірки;
- згоден/ згодна на перевірку моєї роботи на відповідність критеріям академічної доброчесності, у будь-який спосіб, у тому числі порівняння змісту роботи та формування звіту подібності за допомогою електронної системи Unicheck.
- даю згоду на архівування моєї роботи в репозитаріях та базах даних університету для порівняння цієї та майбутніх робіт.

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АНОТАЦІЯ

Ця магістерська робота має на меті проаналізувати міжнародно-правове регулювання питання повернення культурних цінностей колишніми колоніальними державами до країн - колишніх колоній.

Для цілей цього аналізу ми визначили та проаналізували кілька потенційних правових підстав для такого повернення (реституції). Детальні висновки щодо юридичної обґрунтованості виділених підстав слідують за кожним з розділів цієї роботи, тому ця анотація узагальнює їх лише коротко.

У першому розділі ми проаналізували три основні юридичні підстави для реституції, які однаково стосуються всіх культурних цінностей, незалежно від обставин їх набуття:

1) реституція культурних цінностей з метою забезпечення права на самовизначення колишніх колонізованих народів та права їхніх громадян на участь у культурному житті як права людини;

2) правонаступництво нових незалежних держав щодо власності над їхніми культурними цінностями;

3) повернення культурних цінностей за міжнародно-правовим обов'язком співробітництва, в тому числі у питаннях культури.

Щодо першої підстави, можна сказати, що право на самовизначення набуло значного розвитку в практиці міжнародних інституцій, зокрема, органів ООН, але його культурний елемент залишається нечітким. Що стосується другої підстави, то існує окремий корпус норм щодо власності в рамках міжнародного права з питань правонаступництва, але робота Комісії міжнародного права ООН щодо формування норм з правонаступництва держави у сфері культурних цінностей зіткнулася з величезним протистоянням західних держав, про що свідчить той факт, що спеціалізована Віденська конвенція Віденська Конвенція про правонаступництво держав щодо державної власності, державних архівів і державних боргів 1983 р. так і не набрала чинності.

Третя підстава, що спирається на зобов’язання співробітництва, продовжує постійно еволюціонувати, отже можна сказати, що нові незалежні держави мають зосередити свої подальші зусилля на розвитку змісту цього зобов’язання. На цей момент, закріпленню цього обов’язку в міжнародному праві, очевидно, не вистачає юридично зобов'язуючих документів (конвенцій чи договорів).

У другому розділі ми проаналізували механізм реституції, передбачений міжнародним гуманітарним правом (надалі – МГП). Таким чином, цей аналіз стосується лише тих культурних цінностей, які були насильно вилучені в контексті збройних конфліктів. Для такого аналізу ми застосували подвійний підхід. Перший складається з аналізу матеріальних норм МГП і покликаний відповісти на три основні питання: 1) чи застосовувалось МГП, яке існувало на той час, до колонізованих племен та етнічних груп? 2) чи передбачали норми МГП охорону культурних цінностей на той час, коли мали місце випадки мародерства? 3) чи обставини вилучення культурних цінностей під час збройних вторгнень колоніальних військ потрапляли в рамки поняття мародерства?

Другий підхід полягає у розгляді процесуальних аспектів звернення відповідної вимоги до компетентної міжнародної установи шляхом аналізу концепції триваючого порушення, що дозволяє обійти темпоральні обмеження юрисдикції цієї установи.

У третьому розділі ми розглянули зобов’язання фізично захищати культурні цінності як частину Світової культурної спадщини, за допомогою яких колишні колоніальні держави можуть обґрунтувати свою відмову повернути культурні цінності країнам їх походження. Хоча зобов'язання фізично захищати культурні цінності існує, і щодо цього є велика кількість різноманітних правових норм, державна практика не є однорідною навіть серед західних держав, оскільки деякі з них схвалювали певні повернення цінностей навіть у країни з численними випадками неналежних музейних умов.

Також, ми ретельно проаналізували дві істотні процесуальні перешкоди для нових незалежних держав для передачі справи до Міжнародного Суду ООН (надалі – Суд). Перша – це обмеження юрисдикції *ratione temporis*, покладеної на Суд односторонньою заявою відповідних західних держав. Ми встановили два можливих шляхи вирішення цієї проблеми: 1) аргументуючи, що сам спір виник в останні роки, і зазначаючи факти, що привели до нього, можливі відмови колишніх колоніальних держав задовольнити вимоги про реституцію; 2) стверджуючи, що оскільки позбавлення культурних цінностей у колоніальному контексті було триваючим порушенням, тому хоча воно й відбулося до визнання цими державами юрисдикції Суду, воно продовжувало діяти і після цього, а отже цей факт надає Суду компетенцію розглядати спір.

Друга перешкода полягає в оспорюванні юридичного інтересу (дієздатності) нових незалежних держав заявляти вимогу про реституцію, оскільки вони не є безпосередніми жертвами ймовірного порушення, що мало місце у минулому. Отже, їм слід довести успадкування права на відшкодування шкоди від дійсних жертв цих порушень. Це становить окремий виклик для країн – колишніх колоній, оскільки існування правосуб'єктності племен та етнічних груп на момент колонізації заперечується значною частиною правової доктрини та частиною судової практики.

З метою загального висновку до проведеного аналізу можемо стверджувати, що не існує чіткого і визнаного усіма правового механізму, який передбачав би юридично обов'язкову реституцію культурних цінностей колишніми колоніальними державами до країн їх походження, вилучених та перевезених протягом колоніального періоду . З іншого боку, вимоги зацікавлених держав не є абсолютно безпідставними, і існує багато правових норм, які можуть гіпотетично перетворитись на чітке і загальновизнане зобов'язання колишніх колоніальних держав повернути вилучені культурні цінності до країн їх походження.

CONTENT OF THE THESIS

TABLE OF ABBREVIATIONS

Institutions, organizations and conventional instruments:

ECtHR : European Court of Human Rights

G.A.U.N. : General Assembly of the United Nations

GDP : Gross Domestic Product

HRC : Human Rights Committee

ILC : International Law Commission

ICOM : International Council of Museums

ICJ : International Court of Justice

Court : International Court of Justice / Permanent Court of International Justice, European Court of Human Rights (contextually);

ICTY : International Criminal Tribunal for Former Yugoslavia

ICRC : International Committee of the Red Cross

IHL : International Humanitarian Law

PCA : Permanent Court of Arbitration

PCIJ: Permanent Court of International Justice

SC: Security Council

UN : United Nations

UNESCO : United Nations Educational, Scientific and Cultural Organization

Publications :

éd. : Edition

Latin phrases and other abbreviations:

art. : Article

cl. : Clause

Ibid. : Cited in the previous source

p. : Page

para. : Paragraphe(s)

pp. : Pages

Vol. : Volume

See. : Please see for further reading;

INTRODUCTION

In 2017, French President Emmanuel Macron said: "I cannot accept the fact that much of Africa's cultural heritage is kept in France, there is no viable excuse for that."[1] This speech delivered by the Head of state, of one of the world's largest colonial empires at the time, is still seen as a major step forward in the persistent attempts of many African and Asian countries to reclaim cultural values exported from their territories by European colonial powers during the nineteenth and first half of the twentieth centuries.

However, the question that arises before all stakeholders is whether the process of restitution (repatriation) of cultural values can depend only on the good political will of the leadership of certain states, which can easily change with the change of political government, as in any democracy? From the beginning of the decolonization process (1960s) until now, the result of the demands of the former colonies, and now independent states and full members of the international community, to return cultural values depended solely on the voluntary decision of the former metropolis and on the results of bilateral negotiations. They were the negotiations where moral, political or historical aspects superseded the legal one.

It gets obvious that such a model for solving this complex historic problem, which still affects the agenda of international relations, stability, peace and security of the international community, cannot depend only on the will of one party. In this regard, representatives of interested states, as well as researchers from many countries around the world asked a logical question: Does modern international law provide for the obligation of states - former colonial empires to return cultural property exported during their colonial ruling? If yes, what are the conditions of such obligation?

Thus, the acute interest in this matter is explained by constantly increasing attention of the international community to this problem due to increasing demands of former colonies to their former metropolises to return (repatriate) cultural property

[1] *Discours d'Emmanuel Macron à l'Université de Ouagadougou* [Online] Elysee.fr.

exported during the colonial rule of the second half of the twentieth - first half of the twentieth century.

The global question of the present analysis is whether there is a legal obligation in international law for the former colonial empires to return cultural property to the former colonies. In order to respond to this quest, we shall establish what is (are) the international legal basis that give(s) rise to this obligation? What are the conditions for the emergence and implementation of such an obligation? What is the possible mechanism or procedure for implementing such an obligation with the involvement of subjects of international law and international legal institutions?

The purpose of this analysis is to establish whether modern international law provides for the above-mentioned legal obligation and what are the ways to implement it, developed by the practice of international judicial institutions or proposed by doctrine.

This purpose can be achieved via the following steps:

- examining the practice of member states of the international community of resolving disputes related to the claims for return of cultural property to the countries of origin;

- identifying and analyzing legal doctrine (books and articles) of recognized authors and scholars of different countries and different legal systems of the world;

- determining and analyzing the existing conventional (treaty) instruments of international law related to treatment and circulation of cultural property;

- establishing international organizations and their branches (bodies, institutes, agencies, commissions, committees) competent in the field of decolonization, protection and restitution of cultural values (cultural heritage) and analyzing their acts on these matters;

- formulating ideas and suggestions regarding crystallization of an international legal custom as a source of international law in accordance with Art. 38 of the Charter of the International Court of Justice;

- examining and analyzing the decisions of international judicial institutions in cases related to the return (restitution) of cultural property;

- analyzing the activities of international bodies and institutions (in particular, competent commissions, committees, UN agencies and UNESCO) regarding settlement of disputes concerning the return of cultural property;

- offering conclusions and answers to the certain research questions by relying on the norms of international law and corresponding practice of the states.

The subject-matter of this analysis consists of international legal relations of the subjects of international law in the field of decolonization, regulation of treatment and circulation of cultural values, protection and maintenance of both national and world cultural heritage.

The focus of the present analysis is made upon the international legal regulation of the issues of return of cultural values by the former colonies at the present stage of development of the public international law.

For the purpose of this master thesis, we employed various methods of legal research and analysis, particularly the following ones:

- anthropological method (in terms of the fundamental (natural) human right to appreciate the cultural heritage as a component of the human cultural identity).

- hermeneutic method (in terms of interpretation of unilateral acts of subjects of international law – regulations, court rulings, statements and declarations of authorized representatives of states – to establish the recognition of the return of cultural property as legally binding behavior (*opinio juris* element of an international custom).

- dialectical method (in terms of equal and impartial consideration of legal arguments of both interested parties preparing conclusions to the research questions).

- historical method (in terms of research and analysis of historical events and processes of the XIX-XX centuries with regard to restitution of cultural values in order to analyze the evolution of international law).

- synthesis & analysis method (in terms of crystallization of international custom, consisting of two elements: (i) practice of states and (ii) evidence of recognition of such practice as rules of law (*opinio juris*) through the initial separation and separate analysis of these elements with their subsequent synthesis within an international custom).

- comparative method (in terms of comparing domestic legal rules concerning return (restitution) of cultural values in the legal systems of different countries).

- systematization method (in terms of constructing a hypothetical mechanism of return of cultural values through a combination of elements of the obligation as such and the appropriate legal method of its implementation).

- legally formal method (in terms of determining the hierarchical relationship between the rules of international law, the rules of conflicts of legal norms (general and special ones, previous and following ones, etc.) and the application of general rules and principles of international law).

- functional method (in terms of defining legal importance (functions) of various international organizations and their bodies (UN, UNESCO, etc.) and their cooperation in the matters concerned).

This thesis is the result of thorough analysis of extremally diverse legal sources. During its preparation, we examined United Nations Conventions, UNESCO Conventions, conventions adopted under the auspices of other international organizations, in particular, in the field of international humanitarian law, treaties and bilateral agreements starting from 1815. We analysed the case-law of international judicial institutions: International Court of Justice and its predecessor – Permanent Court of International Justice, appellate body of the World Trade Organization, regional courts like European Court of Human Rights, rulings of the international permanent and specialized tribunals; and the most famous decisions of national courts. We researched among the documents of international organisations and its bodies: General Assembly of the UN, Security Council, Economic and Social Council, UNESCO and related institutions, International Law Commission, Human Rights Commission, Committee on Economic, Social and Cultural Rights, Council of Europe and of various International conferences starting from 1815; and some national laws. Obviously, we draw the inspiration and the guidelines for our analysis from the legal doctrine: a great number of books and articles starting from the works of the scholars of XVII centaury, plus individual opinions of judges of international courts. Inevitably, we relied on various

electronic sources and electronic mass media in order to support our analysis with the latest cases concerning its scope.

CHAPTER 1. OBLIGATION TO RESTITUTE CULTURAL PROPERTY DISPLACED DURING THE COLONIALISM BY VIRTUE OF INDEPENDENCE OF THE PREVIOUSLY COLONIZED TERRITORIES.

Sub-Chapter 1.1 Restitution of cultural objects as a corollary of the right of a people to self-determination

In the aftermath of the World War II, a number of international legal instruments,[2] starting with the UN Charter,[3] has begun to consolidate the right of peoples to self-determination, and to raise this right to a rank of a fundamental one.[4] Naturally, among its beneficiaries there were peoples inhabiting UN non-self-governing territories, the administration of which had to be conducted with due regard to the primary character of the interests of the inhabitants of these territories.[5]

Article 1 common to both International Covenants of 1966 states that by virtue of that right all peoples freely pursue their, among others, cultural development.[6] The identical scope of this right is shaped by the 1960 Declaration on the granting of independence to colonial countries and peoples,[7] the one that attributed customary character to this right.[8] It has a long history (dating back to the Covenant of the League of Nations of 1919 at least) and has gained a progressive character according to the Court.[9]

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[2] G.A.U.N., A/RES/637(VII) (1952); G.A.U.N., A/RES/738(VIII) (1953); G.A.U.N., A/RES/1188(XII) (1957); G.A.U.N., A/RES/2625(XXV) (1970);
[3] United Nations Charter, 1945, art. 1 (1), 55;
[4] ICJ, Advisory opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* para. 144;
[5] United Nations Charter, 1945, art. 73; ICJ, Advisory opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* paras. 146-148, 160;
[6] International Covenant on Civil and Political Rights, 1966, art. 1; International Covenant on Economic, Social and Cultural Rights, 1966, art. 1; HRC, *Report to the Economic and Social Council regarding the eight session of the Commission*, E/CN.4/669 (1952), paras. 20-74; HRC, *Report of A. Cristescu*, E/CN.4/Sub.2/404 (1981), para. 599;
[7] G.A.U.N., A/RES/1514(XV) (1960), cl. 2; ICJ, Advisory opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* para. 150;
[8] ICJ, Advisory opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, para. 152;
[9] ICJ, Advisory opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* p. 16; ICJ, Advisory opinion of 16 October 1975, *Western Sahara*, p. 12; ICJ, Judgment of 30 June 1995, *East Timor (Portugal v. Australia*), p. 90; ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*, p. 136; ICJ, Advisory opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, para.142.

For this purpose, cultural development foresees the right of peoples to restore, to appreciate and to enrich their cultural heritage.[10] To this end, international law fails up to these days to give a clear and legally binding answer to the question of what does constitute a nation's cultural heritage, making it up to the states to freely define criteria of belonging to a cultural heritage. [11] Consequently, the states have assumed the task and empowered themselves to declare different items as belonging to national cultural heritage. For example, Cuba vests this function to its Ministry of Culture,[12] the Republic of South Africa outlines categories of national "estate" in the provisions of its National Heritage Resources Act of 1999 and entrusts its Heritage Resources Agency to administer admission to these categories,[13] similar lists can be found in the Australian,[14] Belgium,[15] French,[16] and Chinese[17] legislation,

Moreover, while the right to self-determination is a collective one, possession of cultural property of the colonized peoples by the descendants of the colonizers has individual human rights implications. Specifically, the issue concerns the right of an individual to participate in cultural life of their people as guaranteed by Article 15 of the International Covenant on Economic, Social and Cultural Rights (also "**ICESCR**"). [18] The Committee on Economic, Social and Cultural Rights, a conventional body of this Covenant, expressed that the access to the cultural life shall be financially and physically feasible.[19] Moreover, this right brings human dignity at stake, since meaningful participation in cultural life allows everyone to shape their identity and to occupy a place in a society and its history. [20] Naturally, this right would be meaningless

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[10] HRC, *Report of A. Cristescu*, E/CN.4/Sub.2/404 (1981), para. 599; G.A.U.N., A/RES/3281(XXIX) (1974), Art. 1; G.A.U.N., A/RES/3246(XXIX) (1974), p. 55;
[11] Bories, C. (2011). *Le patrimoine culturel en droit international …*, pp. 432-433
[12] Law on Protection of Cultural Heritage (1977), Cuba, Art. 1;
[13] National Heritage Resources Act (1999), South Africa, parts. 1 and 2 of Chapter I;
[14] Protection of Movable Cultural Heritage Act (1986), Australia, cl. 7, Division 1, Part II of the cl. 7, Division 1, Part II;
[15] Decree related to the conservation and protection of the heritage (1999), Belgium, Art. 5;
[16] Code of Heritage (1999), France, Art. L111-1;
[17] Law on Protection of Cultural Relics (1982), China, Art. 2;
[18] International Covenant on Civil and Political Rights, 1966, Arts. 1(1), 15(1); G.A.U.N., A/RES/217(III) (1948), Art. 27;
[19] CESCR, *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights),* E/C.12/GC/*21* (2009) para. 16(b);
[20] CESCR, *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights),* E/C.12/GC/21 (2009) para. 1; HRC, Report of the independent expert in the field of cultural rights, Farida Shaheed, A/HRC/17/38 (2011), para. 20; G.A.U.N., A/73/227, (2018), para. 13;

if its proclamation were no more than political manifesto of purely theoretical significance without real practical effect, especially given that it is closely tied with the right to education by the virtue of possibility to transmits values, traditions, religious beliefs, languages and other cultural attributes, not to mention its close link to the right to self-determination which is main focus of the current sub-chapter. [21]

To the same end, the right of peoples to development, tightly linked to the right to self-determination, presupposes the exercise of full sovereignty over all kinds of national wealth.[22]

In this regard, restitution of cultural property is deemed to be a rightful way to fulfil the right to self-determination and the right to cultural development stemming from it.[23] One can argue about a rule of customary international law which is being formed and establishes that restitution of items presenting cultural value is a due form of satisfying the right of a people to self-determination. As defined by Article 38 of the Statute of the ICJ, an international custom is evidenced by a general practice accepted as law.

Firstly, the state practice has been generalizing since the first vague of declarations of independence of African and East Asian States in 1960-70s. For example, in 1970 Belgium addressed the requests of Congo and signed a treaty with it stipulating a transfer of certain ethnographic and art articles subsequently exposed in the Institute of the National Museum of Zaire.[24] This act was followed by restitution of nearly a thousand art objects of popular culture between 1977 and 1979.[25] In 1977 the Netherlands restituted to Indonesia a bunch of royal belongings of huge cultural value.

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[21] International Covenant on Civil and Political Rights, 1966, Arts. 13-14; CESCR, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21 (2009) para. 2;

[22] G.A.U.N., A/RES/41/128 (1986), art. 1; G.A.U.N., A/RES/626(VII) (1952); G.A.U.N., A/RES/1803(XVII) (1962); G.A.U.N., A/RES/2158(XXI) (1966); G.A.U.N., A/RES/2386(XXIII) (1968); G.A.U.N., A/RES/2692(XXV) (1970); ECOSOC, E/RES/1737(LIV) (1973); ECOSOC, E/RES/1956(LIX) (1975);

[23] G.A.U.N., A/9330 (1973), para. 18; G.A.U.N., A/RES/3187(XXVIII) (1973); G.A.U.N., A/31/197 (1976); G.A.U.N., A/31/111 (1976), para. 62; G.A.U.N., A/33/157 (1978), para. 56;

[24] Geluwe, H. (1979). *Belgium's contribution to the Zairian cultural heritage*, p. 35; *Denmark to Iceland. A Case without Precedence: Delivering Back the Islandic Manuscripts 1971-1997* in the *68th IFLA Council and General Conference*. [Online]. International Federation of Library Associations.;

[25] Geluwe, H. (1979). *Belgium's contribution to the Zairian cultural heritage.*, pp. 32-38.

[26] In 2002 and 2008, Italy returned the Venus of Cyrene to Libya, shipped to Italy in 1913, and the Obelisk of Axum to Ethiopia, expediated in 1937.[27] In 2007, the United Kingdom sent the human remains of 17 aborigines of Tasmania and nearly twenty Maori tattooed heads to the New Zealand. [28] In 2019, Germany sent back a Bible and whip to Namibia which was looted from there in 1983. [29] In November 2020, both chambers of the French Parliament voted for the return of 27 pieces of African heritage to their places of origin, Benin and Senegal, by the end of 2021.[30] And this list of restitutions is not exhaustive. Overall, six out of eight European colonial empires of XIX – first half of XX century have already acted upon returning cultural objects to their former colonies: the United Kingdom, Italy, Germany, France, Belgium and the Netherlands. [31] This fact clearly demonstrates the extensiveness and uniformity of state practice, especially among the nations particularly interested and touched by the issue.

However, besides its generality, a state practice shall be characterised by the consistency, as the ICJ noted in one of its judgment that "the government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question".[32] At the same time, this constancy does not necessarily presuppose a total uniformity. [33] With regard to the practice at stake, some of these states – France, and Germany, have issued special guidelines in order to regulate the restitution on a permanent basis and not as a one-time gesture. [34]

The second condition to be met for a rule being considered as a custom of international law is the perception of such a practice as a legally mandatory one.[35] As

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[26] Pott, P., Amir Sutaarga, M., (1979). *Arrangements concluded or in progress for the return of objects: the Netherlands-Indonesia*, pp. 38-42;
[27] Pankhurst, R. (1999). *Ethiopia, the Aksum Obelisk, and The Return of Africa's Cultural Heritage*, pp. 236-239;
[28]. Roodt, C. (2013). *Restitution of art and cultural objects and its limits*, p. 303;
[29] *Germany Is Returning Artifacts Stolen From a Namibian Freedom Fighter During Its Colonial Rule* [Online]. Artnet News.
[30] *France Has Approved the Return of 27 Artworks to Benin and Senegal, Signaling What May Be a New Era for Restitution* [Online] Artnet News.
[31] *La colonisation : Les empires coloniaux en 1914* [Online]. FranceTV Education, p. 2;
[32] ICJ, judgment of 20 November 1950, *Asylum (Colombia v. Peru)*, p. 14;
[33] ICJ, judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*, paras. 185-186;
[34] *Rapport sur la restitution du patrimoine africain. Vers une nouvelle éthique relationnelle* [Online]. Report; *Guide pour le traitement des biens de collections issus de contextes coloniaux* [Online]. German Association of Museums..
[35] Shaw, M. (2017). *International law*, p. 55

the Court has admitted several times that *opinion juris* can be deduced from the attitude of States toward General Assembly (also "**GA**") resolutions. [36] In this regard, several UN GA resolutions calling for "prompt restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts and documents by another country … constitutes just reparation for damage done" and recognizing "the special obligations in this connection of those countries which had access to such valuable objects only as a result of colonial or foreign occupation" were adopted without any objections, including from the part of former colonial empires.[37]This perception is now being strengthened by the legal reasoning of national courts, as it was the case with restitution of the Venus of Cyrene in which Italian Council of State decided to rule on restitution of this cultural property explicitly remarking that doing so meets Italian international obligations with respect to customary international law.[38] In particular, the Court stated that the principle of self-determination of peoples includes cultural identity and thus a cultural heritage linked to a territory or its people, which is why the restitutions of art works serves to safeguarding of such cultural links harmed in the course of colonial domination.[39]

The abovementioned practice unequivocally demonstrates that the restitution takes place specifically for the reason of its significance to a rebound of cultural identity of the formerly colonized peoples and to the participation in cultural life of their citizens.

Nevertheless, this point of view leaning towards the recognition of existence of a customary rule obliging such a restitution is widely opposed. To begin with, the right of people to self-determination, which was still under development at the moment of accession of many concerned countries to independence in 1960s-1970s, [40] fails to stipulate whatever form of restitution of cultural property originated from the territories

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[36] ICJ, judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*, para. 188; ICJ, Advisory opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, para. 70.

[37] G.A.U.N., A/RES/3148(XXVIII) (1973); G.A.U.N., A/RES/3187(XXVIII) (1973); G.A.U.N., A/RES/3391(XXX) (1975);

[38] Consiglio Stato, judgement of 20 April, 2007, *Italia Nostra v. Ministry of Cultural Heritage,* paras 4.2-4.4;

[39] Ibid;

[40] G.A.U.N., A/RES/1514(XV) (1960), cl. 2; G.A.U.N., A/RES/2625(XXV) (1970); ICJ, Advisory opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* paras. 142, 144, 152;

inhabited by peoples exercising their right to self-determination. The UN Charter which lies at the core of evolution of this right elaborates nothing on its content, needless to say that it does not mention a cultural dimension of the proclaimed self-determination. [41]

Two International Covenants of 1966 providing for the rights invoked earlier in this thesis entered into force in 1976 – after a majority of states claiming the restitution today declared their independence.[42] Even if to put this consideration aside, relying on the rights guaranteed by the Covenants is substantially weakened because of the fact that, according to the Court's findings, the Covenants obligations are binding upon the states only within their territories or the territories which they control. [43] In this regard, the states may control territories by occupying them, which is no longer the case with regards to formerly colonized countries. One can also argue that these people are not deprived of the possibility to take part in the cultural life since the mere fact that certain art objects originating from their cultures are inaccessible in their domestic museums cannot prevent them from appreciating them by visiting these museums in foreign countries or online through museums' web-sites which make their collections accessible for appreciation on Internet.

Customary nature of the obligation to restitute is also disputed. It may be definitely established only if there is "a solid basis to conclude that the state practice is sufficiently extensive, representative and reflects the approach of the states particularly interested in the issue", as the Court stated in its judgment in *North Sea Continental Shelf (Federal Republic of German v. Denmark and v. /Netherlands)* case. [44] In this regard, one must note that two out of eight former colonial powers never proceeded to the restitution of cultural property exported from its overseas colonies, at least, there is no publicly available record of it: Spain and Portugal, the fact that harms the affirmation that the state practice regarding this issue is well generalized.

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[41] United Nations Charter, 1945, arts. 1, 55;
[42] International Covenant on Civil and Political Rights, 1966, art. 49; International Covenant on Economic, Social and Cultural Rights 1966, art. 27;
[43] ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 112;
[44]ICJ, Judgment of 20 February 1969*, North Sea Continental Shelf (Federal Republic of Germany/Denmark;* paras. 74-77;

Even if some countries returned some art objects to their former colonies, separate cherry-picked cases could barely confirm the existence of a general practice – the one required by the ICJ Statute and reflected in its case-law. No country has decided on a total restitution of all cultural property originated from its former colony and the existent cases are quite incidental. Moreover, the countries often agree upon return of some items, while they categorically object against the return of the others: the United Kingdom did return tattooed heads to the New Zealand, whereas a request of the Republic of Ghana to restitute an Asante gold mask looted in 1874. [45] The same concern is relevant to the already mentioned treaty signed between Belgium and Congo in the early years of the latter's independence : a great number of cultural articles were sent back to Congo, yet still around 120 thousands of them are still conserved in the Belgium museums and art houses.[46]

Also, museum communities in the rest of these eight countries consolidated their position opposing the practice of restitution by stating that the art objects, regardless of their origin, that are conserved in their collections have become their integral part.[47]

Overall, it let us to conclude that the state practice of the former colonial powers is now emerging is extremely diverse, which prevents from establishing a necessary coherence, just like in *Asylum (Colombia v. Peru)* case. [48]

Even more, the Court has clearly ruled in *Fisheries (United Kingdom v. Norway)* case that a customary rule is not applicable to the states which have proved to be persistent objectors to it, even if a great part of international community abides by it.[49] In this light, it is worth mentioning that a series of the UN General Assembly Resolutions concerning the return of art objects to the countries of origin were actually opposed by a number of states having in possession such objects, among them are the United Kingdom, Belgium, Spain, the Netherlands, Portugal and France.[50]

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[45] Greenfield, J. (2007). *The return of cultural treasures*, pp.120-122;
[46] *Restitution d'œuvres : « L'Afrique a été pillée, nous ne pouvons pas l'ignorer »* [Online] Le Monde;
[47] *Declaration on the importance and value of universal museums* [Online] International Council of Museums;
[48] ICJ, judgment of 20 November 1950, *Asylum (Colombia v. Peru)* p. 15.
[49] ICJ, judgement of 18 December 1951, *Fisheries (United Kingdom v. Norway)*, p. 19;
[50] United Nations Digital Library Service (UNDLS). (1973). Summary of the vote on A/RES/3187(XXVIII); UNDLS. (1978) Summary of the vote on A/RES/33/50; UNDLS. (1983). Summary of the vote on A/RES/38/34;

Some of these resolutions, while not voted against, were faced with a large number of abstentions, notably by the countries in possession of cultural property from African countries: thirteen abstentions in one case[51] and sixteen in another. [52] As the Court already expressed, a significant number of abstentions precludes from stating about the existence of *opinion juris*, especially in the case where among the absentees there is a great part of states particularly interested in the issue being decided, which is clearly the case at hand since former colonial powers abstained from the voting.[53]

As Sir Mathewson explained, a representative of the United Kingdom, after his vote of abstention on the resolution 38/34 of the 25th November, 1983, "the United Kingdom cannot accept the principle according to which the cultural objects that were freely and legitimately acquired in the course of years should be restituted to other countries".[54] In the same spirit, the United States has persistently opposed against retroactive application of these resolutions,[55] while Belgium and the Netherlands have both insisted on the voluntary character of these returns which should be pursued via bilateral negotiations.[56]

In many cases, the restitution is based upon political arrangements for certain art objects which happened to come under negotiation. Even in cases of successful negotiations upon return of cultural objects, the return itself may take different forms, as was the case with the restitution by France of a sword to Senegal, which turned to be a five-year loan. [57] Moreover, it was later revealed that this symbolic act was preceded by the conclusion of arms supply agreement between two countries, [58] which backs the statement about political calculations leading to these returns. In this regard, the

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UNDLS. (1985). Summary of the vote on A/RES/40/19; UNDLS. (1987). Summary of the vote on A/RES/42/7; UNDLS. (1989). Summary of the vote on A/RES/44/18; UNDLS. (1991). Summary of the vote on A/RES/46/10; UNDLS. (1993). Summary of the vote on A/RES/48/15; UNDLS. (1997). Summary of the vote on A/RES/52/124;

[51] Off. record of the G.A.U.N., A/33/PV.84 (1978).

[52] Off. record of the G.A.U.N. A/PV.2410 (1975).

[53] ICJ, Advisory opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, para. 71;

[54] G.A.U.N., Minutes of the 71e s.p., 38e sess., A/38/PV.71 (1983); see also G.A.U.N., Minutes of the 87e s.p., 40e sess., A/40/PV.87 (1985); G.A.U.N., Minutes of the 42e sess., 47e s.p., A/42/PV.47 (1987); G.A.U.N., Minutes of the 45e s.p., 44e sess., A/44/PV.45 (1989); G.A.U.N., Minutes of the 35e s.p., 46e sess., A/46/PV.35 (1991);

[55] G.A.U.N., Minutes of the 35e s.p., 46e sess., A/46/PV.35 (1991);

[56] *Ibid*; G.A.U.N., A/RES/32/203 (1977), p. 5; G.A.U.N., Minutes of the 2410e s.p., 30e sess., A/PV.2410, (1975), para. 90;

[57] *Un sabre « historique » en cours de restitution au Sénégal* [Online] French Ministry of Armed Forces;

[58] Au Sénégal, une visite d'Edouard Philippe sous le signe des armes [Online] Le Monde;

International Law Commission has explicitly stated that while a state practice is reasoned solely on this type of considerations, an alleged rule of customary international law lacks its subjective element, *opinion juris*.[59]

It is also worth noting that the language of UN General Assembly resolutions regarding return of art objects to the countries of origin substantially changed in the course of years. At first, they clearly affirmed that such returns "would constitute just reparation for damage done",[60] then the wording changed to the perception of the restitution as "a step forward towards the strengthening of international co-operation and the preservation and future development of cultural values". [61]

Sub-Chapter 1.2 Legal succession of newly independent states to their cultural property.

The other possible legal ground of claiming a return of cultural property is legal succession of newly independent states as successor states to their cultural property after the colonial empires as predecessor states.

On the conventional level, the issue is supposed to be regulated by the Vienna Convention on Succession of States in respect of State Property, Archives and Debt of 1983, but it is not yet in force due to the insufficient number of states having ratified it. Notably, the 1983 Conference adopted a separate resolution recognizing that peoples fighting against colonialism possess permanent sovereignty over their resources and natural wealth and their rights to cultural heritage.[62]

Still, one can assert that its provisions reflect the crystallisation of the customary rules, founded on the general practice perceived as obligatory according to various UN bodies and institutions. According to these rules, a newly independent state, the territory of which at the time of independence was a part of a predecessor State succeeds the latter to the cultural property which creation was contributed by the successor State and

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[59] ILC, *Draft conclusions on identification of customary international law, with commentaries*, A/73/10 (2018), p. 139.
[60] G.A.U.N., A/RES/3187(XXVIII) (1973); G.A.U.N., A/RES/3391(XXX) (1975);
[61] G.A.U.N., A/RES/31/40 (1976); G.A.U.N., A/RES/32/18 (1977); G.A.U.N., A/RES/38/34 (1983);
[62] Resolution concerning peoples struggling against colonialism, alien domination, alien occupation. racial discrimination and apartheid, in A/CONF.117/15, para. 2;

it does so in proportion to this contribution.[63] As such, one can argue about the special approach of the Convention to states appeared as the result of the decolonisation process. Article 15(4) of the Convention underlines that "agreements concluded between the predecessor State and the newly independent State to determine succession to State property of the predecessor State shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources".[64] Noteworthy, Article 149 of the UN Convention on the Law off the Sea was drafted in the same spirit of linking the right on cultural property to a country or a State of its cultural, historical or archaeological origin.[65]

As to the first element, the evidence of the general practice concerning succession to cultural property can be found in numerous international treaties throughout the modern history, starting with the 1864 Vienna Peace Treaty between the Austrian emperor, the Prussian king, and the Denmark king. By signing this treaty, the Kingdom of Denmark not only ceded the Duchy of Schleswig but agreed upon transferring to the Duchy of an antiquity collection of Flensburg related to its history.[66] The 1866 Vienna Treaty between the Kingdom of Italy and the Austro-Hungarian Empire prescribed for the state succession to works of art and science, and to political and historical documents which were "specifically assigned" to the ceded to Italy territories of the Lombardy-Venetia.[67] A wave of post-First World War treaties significantly enriched a practice of allocation of cultural property linked to ceded territories on the basis of territoriality. This approach can be seen in the peace treaties with Austria and Hungary (Article 193(1) of the 1919 Treaty of Saint-Germain and Article 177(1) of the 1920 Treaty of Trianon, respectfully), the reference was made to the period long before the First World War.[68]

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[63] ILC, *Sixth report of M. Mohammed Bedjaoui,* A/CN.4/267 (1973), pp. 49-51; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Vienna, 1983, art. 1(1)(e), 15 (e);
[64] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Vienna, 1983, Art. 15(4);
[65] United Nations Convention on the Law of the Sea, 1982, Art. 149;
[66] Treaty of Vienna between Austria, Prussia on the one hand, and Denmark on the other hand, Vienna, 1864, Art. 14;
[67] Jakubowski, A. (2015). *State succession in cultural property* ,p. 49;
[68] Ibid, p. 65;

A similar arrangement took place under Polish-Germany Financial Agreements of January 9th, 1920 which established that Germany would restitute to Poland "all acts, documents, monuments, works of art and other scientific or library materials which had been removed from the lands conveyed to Poland".[69] The 1920 Treaties of Riga, of Moscow and of Tartu I (with Latvia, Lithuania and Estonia respectively) engaged Russia to return to the Baltic states libraries, archives, museums, creations of arts of important scientific, artistic or historical value displaced during the period of Russian governance of these newly independent states, though the scope of the items to be returned was limited and each case was to be examined by the respective bilateral commission.[70] The 1921 Treaty of Riga between Soviet Russia and Poland prescribed for the transfer of cultural property removed by the Russian administration from Polish territory in the boundaries of Polish-Lithuanian Commonwealth at 1772 or related to Polish nationals, "irrespective of the conditions under which they were carried off or the authorities responsible for such removal".[71] The 1932 Austro-Hungarian bilateral agreement was the first international agreement entirely dealing with state succession to cultural property and based on territoriality and historic links, which was effectively executed and allowed Hungary to receive 36 manuscripts and more than 150 works of art.[72] These various examples allowed Andrzej Jakubowski to conclude that "post-First World War peace treaty practice in the matter of allocation of cultural property applied the principle of major significance to the cultural heritage of successor state, supplementing the paramount principle of territorial links".[73]

Among the post-Second World War state succession cases one can refer to the 1947 Peace Treaty with Italy, which imposed on the latter the obligation to transfer "all objects of artistic, historical or archaeological value belonging to the cultural heritage of the ceded territory" to France, Yugoslavia, and Greece.[74] Similarly, Article 11 of the 1947 Peace Treaty with Hungary imposed on Hungary the obligation to transfer the

[69] Ibid, pp. 67-68;
[70] Ibid, pp. 79-80
[71] Ibid, p. 81;
[72] Ibid, p. 76-77;
[73] Ibid, p. 86-87;
[74] Treaty of Paris between Australia, Belgium, … on the one hand, and Italy on the other, 1947, Art. 4, Annex XIV;

"objects constituting the cultural heritage of Yugoslavia and Czechoslovakia which originated in those territories and which, after 1848, came into the possession of the Hungarian State or of Hungarian public institutions as a consequence of Hungarian domination over those territories prior to 1919", including "original artistic, literary and scientific objects which are the work of Yugoslav or Czechoslovak artists, writers and scientists".[75] According to Jakubowski, this treaty may be considered as instructive for the allocation of cultural property in state succession because of employing the concept of national ties of an article with its creator (artist, writer or scientist).[76]

Generally, reaching of an agreement by two states (a predecessor and a successor) can be deemed as a *modus operandi* of such succession,[77] that was the case, as it was mentioned before, in the arrangements between Austria and Hungary which in 1932 concluded an accord dealing exclusively with the issue of state succession to cultural property and stipulated the redistribution of cultural items founded on the territorial and historic links.[78] Yet another example can be drawn from a set of agreements dealing with the passage of sovereignty from France to newly independent Laos in 1950. On 19 July 1949 two states signed the general convention and on 6 February 1950 concluded a series of detailed annexed conventions concerning, *inter alia*, cultural questions.[79] In particular, the 1950 Convention Relating to the French School of the Far East signed between Francem Cambodia, Laos and Vietnam prescribed for joint ownership of the four states over the most important museums and collections of the school.[80] However, as a result of the following military conflicts, those arrangements were never implemented.[81]

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[75] Treaty of Paris between Australia, Belgium, … on the one hand, and Hungary on the other, 1947;
[76] Jakubowski, A. (2015). *State succession in cultural property*, p. 106;
[77] ILC, *Report of M. Mohammed Bedjaoui*, A/CN.4/204 (1968), p. 106, para. 65; Kowalski, W. (2001). *Repatriation of Cultural Property following a Cession*, pp. 142-152;
[78] Huguenin-Bergenat, H. (2010). *Kulturguter bei Staatensukzession*, p. 361; Tietze, H. (1933). *L'accord austro-hongrois sur la repartition des collections de la Maison des Habsbourg*, p. 23–24, 92–97; Kowalski, W. (2001). *Repatriation of Cultural Property,* p. 139-166*;*
[79] Jakubowski, A. (2015). *State succession in cultural property*, p. 122
[80] Ibid;
[81] Ibid, p. 123;

Another example can be drawn from the 1968 agreement between France and Algeria prescribing for the restitution of three hundred art objects to the Algerian Museum of Beaux-Arts, following the declaration of independence by Algeria.[82]

The evidence of the second element, namely *opinion juris* is much harder to find. In this regard, one can refer to the reports of the International Law Commission Special Rapporteur M. Mohammed Bedjaoui, who drafted them throughout 1970s on the specific subject of state succession in the matters of cultural property. In its sixth report on the subject, he stated that diplomatic practice is not consistent and is difficult to be defined and that a former metropole may dispute the very right of ownership. [83] Plus, the newly independent state may find it difficult to define how much exactly property, and of what kind, it could rightfully claim.[84]

This logically explains why the existence of the customary rule on State succession to state property is hardly provable, especially with respect to the obligation of a former colonial power to transfer certain cultural objects to its former colony. Provisions of the Vienna Convention of 1983 lacks solid ground to demonstrate crystallization of customary rules in this field, since this Convention is signed by 14 States and dully acceded only by 7 of them, as of 2021,[85] and thus never entered into force, whereas 90 States initially took part in the UN Conference on States succession.[86] The Convention was adopted with 54 votes in favour (mainly developing and socialist states), with 11 votes against (Western states).[87] This fact reflects reluctance of numerous states to admit a legal obligation to transfer cultural property to the newly independent states.[88] In its advisory opinion in the case *Legality of the Threat or Use of Nuclear Weapons*, the Court ruled that if the States are profoundly devised regarding the binding force of an international law rule (prohibition of recourse to the nuclear

[82] Bellisari, A. (2016). *The Art of Decolonization: The Battle for Algeria's*, p. 626;
[83] ILC, *Sixth report of M. Mohammed Bedjaoui,* A/CN.4/267 (1973), p. 50, para. 4;
[84] Ibid;
[85] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983;
[86] 13th meeting of the Committee of the Whole, United Nations Conference on Succession of States in respect of State Property, Archives and Debts, *Final Act of the Conference on Succession of States in respect of State Property, Archives and Debts*, A/CONF.117/15.SR.13 (1983), para. 4;
[87] Jakubowski, A. (2015). *State succession in cultural property*, p. 172;
[88] ILC, Report A/CN.4/322 (1980), para. 52;

weapon in that case), the ICJ would not consider itself able to establish the existence of *opinio juris*. [89] Furthermore, during the consideration at the UN Conference on State succession to the state property of the provisions of the Article 14 concerning State succession of a newly independent state to the movable property originating from its territory, many States were opposed to the adoption of that Article, notably the United States, the United Kingdom, Japan and France.[90] In this regard, if the respective rule of international law does not exist, ownership rights over immovable property are defined by the national law according to the doctrine of "acquired rights"[91], which has been a part of public international law since a long time.[92]

A number of restitution calls based on state succession concept remain unsuccessful. Koh-i-Noor, a large diamond with ancient history rooting to the epoque of Alexander the Great serving as a royal regalia of different Indian, Mogul, Persian and Afghan monarchies, is one of the most telling examples.[93] In 1849, the last Sikh ruler, while ceding Sikh territories also had to surrender the Koh-i-Noor to the Queen of the United Kingdom of Great Britain and Ireland.[94] After 1947, the year of independence of India and Pakistan, both these countries attempted to have this jewellery back. Indian government made two requests: the first one was formed right after the independence in 1947, the second was made in 1953 when the coronation of Elisabeth II took place, they were both refused.[95] In 1976, Zulfiqar Ali Bhutto, the Prime Minister of Pakistan, formally requested that the gem be returned to Pakistan since it was in the geographical territory of present-day Pakistan that it had been surrendered to the British, the request was also rejected.[96] Andrzej Jakubowski estimates that this particular case demonstrates

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[89] ICJ, Advisory opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, para. 67;
[90] 13th meeting of the Committee of the Whole, United Nations Conference on Succession of States in respect of State Property, Archives and Debts, *Final Act of the Conference on Succession of States in respect of State Property, Archives and Debts*, A/CONF.117/15.SR.13, paras. 2-4, 7, 32-41, 46-54;
[91] ILC, Rapport A/CN.4/119 (1959), para. 30; O'Connell, D. (1970). *Recent problems of state succession in relation to new states*, pp. 134–146, 166-169;
[92] PCIJ, Judgment of 25 May 1926, *Certain German Interests in Polish Upper Silesia (Merits*), p. 42; ICJ, Judgement of 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, op. ind. of Sepúlveda-Amor, para. 28;
[93] Ghoshray, S. (2008). *Repatriation of the Kohinoor Diamond*, pp. 746–47;
[94] Jakubowski, A. (2015). *State succession in cultural property*, p.91;
[95] *The Koh-i-Noor: diamond robbery?* [Online] The Telegraph;
[96] Jakubowski, A. (2015). *State succession in cultural property*, p. 91;

the difficulties of relocation of cultural property on the basis of state succession in the post-Second World War period.[97] The problem is that newly independent states were shaped within the administrative boundaries defined by their colonial rulers, which is a general principal *uti possidetis juris* as recognized by the International Court of Justice.[98]

Quite often those arrangements did not respect ethnic or religious territorial compositions, which creates necessity of establishing the links between historic tribes and peoples and modern African states.[99] In the 1962 Temple of Preah Vihear (Cambodia v. Thailand) case where the issue arose with regards to the delimitation of borders between two states within the area of the Buddhist temple, the Court ordered Thailand to restitute to Cambodia the temple and the cultural objects removed from it.[100] At the same time, the sole principle of territoriality, when it is not matched with the well-established link to certain tribes or cultures, is significantly weak in terms of legitimacy to claim a succession. Moreover, even where the arrangements appearing as state succession did take place, one can argue about *ex gratia* arrangements, as with regards to the 1968-Franco-Algerian accord.[101]

Andrzej Jakubowski argues that state succession arrangements in the interwar period usually affirmed the principle of integrity of internationally ranked collections as the principle of protection of the interest of human society as a whole, referring to the concept of the universal heritage of the mankind, which will be developed further on.[102] One should also distinguish cases of acquiring cultural materials as war booty in the event of a colonial conflict from cases of peaceful transfer of cultural values by means of trade or exchange by the virtue of private law.[103]

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[97] Ibid, p.93
[98] ICJ, Judgment of 22 December 1986, *Frontier Dispute (Burkina Faso/Republic of Mali)*, paras. 21-26.
[99] Jakubowski, A. (2015). *State succession in cultural property*, p. 93
[100] ICJ, Judgment of 26 May 1961, *Temple of Preah Vihear (Cambodia v. Thailand)*, para. 35;
[101] Goy, R. (1970). *Le régime international de l'importation, de l'exportation et du transfert de propriété des biens culturels*, p. 613;
[102] Jakubowski, A. (2015). *State succession in cultural property*, p.88
[103] Jakubowski, A. (2015). *State succession in cultural property*, p. 118

Moreover, private entities are not responsible for respecting international obligations of the States of their location and thus the latter are of no right to manage collections of these entities.[104]

Sub-Chapter 1.3 Return of cultural commodities to the countries of origin under the legal obligation to cooperate.

Cooperation in good faith is the principle of public international law which obliges the states to cooperated between each other in accordance with the UN Charter.[105] In this light, the UN General Assembly reaffirmed numerous times that the states have the obligation to cooperate in order to ensure the right of peoples to development. [106] This position of the General Assembly is even more important if to take into consideration its essential role in the decolonization, according to the Charter, as highlighted by the ICJ in its advisory opinion *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* in 1965. [107] To this end, the ICJ repeatedly stated that the states shall execute the obligation to cooperate in good faith.[108] With respect to cooperation in the cultural field, one can suggest that this obligation might entail restitution of the art objects and museum articles to the countries of origin.[109] For this purpose, the states having access to these art objects by reason of colonial domination shall fulfil this obligation.[110]

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[104] ILC, Text of the draft of articles and commentary A/CN.4/SER.A/2001/Add.1 (2001), art. 8, para. 5-6, art. 5, para. 3; ICSID, decision of 17 October 2006, *Helnan International Hotels A/S v. Arab Republic of Egypt*, para. 92-93; ICSID, ruling of 3 February 2006, *EnCana Corporation v. Republic of Ecuador*, p. 154;
[105] G.A.U.N., A/RES/2625(XXV) (1970), principles d), g);
[106] G.A.U.N., A/RES/41/128 (1986), art. 3;
[107] ICJ, Advisory opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* para. 163, 167*;*
[108] ICJ, Judgment of 20 December 1974, *Nuclear Tests*, para. 46; ICJ, Judgment of 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, para. 94; ICJ, Judgment of 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, para. 145;
[109] G.A.U.N.: A/RES/3187(XXVIII) (1973); A/RES/3391(XXX) (1975); A/RES/31/40 (1976); A/RES/32/18 (1977); A/RES/33/50 (1978); A/RES/34/64 (1979); A/RES/35/127 (1980); A/RES/38/34 (1983); A/RES/40/19 (1985); A/RES/42/7 (1987); A/RES/44/18 (1989), A/RES/46/10 (1991); A/RES/48/15 (1993); A/RES/52/24 (1997); A/RES/54/190 (1999); A/RES/56/97 (2001);
[110] Ibid.; UNESCO General Conference, 18 C/ Resolution 3.428;

The state practice of restitution itself may confirm the customary character of this obligation in the cultural domain. [111] For instance, the 1968 bilateral cultural agreement between the Netherlands and Indonesia expressly marked application of the procedural principle of cooperation, although it did not directly address the issue of the allocation of cultural property in relation to the process of decolonization.[112] In 1971, Denmark and Iceland settled the issue of the Arnamagnaean Manuscripts – a collection of mediaeval literary sagas, gathered in the eighteenth century by Icelandic scholar and bequeathed to the University of Copenhagen, when Iceland formed part of the Danish-Norwegian kingdom.[113] After long negotiations started in 1944 even before the separation of Iceland from Denmark, in 1971 Iceland and Denmark finally ratified a treaty which provided for the return of the manuscripts within a period of 25 years from its ratification.[114]

In 1978, a few important cultural objects were eventually returned to Indonesia. Primarily, these concerned the so-called Lombok Treasures, removed from the Indonesian island during a military expedition at the end of the nineteenth century.[115] The collection was sent to Amsterdam and displayed in the Rijksmuseum and then it was kept in Leiden. Aside from this, the Netherlands handed over the objects related to Prince Dipo Negoro, a national hero in the fight against colonial rule.[116]

In 2001, the Russian Federation relieved the claim of Ukraine to hand over four medieval frescoes originated from the twelfth-century St. Mykhailo Zlatoverhy Cathedral in Kyiv. The cathedral was destroyed during the Stalinist repressions in the mid-1930s and the frescoes were sent to Russia, while the remaining fragments rested in Kyiv. In 1943 these fragments were looted by the German military forces and when they were taken from Germany in the aftermath of the Second World War, they were

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[111] *Case of returns or restituions | United Nations Educational, Scientific and Cultural Organization*. [Online]. UNESCO (see restitution Italie-Ecuador in 1983); Prott, V. L. (2011). *Témoins de l'histoire : Recueil de textes et documents relatifs au retour des objets culturels* (see. Restitution United Kingdom – South Africa in 2002); *La Suède rend un totem à des Indiens du Canada* [Online] Le Monde. (see Restitution Sweden-Canada in 2006);
[112] Jakubowski, A. (2015). *State succession in cultural property*, p. 125;
[113] Ibid, p. 158;
[114] Ibid, p. 158;
[115] Pott, P., Amir Sutaarga, M., (1979). *Arrangements concluded or in progress for the return of objects: the Netherlands-Indonesia*, pp. 41–42;
[116] Ibid.

nevertheless transferred to Russia. The ultimate return of these artworks resulted from the 1992 Commonwealth of Independent States Agreement on Cultural and Historic Treasures calling for the return of cultural property to the countries of origin and certain Russian internal laws on cultural heritage. [117]

Another vivid case of successful outcome of the cultural cooperation with regard to return of cultural property to a place of origin is Italy-Slovenia arrangements involving Istria's jewels. It concerns around one hundred art pieces of the period from the 14th to the 18th centuries by the prominent artists of the Venice Republic like Benedetto and Vittorio Carpaccio, Cima da Conegliano, Alvise Vivarini, Jacopo Palma il Giovane, and Giambattista Tiepolo.[118]

In the same spirit of cultural cooperation, Japan returned a group of precious cultural relics to South Korea. For a long time during the history, Korean peninsula suffered from destruction and plunder of material property in the result of wars with Japan. All of this climaxed in 1910 when the Annexation Treaty formally fixed the colonization of Korea by Japan. Naturally, among other things, Japanese ruling caused significant loss of Korean cultural heritage shipped to Japan. Only after Second World War, Korean independence and drastic change of the Japanese policy and international stance, the issue of relocation of Korean displaced cultural property was revised. On 22 June 1965, not least with the US solicitation, two countries signed the Treaty on Basic Relations,[119] followed by the Agreement Concerning Cultural Property and Exchange. In accordance with Article II of this Agreement, Japan was bound to turn over to the Republic of Korea the art objects specifically enumerated in the Annex to the agreement within six month from its entry into force.[120] In the result of this arrangement, Japan returned 1 321 cultural objects overall, including celadon porcelain and unique old documents.[121] Furthermore, In November 2010, Japan undertook to restitute to South Korea around 1200 royal documents Uigwa, protocols of the over 500-year-long Joseon

[117] Jakubowski, A. (2015). *State succession in cultural property*, p. 215
[118] Hoyer, S., Hocevar, J. (2005). *Art Works from Koper, Izola, Piran Retained in Italy*, pp. 67–75.

[119] Treaty between Japan and Republic of Korea on Basic Relations, 1965, p. 33;
[120] Agreement between Japan and Republic of Korea on the art objects and cultural co-operation, 1965, Art. 2;
[121] Scott, G. R. (2008). *Spoliation, cultural property, and Japan* p. 857.

Dynasty (1392–1910), depicting through prose and illustration the major ceremonies and rites of the royal family and on 6 December 2011 the actual return took place during a special ceremony.[122]

In 2018, a group of major European museums agreed to loan a great number of important artifacts to a newly Royal Museum to be opened in Nigeria in 2021, including the Benin bronzes stolen during the Benin Expedition of 1897.[123]

On the other hand, there is still a place for negative practice. For instance, in July 2016, the Benin government made an official request for return of Guezo, Glele and Behanzin treasures looted by the French army in 1892 from the royal palaces of Abomey in the modern-day Benin, which was rejected without reasoning.[124] Another return case is still in progress, although there are negligible chances that it will lead to success of the requesting party, at least in short- or middle-term perspective. It concerns so-called the Parthenon Elgin Marbles – a set of sculptures removed from the Acropolis in Athens in the early 19th century by the British diplomat Lord Elgin which Greece has been struggling to get back since almost the very first days of independence in 1832.[125] Among the reasons invoked to justify remaining of the artefacts in the British Museum are already known arguments of belonging of these objects to the British cultural heritage and their integration into British culture, and even that they contribute to British self-identification.[126]

As to the *opinio juris* element of this customary obligation to cooperate, we can say that *adoption* of the national laws prescribing for the restitution of cultural property to the countries of origin is of service in this regard. In particular, US *Native American Graves Protection and Repatriation Act* prescribes that if the cultural affiliation with a particular Indian tribe is shown with respect to sacred objects or objects of cultural

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[122] Jakubowski, A. (2015). *State succession in cultural property*, p. 294
[123] *Europe's Largest Museums Will Loan Looted Benin Bronzes to Nigeria's Planned Royal Museum* [Online] Artnet News.
[124] *President Macron, African art and the question of restitution* [Online] Financial Times.
[125] *Greece wants Parthenon Marbles back, Tsipras tells May* [Online] Reuters.
[126] Merryman Henry J. (2006) *Imperialism, Art And Restitution*, p. 6;

patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization, shall expeditiously return such objects.[127]

On international level, there were adopted the 1966 UNESCO Declaration of Principles of International Cultural Co-operation, and the 1976 UNESCO Recommendation concerning the International Exchange of Cultural Property. In 1978 the General Conference of UNESCO set up the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (UNESCO Intergovernmental Committee).[128] According to the statues of the Committee, the main sphere of its activities concerned the promotion of "multilateral and bilateral co-operation with a view to the restitution and return of cultural property to its countries of origin" and in the area of international "exchanges of cultural property in accordance with the Recommendation on the International Exchange of Cultural Property".[129]

However, on the other side of the scale, one may invoke the concept of world cultural heritage, which is being operated by a number of international and regional conventional instruments. The preamble of the 1972 UNESCO Convention concerning the protection of the world cultural and natural heritage urges the international community *as a whole* to participate in the protection of the cultural heritage of outstanding universal value.[130] Plus, Article 6 of the 1972 UNESCO Convention, while respecting the sovereignty of the States over their cultural heritage, insists on belonging of this heritage to the world heritage for which the duty of the international community to cooperate exists.[131] Besides, the World Heritage Committee has developed the criteria for classification of an article as presenting exceptional and universal value and thus for its inscription on the list of World Heritage. [132]

In this regard, the notion of world cultural heritage includes any unique sign of a living or disappeared civilisation, a material element tangibly associated with the events

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[127] Native American Graves Protection and Repatriation Act (1966), United States, para. 3005 (a) (2);
[128] Jakubowski, A. (2015). *State succession in cultural property*, p. 157;
[129] Ibid, p. 157;
[130] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, preamble, rec. 7;
[131] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, Art. 6 (1);
[132] World Heritage Committee, Rapport WHC-94 / CONF.003/INF.6 (1994);

or live traditions, beliefs, and art works of the exceptional universal importance. [133] Moreover, the 1972 UNESCO Convention for the protection of the world cultural and natural heritage has adopted the approach according to which an absence of inscription of an article on the appropriate list edited by the Committee fails to affect recognition of the article as presenting universal significance. [134] And while the 1972 Convention modifies neither the ownership rights and titles, nor the state sovereignty over this property, 193 State parties to this Convention have accepted the provision according to which there is a prohibition to seize or to commercially exploit the cultural property recognized as the heritage of mankind.[135] Furthermore, this property shall be assembled and conserved in appropriately maintained museums[136] in order to be preserved and transmitted to the future generations in the general interest.[137]

International community has explicitly recognized and affirmed the principle of the common heritage of mankind with regards to the underwater archaeological objects dated of more than one hundred years by virtue of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.[138] In opposition to the claims raised by source and post-colonial countries, the directors of the main museums in Europe signed the 2004 Declaration on the Importance and Value of Universal Museums. Among other things, the Declaration stressed, with respect to the cultural artefacts acquired during colonial times, that "over time, objects so acquired-whether by purchase, gift, or partage - have become part of the museums that have cared for them,

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[133]Intergovernmental Committee on protection of world cultural and natural heritage, *Operational Guidelines for the Implementation of the World Heritage Convention,* WHC.16/01 43 COM 11A, annex 3, pp. 81-82 para. 77, cl. (iii), (vi);

[134] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, arts. 15 – 18;

[135] *Au-delà des traités : l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel*. [Online] Cadmus.eui.eu.;

[136] Scovazzi, T. (2011). *Diviser c'est détruire ...*; Comité intergouvernemental, Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, *Final report of the 16e session*, CLT-2010/CONF.203/COM.16/6 REV (2010), paras. 40-41;

[137] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, arts. 1, 2; Framework Convention on the Value of Cultural Heritage for Society, 2005, art. 1(1); *Declaration on the importance and value of universal museums* [Online] International Council of Museums;

[138] United Nations Convention on the Law of the Sea, Montego Bay, 1982, arts. 149, 303; Convention on the Protection of the Underwater Cultural Heritage 2001, arts. 2 (3); Garducci, G. (2002*), New Developments in the Law of the Sea …*; Scovazzi, T. (2011). *Diviser c'est détruire ...*; Verhoeven, J. (2001), *Patrimoine culturel ou historique et droit international*;

and by extension part of the heritage of the nations which house them".[139] In addition, it asserts that "although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation".[140]

To sum up all what has been discussed in this Chapter, we can say that all three legal grounds for return of cultural property to former colonies are faced with vivid controversies of the opposing parties with regard to interpreting of the legal nature of completed and projected returns. While it is true that all three possible grounds for return, namely the right of self-determination, the state succession to disputed cultural property and the obligation to cooperate in cultural development, have been evolving throughout twentieth century with a notable upraise in the aftermath of the World War II, we cannot conclude that at the present state at least one of them has gained a sufficiently solid level of unanimity among the members of the international community.

The right to self-determination did receive a wide recognition and support in the 60-70s of the past century, especially in the wake of adoption of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, although its cultural dimension was not articulated that clearly. In order to secure the support of the UN General Assembly draft resolutions, representatives of the newly independent states had to change radical wording of "**restitution**" to "**return**" and linked it rather to the cultural development of their respective nations and not to self-determination as such. Even this softened option failed to see a clear support of the former colonial powers, as they abstained from voting with spectacular solidarity among themselves. This approach of the Western countries is of utmost importance for our analysis, since in the matter of restitution of this kind of cultural property we can rely on nothing but a customary rule of international law, while perception thereof is key in every holistic analysis of *opinion juris* as of one of two elements of such rule. All the convention rules contained in the international instruments like the 1970 UNESCO

[139] *Declaration on the importance and value of universal museums* [Online] International Council of Museums;
[140] Ibid

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property or the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects are as good as an example of how masterfully former colonial powers can claim their support of protection of legitimate property over cultural values and preclude effect of these same instruments to their sensitive situations by excluding their retrospective application.

The above-analyzed state succession regime is no better for the strive of the newly independent States to recollect their lost cultural relicts. At the time when most of them acceded to independence (1960-70s), the issue was barely known and kept on the table of discussion of the international legal community thanks almost exclusively to the reports of the Special Rapporteurs of the International Law Commission. When the Commission's efforts to consolidate and, more importantly, to crystalize the emerging rules in a conventional instrument succeeded by adoption of the 1963 Vienna Convention on Succession of States in respect of State Property, Archives and Debt, it was all but start and the path towards the consolidation of this rule and universal acceptance is yet to undergo since only 14 States signed it and even less number of States completed its ratification and the Convention has never entered into force, not to mention that it has no retrospective effect. While some Western States with profound colonial history showed some remarkable gestures by signing succession agreements with their former colonies (France-Algeria and France-Laos arrangements), which included cultural property matters, other State vehemently opposed the idea of covering cultural artefacts property transfer by the state succession regime, which was demonstrated during the 1983 UN Conference in Vienna prior to adoption of the Convention. Separate examples of state succession arrangements reconciling interests of both sides did take and continue to take place in international practice, although we find it hardly to conclude that there is general, uniform and continuous practice in the field allowing to talk about customary character of this kind of succession rules.

Even less realistic seems to us the possibility to establish an obligation to return or restitute cultural property based on the obligation to cooperate. It is true that this obligation is embodied in numerous international legal instruments, starting from the

UN Charter and the judgments of the ICJ and ending by the General Assembly resolutions and the ones of the UNESCO Conference, but its cultural aspect is much less elaborated. It is also true that we have managed to establish an important number of examples of successful bilateral arrangements between former colonial powers and former colonies in the spirit of cooperation, but in no one of these cases the ceding party acknowledged a legally mandatory force of this cooperation and some of them expressively referred to *ex gratia* concept. Moreover, on the other side of the scale, former colonial empires put the arguments of universal value of the disputed cultural property and the common obligation to physically protect them, which lies upon them. Another argument often advanced by these countries and their museum officials is that the acclaimed relicts have already become an integral part of their domestic collection and of their cultural self-identification.

CHAPTER 2. RESTITUTION OF CULTURAL ITEMS SEIZED DURING ARMED ATTACKS CONDUCTED BY THE COLONIAL POWERS AS A REPARATION FOR VIOLATION OF INTERNATIONAL HUMANITARIAN LAW.

Sub-Chapter 2.1 International humanitarian law framework of cultural property seizure resulting from military interventions of the colonial powers in the second half of 19th – the first half of the 20th centauries.

One of the legal perspectives on the basis of which modern states with the history of surviving colonial domination can claim restitution of exported cultural values is the one of international humanitarian law. However, this perspective is in no way more solid than the ones discussed in the previous chapter. For the purposes of this thesis we identified at least three legal obstacles for such states to ground their restitution claims on the basis of international humanitarian law. First of all, the issue of applicability of this body of law is questionable, at least to say. Secondly, even if international humanitarian law (also referred to as "**IHL**") applied in the context of armed conflicts taking place in the former colonies, it is not clear that at that time IHL firmly imposed the obligation of protection of cultural property, especially against requisitions. Finally, even if it did, some reasonable arguments can be presented in order to dispute that expropriation of cultural property occurring in the colonies, even in the context of armed conflicts, failed to fall within the meaning of the notion of looting under international humanitarian law.

Before all, it is important to revoke the principle of non-retroactivity which establishes that the norms of the public international law have no effect for the facts and relations taking place before entering into force by these norms. [141] Before the 1954 Hague Convention regarding the cultural property which entered into force in 1956, the only conventional instruments concerning this matter comprised the Hague Regulations of 1899 and 1907 which failed to apply to parties other than the Contracting Parties to

[141] Convention (III) relative to the Treatment of Prisoners of War, 1949, art. 99; Convention (IV) relative to the Protection of Civilian Persons in Time of War,1949, arts. 65, 67; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I), 1977, art. 75; Additional protocol to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), 1977, art. 6;

them.[142] In other words, we can confidently state that from the second half of the XIX centaury and up until the end of the Second World War there was no conventional international rule of conducting hostilities applicable to the situations other than armed conflicts between two sovereign States.

Starting from the issue of applicability of the international humanitarian law, we need to state that it applies to, *inter alia*, the international armed conflict, the notion of which, in its turn, is related to so-called "belligerent occupation", and this rule was firstly universally embodied in the Hague Regulations of 1899 and 1907.[143] Of course, colonies were not parties to these Regulations since they were not even states and their legal personality are hardly identifiable and classified, yet this rule is relevant since there is the evidence to affirm its customary character. The latter can be established and recognized since at least the second half of the nineteenth century,[144] supported by a rich state practice,[145] as well as by the *opinio juris.*[146] A belligerent occupation takes place when a territory, which was previously under sovereignty[147] of a certain state gets subject to the authorities established by the occupying state, either by the armed forces or in a peaceful way.[148] In other words, armed interventions of the colonial powers at that time could have entailed the application of the international rules of conducting hostilities in case of recognition of belligerence as a quality necessary for giving effect to such rules, otherwise those were the internal laws of these colonial powers which

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[142] Convention (IV) concerning the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 1907, art. 2;

[143] Regulations concerning the laws and customs of war on land, 1899, 1907, Art. 42;

[144] Schroeder, P. W. (1994). *The Transformation of European Politics: 1763-1848*, p. 72; Benvenisti, E. (2008). *The Origins of the Concept of Belligerent Occupation,* p. 623**;** Vattel, E. (1835), *Le droit des gens ou principes de la loi naturelle*, pp. 178-179, 230; Oppenheim, L. (1935). *International Law : A Treatise*; Nabulsi, K. (1999). *Traditions of War*, p. 172;

[145] Challine, P. (1934). *Le droit international public*, pp. 122-124; *Instructions to Government Armies in the Field (Lieber Code),* General Ordinance No. 100, United States of America, (1863), art. 3; Cour de cassation de France, decision of 1 February 1837, *Magill c. Héritiers Monnel-Gonnier*; Rousseau, Ch. E. (1983). *Le droit des conflits armés*;

[146] Brussels Conference (1874), *Draft of Declaration,* art. 2, 3; Institute of International Law. (1880). Handbook *The Laws of War on Land*; Institute of International Law, (1957), *General Table of Resolutions (1873-1956)*, pp.180-198; Heffter, A. W. (1844). *Das Europaische Volkerrecht Der Gegenwart,* para. 119; Fiore, P. (1865). *Nuovo dritto internazionale pubblico*, p. 443-444;

[147] PCIJ, Judgment of 5 April 1933, *Legal Status of Eastern Greenland*, p. 48; ICJ, Advisory opinion of 16 October 1975, *Western Sahara*, para. 152;;

[148] ICJ, Judgment of 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* para. 169; ICJ, Advisory opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, para. 75; ICTY, judgment of 31 March 2003, *Naletilić v. Martinović,* para. 216; Arbitral tribunal, ruling of 28 April 2004, *Central Front — Claims by Eritrea*, para. 57;

applied to such interventions.[149] Hence, this recognition of belligerence could have resulted in application of rules and customs otherwise applied to conflicts between States.

However, even if we would admit that mere fact of conducting hostilities sparked by rebelling tribes can lead to recognition of belligerence, application of the laws of international armed conflict still depends on existence of a certain level of intensity of the hostilities and of self-organization of the rebels.[150] At the same time, we need to note that a territory can be declared to be occupied only if it is placed under the authority of the alien armed forces, [151], which cannot be the case if this territory already finds itself under the sovereignty of the state to which these armed forces belong. In this light, it is safe to say that while the customary force of the Hague Regulations of 1899 and 1907 can be easily established, [152] Article 2 of these Regulations fail to apply to the cases of the territories where rebellious population is taking up arms against the forces of the State which already exercise sovereignty over this territory.[153] In this light, one may argue that sporadic insurgency of the colonized tribes and peoples occurring all across the second half of the nineteenth and the first half of the twentieth centauries may be qualified as internal disturbances suppressed by internal forces of order and the laws of international armed conflicts are not applicable to it. It is important to bear in mind that the fundamental right of a state to exercise sovereignty over its territory was solidified in a number of fundamental instruments of international law and constitutes a cornerstone of the international relations.[154]

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[149] Instutite of International Law, Yearbook, Neuchâtel session 1900, pp. 227-228.
[150] Aivo, G. (2013), *Le statut de combattant dans les conflits armés non internationaux*, p 69.
[151] Annex of the Convention (IV) concerning the Laws and Customs of War on Land : Regulations concerning the Laws and Customs of War on Land, 1907, art. 42; ICJ, Judgment of 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*, para. 172; ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, pars. 78, 89;
[152] ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* para. 89; ICJ, Advisory opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, para. 75;
[153] Convention (II) concerning the Laws and Customs of War on Land, 1899, art. 2; Convention (IV) concerning the Laws and Customs of War on Land, 1907, art.2;
[154] United Nations Charter, 1945, art. 2(4); ICJ, Judgment of 9 April 1949, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, para. 4, 35; G.A.U.N., A/RES/2625(XXV) (1970), principle No. 6; G.A.U.N., A/RES/41/128 (1986), art. 1; Lauterpacht, E. (2009). *International law ...,* vol. 1, p. 367, 367–70; Virally, M. (1977), *Une pierre d'angle qui résiste au temps avatars et pérennité de l'idée de souveraineté*, p. 179;

Another way to approach the question of applicability of the IHL to colonial armed conflicts in favour of the positive outcome is the notion of "civil war", replaced by the notion of "armed conflict not of an international character" with the adoption of the 1949 Geneva Conventions and priorly existed rather on the doctrinal than practical level in view of its perception by the international law actors. [155] In fact, the common Article 3 of the 1949 Geneva Conventions is the first international conventional minimal standard developed and aimed specifically at non-international armed conflicts, which set up the limits of conducting armed conflicts to be respected by both parties equally, by a non-state entity inasmuch as by a recognized government. While these Conventions were adopted only in 1949, entered into force even in 1950, thus after most of armed conflicts in the colonies took place, they can be still handy to some of such conflicts that persisted up until the 1950s, the example of the Algerian war for independence is the most vivid example of such conflicts with spectacular level of intensity and self-organization of the insurging Algerian people.[156] The latter factor is important to establish since the Contracting Parties to the 1949 Geneva Conventions intended to limit the application of the common Article 3 by this criterion, thought the ICRC expressed the position that this criterion is not indispensable for entailing application of the common Article 3.[157]

Yet even the latter, being adopted so lately, cannot be perceived as an ideal solution for IHL application to colonial conflicts. Before all, we need to mention that Contracting Parties to these Conventions explicitly intended to limit the scope of application of the common Article 3 by noting that it cannot be applied to every single case of armed violence involving official government forces.[158] In the 1952 commentary to the 1949 Geneva Conventions, the ICRC elaborated on the criteria for application of the common Article 3, which were deemed to be "useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived

[155]Geneva Conventions, 1949, Art. 3 (common);
[156]David, E. (2019). *Principe de droit des conflits armés,* pp. 142-143;
[157]1958 Commentary of the Article 3 common to 1949 Geneva Conventions [Online] International Committee of Red Cross.
[158]Pictet J. (1952) *Commentaires des Conventions de Genève du 12 août 1949*, pp. 41-50;

insurrection".[159] Among them was the criterion of self-organization of the party in revolt.[160] The latter criterion can be met if this party possesses an organized military force, has an authority responsible for its acts and capable of ensuring the respect and application of the IHL rules, exercises control over certain territory authority over the respective local population.[161] To this end, one of few cases qualifying for these criteria is the Algerian war for independence during 1954-1962 during which around two hundred fifty thousand people died and many more were wounded.[162] At the same time, it is worth noting that autochthonous tribes and ethnical groups could not have gained any legal entity or capacity, failing to present, commonly or distinctly, any institutional form or representative body, as the Court concluded in *West Sahara*[163]. Needless to say, they were not contracting parties to the conventional instruments of the international humanitarian law existing at that time.

The notion of "civil war" is applied to the conflicts where the parties constitute two distinct and sufficiently organized social groups and the hostilities themselves attain certain level of intensity, regardless of the fact whether one of the party to the conflict is a recognized government or not. [164] In other words, an uprising of a tribe inhabiting a colonized territory against the colonial administration may evolve to a "civil war" if these two criteria are satisfied, which means that this upraising gains a form of general rebellion of a spectacular scale, while the rebels are duly organized and coordinated.

However, in practical terms, establishing these two criteria is barely possible since the anticolonial rebellions, taking place 100-150 years ago, were rather chaotic insurgencies of separate tribes or peoples without any coordination between themselves, even being hostile to each other. Almost no evidence was left allowing to examine the level of self-organization and coordination of the anti-colonial uprisals of local peoples and tribes, that allows former colonial powers to assert that the armed interventions

[159]Ibid, p. 50;
[160]Ibid, p. 49;
[161]Ibid, pp.49-50;
[162]Yacono, X. (1982), *Les pertes algériennes de 1954 à 1962*, p. 128;
[163] ICJ, Advisory opinion of 16 October 1975, *Western Sahara*, pars. 149, 152; Waschefort, G. (2016), *Africa and international humanitarian law,* pp. 602-604;
[164]Heffter A.W. (1883). *Le Droit international de l'Europe* p. 253;

aimed at repressing those insurgencies were rather police operations in response to internal disturbances and were falling entirely within the realm of the internal law since every state has the inherent and essential right to protect its integrity, sovereignty and internal order against either external or internal threats. Yet on the other hand, the sole fact that colonial powers sent regular troops from the metropolitan territory for punitive expeditions may indirectly indicate that those hostilities attained significant level of scale and intensity, even if actual clashes fail to engage the entirety of those forces. Furthermore, control of a part of the territory and existence of a frontline between parties to the armed conflicts can be auxiliary factors for founding the application of the international humanitarian law rules, notably the already-mentioned Article 3 and the 1954 Hague for the Protection of Cultural Property in the Event of Armed Conflict.[165]

In fact, these two criteria of intensity and self-organization remain fundamental for establishing such a type of armed conflict even on the present stage of the IHL development.[166] In this way, they can serve not only as the ones for declaring a conflict as a civil war, but also they can support the abovementioned character of belligerence and thus the recognition of a classic international armed conflict.[167] Moreover, the more intensive and extensive the armed conflict is, the more solid reasons exist to claim the application of the international humanitarian law, especially since these two criteria are almost the sole that can be objectively appreciated in view of the scope of factual evidence related to that time remain accessible in modern days and in view of the aim to differentiate an internal disturbance from an armed conflict under IHL. [168]

Once establishing control over the occupied territory, the occupying authority is obliged to take all measures in order to restate and to ensure application and observance of the existing rules of the law of armed conflicts.[169]

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[165] 1958 Commentary of the Article 3 common to 1949 Geneva Conventions [Online] International Committee of Red Cross;
[166] Ibid;
[167] David, E. (2019). *Principe de droit des conflits armés*, p. 220; Aivo, G. (2013), *Le statut de combattant dans les conflits armés non internationaux*, p. 67.
[168] David, E. (2019). *Principe de droit des conflits armés*, p. 221; Heffter A.W. (1883). *Le Droit international de l'Europe.*, p. 253; Perels, F.(2014), *Manuel du Droit Maritime International*, pp. 186-187; Aivo, G. (2013), *Le statut de combattant dans les conflits armés non internationaux*, p. 69.
[169] Regulation concerning the Laws and Customs of War on Land, 1899, 1907, Art. 43;

In this regard, among these rules and customs of war, the obligation to protect cultural property during an armed conflict is one of the most ancient customary rule of the international humanitarian law.[170] Yet in 1758 Emmerich de Vattel in his *Law of the Nations* of 1758 stated that «temples, tombs, public edifices and all other works respected by their brightness shall be protected».[171] From this time onwards, various legal instruments and pieces of doctrine asserted this constant: Final Act of the 1815 Vienna Congress, Lieber Code of 1863, the 1874 Brussels Declaration.[172] These documents attested the widely accepted perception of this rule by the principal actors of the international community as the latter existed at that time.[173] With regard to the 1863 Lieber Code, which was the code of customs and rules of war issued by the U:S: President Abraham Lincoln to the Union Forces in the context of 1861-1865 American Civil War, the ICRC confirmed that "although they were binding only on the forces of the United States, they correspond to a great extend to the laws and customs of war existing at that time". [174] The 1863 Lieber Code exempted property belonging to churches, universities, academies of learning or observatories or museums of the fine arts from the general permission for a victorious army to appropriate property of the ceded territory and since then the prohibition of seizure of such territory continued to gain more and more universal acceptance and evolution up until the modern state of the development of IHL. [175] The next time this rule was reaffirmed in the Brussels Declaration of 1874 which prescribed for the obligation of belligerents to abstain from stealing and looting of the cultural property,[176] and, *a fortiori*, to export them, [177] namely

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[170] Henckaerts, J-M., Doswald-Beck, L. (2006). *Droit International Humanitaire Coutumier*, pp. 175—184;
[171] Vattel, E. (1835). *Le droit des gens ou principes de la loi naturelle;*
[172] Vienna Congress, *Final act*, Vienna, 9 June 1815; *Instructions to Government Armies in the Field (Lieber Code),* General Ordinance No. 100, United States of America, (1863); Brussels Conference (1874), *Draft of Declaration*; Convention (IV) concerning the Laws and Customs of War on Land and Annex to it: Regulation concerning the Laws and Customs of War on Land, 1907.
[173] Institute of International Law. (1880). Handbook *The Laws of War on Land*; Brussels Conference (1874), *Draft of Declaration*
[174] Commentary to the Instructions for the Government of Armies of the United States in the Field (Lieber Code) [Online] International Committee of Red Cross
[175] General Ordinance No. 100, United States of America, (1863), rule No. 34 (section II.);
[176] Brussels Conference (1874), *Draft of Declaration,* art. 2, 3; Institute of International Law. (1880). Handbook *The Laws of War on Land*; Convention concerning the Laws and Customs of War on Land, 1899, 1907, art. 28, 47; Regulation concerning the Laws and Customs of War on Land, 1907, art. 56; *Roerich Pact*, 1935, art. 1; Institute of International Law, (2006), *Handbook on Customary International Humanitarian Law*, rule No. 40; Stone, P. G. (2011). *Cultural Heritage, Ethics and the Military*, p. 35;

« arts and sciences »[178] or «historic monuments, art and science creatures».[179] This obligation was universally accepted by the international community existing at that time[180], endorsed by the state practice and,[181] and then codified in the Articles 4(3) and 19 of the Hague Convention of 1954. Even if to take into account the fact that this Convention was signed only in 1954, it changes little with respect to the conclusion that looting of cultural property was prohibited long before this date and the Convention merely confirmed it as a long-standing rule of customary international humanitarian law.

However, some parties of the legal doctrine on this issue disagree that looting of cultural property was clearly and unequivocally outlawed at that time by whatever rule of customary or conventional character. Furthermore, there is a position stating that the practice of looting was generalized and universally accepted at that period and that the actors of armed interventions had a right to trophies of the war.[182] Even if this position is too marginal, it is also true that seizure of cultural property in non-international armed conflict was far too long unraised on both conventional and customary level of the international humanitarian law almost up until the 1954 Hague Convention, when an overwhelming majority of colonial conflicts had been already the reality of the past.

Even if the 1949 Geneva Conventions included common Article 3 applying to non-international armed conflicts, it set the minimum level of protection which had no reference to the protection of cultural property,[183] because, perhaps, the state representatives were of opinion that the minimum standard of protection should not have included protection of cultural property. As it outlines the already mentioned 1952 commentary to the 1949 Geneva conventions, the evidence for the previous statement

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[177] Institute of International Law, (2006), *Handbook on Customary International Humanitarian Law,* rule No. 41;
[178] Brussels Conference (1874), *Draft of Declaration;*
[179] Regulation concerning the Laws and Customs of War on Land, 1899, 1907, art. 56; Brussels Conference (1874), *Draft of Declaration,* art. 8; G.A.U.N., A/RES/56/83, (2002), art. 31;
[180] Fiore, P. (1884), *Trattato di diritto internazionale pubblico*, pars. 1664, 1747; Martens, F. (1887). *Traité de droit international*; Maine, H. S. (1894). *International Law,* pp. 194-195; Pillet, A. (1898). *Les lois actuelles de la guerre*, para. 222;
[181] *Lieber Code (1863),* United States of America, art. 22; *Roerich Pact*, 1935; International Office of Museums of the League of Nations (1938), *Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War*; Comité national français (1943), *Déclaration solennelle*;
[182] *Rapport sur la restitution du patrimoine africain. Vers une nouvelle éthique relationnelle* [Online]. Report, p. 16;
[183] Geneva Conventions, 1949, Art. 3 (common);

can be found within the fact that the States clearly separated the rules they intended to make applicable to non-international armed conflicts by enumerating them in the common Article 3 from the other rules aimed at the armed conflicts between these States.[184] In this light, it is hard to argue that the States implicitly included protection of cultural property in the minimum threshold of protection designed in the common Article 3 and this conclusion precludes from establishing *opinio juris* as the indispensable element for giving its rule a customary force. With regard to the state practice of the presumed customary prohibition of looting of cultural property in this type of armed conflicts, it is also equally difficult to claim consistency and coherence of the one. For example, even during the Spanish Civil War of 1936-1939 (almost the end of the first half of the twentieth century), relocation of cultural assets by the opposing parties frequently occurred.[185] Not surprisingly, internal legal regimes could have easily admitted relocation of cultural property even in the result of armed raids of colonial administrations.[186]

Nevertheless, even if we would admit for the purpose of discussion that such a rule was put in place, as a custom, during the time when many cases of colonial armed interventions took place, proving that looting of cultural property did take place is another task difficult to complete. This is the 1954 Hague Convention mentioned above that elevated the prohibition of looting of cultural property to the level of universal acceptance, while Additional Protocol II to the 1949 Geneva Conventions extended its prohibition to non-international armed conflicts. By the Article 4(3) of the 1954 Hague Convention, the Contracting Parties agreed "to undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property". According to the ICRC definition of the looting, it can be defined as "the forcible taking of private property by an invading or conquering army from the enemy's subjects".[187] Plus, the Statute of the International Criminal Court indicates that such a forcible taking takes place for private or personal

[184] Pictet J. (1952) *Commentaires des Conventions de Genève du 12 août 1949*, pp.41-50;
[185] *Atroce guerre d'Espagne* [Online] Le Monde;
[186] Aivo, G. (2013), *Le statut de combattant dans les conflits armés non internationaux*, pp. 87-88.
[187] *Practice Relating to Rule 52. Pillage.* [Online] International Committee of Red Cross.

use.[188] There are at least two logical and formal problems with these definitions. The first one (and already exposed above) consists of the fact that these takings took place within the territories under the well-established sovereignty which was generally recognized as legitimate by the international community existing at that time, which precludes employing such terms as "invading". The second problem occurs with respect to "private or personal use". As it was abundantly presented above within this and the previous chapters, almost all of the restitution claims of the modern post-colonial states concern the cultural property currently conserved and displayed in publicly open museums across the world, more often under public rather private property. Even if in some cases the seized cultural values remained for some time in private collections, they were subsequently offered by private holders or their successors to public museums and it frequently happened at the active urge by the latter. In this light, proving private or personal goal guided by the greed is practically impossible task.

Finally, it is worthy to mention that when this rule is breached, the responsible state bears an obligation to make a reparation to the victim state.[189] In this context, the practice of the international community demonstrates that the obligation to remedy the harm of pillaging of cultural property has to be preferably fulfilled by means of repatriation of the property at stake.[190] As an exemple, we can cite the case of returning of some paintings to Belgium from the United States,[191] or the restitution of *Venus of Cyrene* by Italy to Libya[192] – both of them were based on the Hague Convention of 1907. Hence, we may conclude that once the challenging mission of proving all three assertions with regard to application of the IHL to the colonial history is completed, namely, application of the IHL itself, existence of the relevant rule at the material time

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[188] Rome Statute of the International Criminal Court, 1998, Art. 8(2)(b)(xvi),(e)(v));

[189] Henckaerts, J.M., Doswald-Beck, L. (2006). *Droit International Humanitaire Coutumier,* pp. 698-726; Treaty of Saint-Germain-en-Laye, 1919; Treaty of the Trianon, 1920;

[190] Treaty of Paris between Australia, Belgium … on the one hand, and Italy on the other hand, 1947, art. 12, 37; Jakubowski, A. (2015). *State succession in cultural property*, p. 117; Convention on the Settlement of Questions Arising from War and Occupation, 1952, Chapter 5, art. 1, para. 1; Convention for the Protection of Cultural Property in the Event of Armed Conflict, Protocol No 1, 1954, pars. 3, 4; Henckaerts, J. M., Doswald-Beck, L. (2011). Droit international humanitaire coutumier. *Déclaration à restituer les biens culturels exportés de l'Irak*, rule 41; SC, S/RES/686 (1991); SC, S/RES/687 (1991); SC, S/RES/1284 (1999);

[191] New York Supreme Court, judgment of 10 February 1966, *Menzel v. List*;

[192] Fourth chamber of the Court of Italy, judgment of May 15, 2008, *SECAP SpA (0147/06) et Santorso Soc. coop. arl (C-148/06) c. Commune di Torino*;

and qualification of the events as looting, claiming restitution of the looted property as an appropriate reparation is a relatively simple task.

Sub-Chapter 2.2 Legal issues arising from the modern states' claims under international humanitarian law.

In terms of procedural issues of consideration of such claims by the international institutions and particularly by the International Court of Justice, the first and the most evident obstacle is to quash the limitations to the competence *ratione temporis* imposed on this competence by the former colonial powers. In this regard, we may propose a concept of continuous violation which we propose to apply to the facts of looting of cultural property of colonized territories and peoples taking place at that time.

In light of the limits of the Court's competence over such cases often imposed by the time reserve, [193] the principal task of the Court is to identify the facts and the situations which form the material object of the dispute, in other terms – its real cause. [194] As such, the newly independent states with the colonial past may argue that all the looting of cultural property during punitive armed raids of the colonial administrations constitute such "real cause" of the dispute and thus the violation of the international humanitarian law. [195] In this regard, the time period of commission of this continuous violation extends to all the period during which this lasting illicit act remain non-conforming with the international obligation to protect cultural property.[196] It is also important to assert that a continuous violation can shape an object of the dispute,[197] or,

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[193] ICJ, Judgment of 22 July 1952, *Anglo-Iranian Oil Co. (United Kingdom v. Iran),* p. 144; ICJ, Judgment of 26 November 1957, *Right of Passage over Indian Territory (Portugal v. India),* pp.145-146; Parisi, F. and Ghei, N. (2003), *The Role of Reciprocity in International Law*, p. 15;

[194] ICJ, Judgment of 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India),* p. 33; Wyler, E. (1991), *Quelques réflexions sur la réalisation …*, p. 881;

[195] ECtHR, judgment of 19 December 2002, *Broniowski v. Poland*; PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria*, p. 80-82; ICJ, Judgment of 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India),* p. 33-36; PCIJ, Judgment of 30 August 1924, *Mavrommatis Palestine Concessions*, p. 11;

[196] G.A.U.N., A/RES/56/83 (2001), art. 14 (2); Goodwin-Gill, G. S. (1985). *System of the Law of Nations …*, pp. 193-198; ICJ, Judgment of 24 May 1980*, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, para. 76-77; ICJ, Advisory opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* para. 126;

[197] ECtHR, judgment of 19 December 2002, *Broniowski v. Poland*; ECtHR, report of 8 January 1960, *Becker v. Belgum*, p. 48-49; Alexandrov, S. A. (1995). *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*;

in other words, a contentious point between the parties, [198] and thus it can constitute a generating situation.[199] This type of violation exists if the situation stems from the unlawful act which lasts in its non-conformity with an international obligation[200] and can be ended only by ceasing.[201] In case of looting the cultural property during an armed conflict, the violation persists inasmuch the looted objects remain in possession by the responsible State.[202] Moreover, failure to grant reparation for damages caused during the looting [203] constitutes a separate violation and rests illegal as long as the reparation remains unrealized, and thus it has a continuous nature. [204] While the Court has never stated on the issue or situations involving continuous violations,[205] we still need to stress that neither it has expressly rejected this approach [206] and that, in general, it dealt several times with the cases where continuous violations did take place.[207]

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[198] ICJ, Judgment of 13 December 2007, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 38; ICJ, Judgment of 20 December 1974, *Nuclear Tests (Australia v. France)*, para. 29; ICJ, Judgment of 20 December 1974, *Nuclear Tests (New Zealand v. France),* p. 466, para. 30;

[199] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 24; ICJ, Order of 2 June 1999, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, para. 27; ICJ, Judgment of 12 April 1960, *Right of passage over Indian territory*, p. 33; Wyler, E. (1991). *Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite*, p. 881; Maus, B. (1959). *Les réserves dans les déclarations d'acceptation de la juridiction obligatoire de la Cour internationale de Justice*;

[200] G.A.U.N., A/RES/56/83 (2002), art. 14 (2); ICJ, Judgment of 24 May 1980, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* para. 77; ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 21;

[201] G.A.U.N., A/RES/56/83 (2002), art. 30; ICJ, Advisory opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* para. 126; PCIJ, Judgment of 13 September 1928, *Factory at Chorzów, p. 59*; Crawford, Cf. J. (2005). *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, pp. 136, 251-252; ICJ, Judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para. 148;

[202] ECtHR, Judgment of 18 December 1996, *Loizidou v. Turkey*, para. 40; ILC, Preliminary report by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, The responsibility of States for internationally wrongful acts,* A/CN.4/416 (1998), p. 14; Distefano, G. (2006). *Fait continu, fait composé et fait complexe dans le droit de la responsabilité*, p. 8; ECtHR, Judgment of 24 June 1993, *Papamichalopoulos and others v. Greece*, para. 40; ICJ, 22 December 2009*, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Counter-Memorial of Italy, p. 3, para. 1.11;

[203] G.A.U.N., A/RES/56/83 (2002), art. 31; ICJ, Judgment of 22 July 1952, *Anglo-Iranian Oil Co*, para. 93;

[204]Ago, R. (1939). *Le délit international*, pp. 519-521; Personnaz, J. (1939). *La réparation du préjudice en droit international public*, p. 83;

[205] Pauwelyn, J. (1995). *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, pp. 415-450; PCIJ, Judgment of 30 August 1924, *Mavrommatis Palestine Concessions*, p. 35; Maus, B. (1959). *Les Réserves dans les déclarations d'acceptation de la juridiction obligatoire de Cour International de justice*, p. 82;

[206] ICJ, Order of 2 June 1999, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, para. 28; ICJ, Order of 15 December 1979, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* p. 3; ICJ, Judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para. 14;

[207] ICJ, Advisory opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, para. 118-133; ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 21; ICJ, Judgment of 30 June 1995, *East Timor (Portugal v. Australia)*, para. 5;

On the other hand, one may argue that the very act of seizure of property fails to gain continuous character simply because of its effects or its consequences, namely a persistent hold of such property, extends over time.[208] Hypothetical looting of cultural property committed by the colonial administration presents rather an instant character since it is terminated in the moment of commission [209] and immediately entails its consequences, for instance, state responsibility of the guilty party.[210] In the case *Phosphates in Morocco*, the Permanent Court of International Justice rejected Italian position according to which the monopolization of the Moroccan phosphates caused by the unlawful internal legislation being in effect during 1920-1934 constituted the continuous violation.[211] The Permanent Court of International Justice established that the 1920 decrees removing a common use of the phosphate reserves were contrary to the international law as it was shaped at that time and that every single case of adoption of such decree constituted an accomplished fact and immediately engaged the state responsibility.[212] Besides, the Court never sacrificed a temporal limit of its competence to the concept of continuous violation.[213]

The second procedural issue is related to legal standing of the modern states on the territory of which previously colonized tribes and peoples used to live. In particular, it is not that evident that these modern states directly and unconditionally succeed to claims for reparations, read restitutions, for the damage caused to those tribes and peoples. It is true that in the disputes concerning grave violations of the international humanitarian law, a harmed party has always a right to demand legitimate reparations.

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[208] ECtHR, Judgment of 13 December 2000, *Malhous v. Czech Republic*, para. (2) (c); ECtHR, Judgment of 4 March 1996, *Brezny v. Slovakia*, p. 65; ECtHR, Judgment of 3 December 2002, *Smoleanu v. Romania*, pars. 45-46; ICJ, Order of 2 June 1999, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, para. 29; WTO Appellate Body, Panel Report of October 17, 1996, *Brazil - Measures Affecting Desiccated Coconut,* para. 32;

[209] ICSID, ruling of 8 May 2008, *Víctor Pey Casado et Fondation Président Allende v The Republic of Chili*, para. 608; ECtHR, Judgment of 13 December 2005, *Bergauer and others v: The Czech Republic*, p. 10; ECtHR, partial ruling on admissibility of 24 October 2006, *Abbasov v. Azerbaijan*, p. 5, para. 4; ILC, Text of the draft of articles and commentary A/CN.4/SER.A/2001/Add.1 (2001), art. 14, p. 147, para. 4;

[210] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 4, 28; PCIJ, Judgment of 26 July 1927*, Factory at Chorzów*, p. 47;

[211] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 13;

[212] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco,* pp. 4, 28;

[213] ICJ, order of 6 July 2010, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, dissenting opinion of the Judge Cançado Trindade, para. 71-72; PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria*, p. 80-82; PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 4, 28; Pauwelyn, J. (1995), *The Concept of a 'Continuing Violation …*, p. 436;

[214] The victims of the flagrant violations of the IHL did not receive a just reparation during the colonial period,[215] since they did not possess a legal personality of states necessary to bring a case before the international court.[216] Nevertheless, the insurging movements of the autochthone tribes which fought for their independence have been recognized as having the international legal personality.[217] To this end, the autochthone peoples possess legal rights and obligations,[218] in other terms, the legal interest, including the right to obtain reparation for damages inflicted to them during the colonial time.[219] According to the Court's position formulated in the case *Certain Phosphate Lands in Nauru*, the autochthone peoples claimed their rights, including the one to demand the reparation for the damages incurred,[220] on the basis of the succession as a newly independent state.[221] Similarly to the case *South West Africa*[222] or *Northern Cameroons*[223]*,* the Court supported its position by referring to the violations occurring during the period of the international mandate in the case *Certain Phosphate Lands in Nauru*, when Nauru requested the Court to decide on the violations of the Australian mandate administration of Nauru's territory as the subordinated in order to claim the reparation for the material damages.[224]

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[214] G.A.U.N., A/RES/60/147 (2005); ILC, *Report of Theo van Boven*, E/CN.4/Sub.2/1993/8 (1993);
[215] ICJ, Judgment of 18 July 1966, *South West Africa (Ethiopia v. South Africa)*, para. 44*;* ICJ, Judgment of 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom) p. 35*; ICJ, Judgment of 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)* para. 30;
[216] Statute of the International Court of Justice, 1945, art. 34 (1), 35 (1); ICJ, Advisory opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, p. 179; ICJ, Judgment of 21 December 1962, *South West Africa (Ethiopia v. South Africa)*, p. 319; ICJ, Judgment of 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom)*, p. 32;
[217] Convention for the Protection of Cultural Property in the Event of Armed Conflict, Protocol No 1, 1954, art. 1, para. 4; Quoc, N., Daillier, P., Pellet, A. (1980). *Droit international public*, pp. 464-466; Reuter, P. (1961). *Principes de droit international public*, p. 500;
[218] Council of Europe (1984), *International legal protection of cultural property,*; Niec, H. (2000). Report d'articles « *Pour ou contre les droits culturels ?* »; First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples, *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples,* Whakatane; ICJ, Advisory opinion of 16 October 1975, *Western Sahara*, para. 152; HRC, views of 30 June 1981, *Lovelace v. Canada*, para. 17; Thornberry, P. (1992). *International law and the rights of minorities*, p. 211;
[219] ILC, *Forth report of M. R. Ago*, A/CN.4/264 (1972), para. 72–73; ILC, *First report of J. Crawford*, A/CN.4/490/Add.5 (1998), p. 47, 54–55; ICJ, Judgment of 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*, para. 245;
[220] ICJ, Judgment of 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, p. 5;
[221] Atlam, H. M. (1986). *Succession d'Etats et continuité en matière de responsabilité internationale,* pp. 107–109, 117–118; Peterschmitt, M. (2001). *La succession d'Etats et la responsabilité internationale pour fait illicite,* p. 44;
[222] ICJ, Judgment of 18 July 1966, *South West Africa (Ethiopia v. South Africa),* p. 65;
[223] ICJ, Judgment of 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom)*, p. 34;
[224] ICJ, Judgment of 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, p. 30;

Thus, international humanitarian law barely offers legally sound options for the newly independent states to claim restitution of their cultural property on this basis. From substantial perspective, the challenge is three-fold and existentially guided by the principle of non-retroactivity of the rules of international law. At first, an applicant party shall define the body of law, or, in other words, a set of legal rules, applicable at a certain moment and to certain subjects. This duty sole is difficult one since at the time when most of looting cases took place the international humanitarian law itself was at the very first stage of its development, thus to state that the stakeholders cared about expanding its effect to other parties than themselves is daring. No textual provision mentioned non-state actors as beneficiaries of international humanitarian law up until the common Article 3 of the 1949 Geneva Conventions. The civil war concept which some authors suggest applying in the context of colonial armed conflicts is rather doctrinal than of hard-law origin. Moreover, if the belligerency as an important characteristic of a party of the IHL can be attributed to insurging tribes in colonies, the application of the notion of belligerent occupation to the armed interventions of the colonial powers is fiercely disputable, since they had exercised their sovereignty over the colonized territories even before these interventions and seizures themselves, yet before 1870s-1880s when the very first rules of the IHL began to emerge. It is almost delirious to assert that the High Contracting Parties yet proving difficult to find a solution for application of the war rules between themselves, intended to expand their effect to non-state actors, especially inhabiting their colonies.

Secondly, an interested party shall also establish that at the necessary moment there was already a rule of international law of conducting hostilities granting protection of cultural property from forceful seizures. It is true that the first international documents mentioning such a protection appeared already in the 70s-80s of the XIX centaury, but they were only the Hague Regulations of 1899 and 1907 that explicitly mentioned such a rule within their provisions. And only in 1954 with the adoption of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol that this protection was clearly extended to non-international armed conflicts, when most of the colonial conflicts had passed.

Thirdly, there is an issue with proving that looting as defined by the rules of IHL did take place. Indeed, there is certain more or less solid evidence that many cultural artefacts were relocated in the result of armed raids of the colonial powers. With respect to some of these artefacts, we can even trace the exact circumstances of such relocation. Yet for the purpose of establishing these circumstances within a legal proceeding before an international court or tribunal, existing evidence may not suffice. Plus, even during armed interventions, some of the cultural values were acquired by colonialists in the other way than looting: purchase, exchange, discovery, etc. The problem of proving the looting also occurs with regard to the intent of the colonists: while it is important for the notion of looting that it is undertaken with intent of personal or private benefit, often greed, most of cultural values that are reclaimed in modern days were offered to the museums and other public institutions and are conserved there, which is quite obviously the opposite to the personal or private benefit.

In addition to substantial obstacles, there are several procedural ones. Newly independent states will need to address their claim before an international judicial institution, even if they are confident enough in their legal reasoning. In order to do it, they need to define a competent court and to ensure that their demands are admissible. However, there are serious concerns with regard to both these tasks.

A seized institution shall have jurisdiction to adjudicate a dispute involving a respondent state. While the jurisdictions *ratione materiae or ratione loci* do not pose evident barriers, the jurisdiction *ratione temporis* does. It will be extensively illustrated in the following Chapter, but for the sake of clarity right here, it is important to note that all modern state which are former colonial powers consistently limit their consent to the *ratione temporis* jurisdiction of the international judicial institutions, the most vivid example being the International Court of Justice. Thus, dealing with such a reservation is a complicated distinct task for the interested states.

The only relatively easy task for claiming parties is to argue that restitution of looted cultural values is the most appropriate type of reparation for it as for an internationally wrongful act. It seems to us that for this sole question there is almost a uniformity among the actors.

CHAPTER 3. CURRENT ISSUES OF THE RESTITUTION OF CULTURAL OBJECTS TO THE COUNTRIES OF THEIR ORIGIN

Sub-Chapter 3.1 Failure to ensure physical integrity of the cultural heritage as a legal ground for refusal to restitute.

One of the main arguments set forth by the opponents of the restitution in the western countries is that newly independent states will certainly fail to physically protect cultural property once it is entrusted to their hands. From this perspective, these countries argue that the restitution cannot take place since it would then cause a violation of their obligation to protect cultural heritage, whether their own or the universal one, prescribed by a number of international conventional provisions. On the other hand, they often estimate that their museums are the most suitable place of conservation of cultural property, equally accessible to the nationals and residents of the newly independent states and thus can serve for educational purposes for the latter. In this regard, they suggest that the current arrangements of location and conservation of the cultural property is the best scenario in view of the interests of international community as a whole to preserve its universal cultural heritage.

In general, the obligation to protect is embodied in both the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property and the 1972 UNESCO Convention concerning the protection of the world cultural and natural heritage. By ratifying the 1970 Convention, all Contracting Parties considered that "cultural property constitutes one of the basic elements of civilization and national culture" and that "it is incumbent upon every State to protect the cultural property existing within its territory".[225] Likewise, by virtue of adhering to the 1972 UNESCO Convention, the Parties

[225] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970, Preamble;

established "an effective system of collective protection of the cultural and natural heritage of outstanding universal value".[226]

In this regard, it is important to note that the architectural artworks and their premises, as well as monumental paintings and natural sights are protected by virtue of the 1972 UNESCO Convention.[227] The protection of the cultural property constitute an international obligation of every State party of the 1972 UNESCO Convention.[228] In accordance with the Court's position formulated in the case *Costa Rica v. Nicaragua,* the State is obliged to react with the due diligence with the aim to prevent or reduce the damage for cultural property and to take all appropriate measures in view of the nature, the dimensions, the location of the cultural values, as well as of the character of the danger to which they are exposed.[229] In order to ensure the protection of the world cultural heritage, the 1972 UNESCO Convention establishes the obligation of every State Party to it to take appropriate preventive measures available to it, [230] and to demonstrate a reasonable care with regard to these measures. [231] Every State undertakes to guarantee and to fulfil international obligations with due diligence within the territory under its sovereignty. [232] In the case *Gabčíkovo-Nagymaros project*, the Court interpreted the obligation of precaution and due diligence as the one prescribing for the prevention from all damage, namely, taking into account the risks of danger and the vigilance with respect to the application of the appropriate measures. [233]

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[226] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, Preamble;

[227] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 1, 4, 5; Intergovernmental Committee on protection of world cultural and natural heritage (2019), *Operational Guidelines for the Implementation of the World Heritage Convention*; Blake, J. (2000), *On Defining the Cultural Heritage;* Francioni, F., Gordley, J. (2013). *Enforcing Cultural Heritage Law*; Pressouyre, L. (1993). *La Convention du patrimoine mondiale, vingt ans après*;

[228] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 5;

[229] ICJ, Judgment of 2 February 2018, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* para. 104, 153, 228;

[230] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 4, 5;

[231] ITLS, Advisory opinion of 1 February 2011, *Responsibilities and Obligations of States which Sponsor Persons and Entities in the Context of Activities Carried Out in the Area*, p. 111–120, 125-135; WCESKT, (2005), The Precautionary Principle; ICSCRCP, (2013), *Archaeological Due Diligence Assessment*; *Proposition de loi relative au patrimoine monumental de l'État*, (2011), France; *Loi sur le patrimoine culturel*, (2011), Canada, p. 21, a. 189;

[232] ICJ, Judgment of 9 April 1949, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, p. 22; PCIJ, Advisory opinion of 4 February 1932, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory;* PCIJ, Judgment of 7 June 1932, *Free Zones of Upper Savoy and the District of Gex*;

[233] ICJ, Judgment of 25 September 1997,*Gabčíkovo-Nagymaros Project*, par 97, 113; see also Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997; G.A.U.N., A/RES/51/229 (1997); G.A.U.N., A/RES/56/83 (2001); *Proposition de loi relative au patrimoine monumental de l'État*, France (2011); *Loi sur le patrimoine culturel*, Canada (2011), c. 21, a. 189; TIDM, Order of 3 December 2001, *Mox Factory Case (Ireland v. United Kingdom)*;

The 1972 Convention prescribes for the *erga omnes partes* obligation to enact necessary measures to ensure identification, protection, conservation, appreciation and transmission of the cultural heritage to the future generations.[234] All the parties to this Convention undertake to ensure these measures with respect to their cultural and natural heritage located at their territory with due diligence and precaution.[235]

The execution of these obligation transcends into the responsibility of each State to take various measures and to uphold preventive policy to the extent afforded by its financial sources, to objectively assess the circumstances of the situation, the level of threats and to opt for the most suitable measures with regard to its cultural or natural heritage. [236] Among other things, these measures include creation of museums with decent conditions, [237] adoption of the appropriate legislation and cooperation with the international community,[238] and they constitute the requirements of utmost importance for ensuring a due protection and appreciation of the cultural and natural heritage. In this light, the obligation to ensure decent museum conditions consists of ensuring decent conditions in the museums, including the protection from natural disasters, maintaining protective environment for the collections, providing sufficient funds, conserving and restoring cultural values.[239] It is also essential to remember that the obligation to protect cultural heritage is equally inherent to the scope of the right to participate in cultural life as guaranteed by the Article 15 of the International Covenant on Economic, Social and Cultural Rights.[240] In this regard, the UN Committee on Economic, Social and Cultural Rights voiced the position that in order to effectively ensure this right the State Parties

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[234] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 5;
[235] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 4; WCESKT, (2005), The Precautionary Principle;
[236] UNESCO General Conference, 11 C/Resolutions (1960), para. 4; UNESCO General Conference, 17 C/Resolutions, (1972); ICOM, *Code of ethics for museums,* (1986); Liston, D. (1993). *Museum Security and Protection;*
[237] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 5; UNESCO General Conference, 20 C/Resolutions (1978), para. 12 (c); UNESCO General Conference (1966), *Museum Development,*; Convention on the Defense of the Archaeological, Historical and Artistic Heritage of American Nations, 1976;
[238] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 5, 17; UNESCO, ICOMOS, IUCN, ICCROM, (2010), *Managing disaster risks for World Heritage*; Destexhe, A. (2015), *Assurer une protection durable du patrimoine culturel matériel et immatériel de l'humanité contre la destruction et la dégradation*;
[239] Rollet-Andriane, L. J. (1979), *Retour et restitution de biens culturels*; Boylan, P. (2006). *Comment gérer un musée : manuel pratique;* ICOM (1986), *Code of ethics for museums*, p. 2.2; UNESCO General Conference, 20 C/Resolutions (1978), Annexe 1, pp. 11-17, para. 12; ICOM, Conservation Committee (1975), Prepublication Doc. 75/3/2;
[240] CESCR, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21 (2009), para.15 (b);

are obliged, *inter alia*, to respect and to protect the cultural heritage located within its territory.[241]

In addition, this obligation also prescribes for the protection against third parties non-affiliated with the government. Prevention *ad intra, ex ante* or *ex post* constitutes the state responsibility for a harmful act committed by individuals as a consequence of the lack of due diligence on the part of the State.[242] In particular, the States are obliged to observe that all the activities within their maritime space are conducted by the professionals and to control the protection of the cultural, historic or archaeological articles discovered at sea. [243] Furthermore, in the course of discoveries undertaken under its sovereignty, the State is obliged to ensure that the excavated articles are transported and conserved in the appropriate institutions, including museums, libraries and universities.[244]

Plus, in order to supervise the conduct of the actors of archaeological excavation, the State are subject to the obligation to establish the mechanism of special permissions issued to professional archaeologists indicating the scope of their power, the expected outcome and the duration of the archaeological research. [245] For the purpose of identifying and assessing cultural values, the States undertake to provide for inventarisation of the cultural property.[246] Even more, the access of the public to the cultural heritage is an integral part of the necessary requirements for proper respect and

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[241] Ibid, para. 50;

[242] ICJ, Judgment of 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America),* p. 36, para. 40; ICJ, Judgment de 24 May 2007, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, para. 29; ICJ, Judgment of 27 June 2001, *LaGrand (Germany v. United States of America),* p. 493-4, pars. 76-7; PCIJ, Judgment of 12 December 1934, *Oscar Chinn,* p. 81, 87; PCIJ, Judgment of 13 September 1928, *Factory at Chorzów,* p. 29; United Nations Conference on the Environment, *Stockholm Final Declaration* (1972), art. 7; G.A.U.N., A/RES/51/229 (1997);

[243] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 5 b), e); Agreement relating to the application of the United Nations Convention on the Law of the Sea of December 10, 1982, Montego Bay, 1994, art. 139; International Convention on Maritime Search and Rescue, 1979, chapitre 5;

[244] UNESCO General Conference, 11 C/Resolutions CPG.61/VI.11 (1960); UNESCO General Conference, 14 C/Resolutions, CFS.67/VII.4/A/F/S/R (1966); UNESCO General Conference, 31 C/Resolutions (2001);

[245] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 5 (b); UNESCO General Conference (1956), 9 C/Resolutions; UNESCO General Conference (1968), 16 C/Resolutions;

[246] UNESCO General Conference, 16 C/Resolutions (1968); First International Congress of Architects and Technicians of Historic Monuments, Athens (1931), *Charter of Athens*; Colloquium on inventories of cultural goods in Europe (1980), *General inventory of monuments and artistic riches of France*; Loi sur l'importation et l'exportation des biens culturels, Canada (1985); Proposition de loi relative au patrimoine monumental de l'État, France (2011);

appreciation of the cultural property.[247] As an example, we can cite the case of discovering of the wrecked ship *Deltebre* in Spain. This case is noteworthy because of the fact that the amateurs and the tourists were granted permissions to participate in underwater archaeological searches with the aim to provide the public with the possibility to enjoy the site and understand the historic context and importance of the cultural heritage. The UNESCO subsequently saluted and recognized the excellent level of the preservation of cultural values and enlisted this example in the list of Best Practices of the Underwater Cultural Heritage.[248]

Moreover, the States are required to manage and to plan archaeological activities at the national and local levels, in cooperation with the other States and by taking legislative, financial and administrative measures necessary for it..[249] In light of the current extensive state practice, there is an aggravated risk of losing or damaging of the underwater cultural values during uncontrolled archaeological diggings. [250] In this respect, negligence of a State to take appropriate measures may entail recognition of its international responsibility, as the Court expressed in the case *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. [251] By referring to the principle of precaution and due diligence, the Court declared Uruguay responsible for derogating from its obligation to protect the environment because it failed to notify the parties concerned about the harmful activities with the river.

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[247] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, art. 6, 7, 13; UNESCO General Conference, 11 C/Resolutions CPG.61/VI.11 (1960); UNESCO General Conference, 31 C/Resolutions (2001); UNWTO (1980), *Manila Declaration on World Tourism*; Conference of the International Union of Official Tourism Bodies (1963), *Recommendations held in Rome*; ICMS (1976), *Cultural Tourism Charter*;

[248] *L'histoire d'une épave, Deltebre, Baix Ebre, Catalogne - l'Espagne*. [Online] UNESCO.; *Les Meilleures Pratiques du Patrimoine Culturel Subaquatique* [Online] UNESCO; ICOM (2015), *The Deontological and Ethical Dimensions of Archeology*, p. 10;

[249] ICOMOS (1964), *International Charter on the Conservation and Restoration of Monuments and Sites*; UNESCO General Conference, (1968), 16 C/Resolutions*;* European Convention for the Protection of the Archaeological Heritage, 1969;

[250] UNESCO (2006), *The Impact of Treasure-Hunting on Submerged Archaeological Sites;* Throckmorton, P. (1990). *The world's worst investment: the economics of treasure hunting with real life comparisons.*, pp. 75-83; Throckmorton, P. (1971). *Shipwrecks and archaeology: the unharvested sea*; Ichon, A. (1968). *La mission archéologique française au Panama, Journal de la société des américanistes,* pp. 139-143; Aznar, M. J. (2015). *Regarding les Epaves de Navires en Haute mer et le Droit International;*

[251] ICJ, Judgment of 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay,* para. 145;

On the other hand, insufficient diligence in conservative measures can entail the risk of losing or harming of the cultural property.[252]

Furthermore, failure to ensure necessary protection against the heightened risk of losing or deteriorating of the cultural property entails the state responsibility and demonstrates its incapacity to safeguard cultural values in the case of hypothetical return of these values to this state.[253] In many cases, museums and open sights are poor and suffer from systematic lack of funding, embezzlement thereof and inadequate management. Among the most frequent troubles that face these institutions in newly independent states we can name the cases where rain infiltrates abundantly, wild animals roam limitlessly, physical constructions are degrading and eventually falling.

These infringements directly contravene a number of provisions of the Code of Professional Ethics promoted by the International Council of Museums. Among them the most relevant obligations include to "ensure adequate premises with a suitable environment for the museum", to develop and to maintain policies with respect to "the collections and other resources against natural and human-made disasters", and "to ensure appropriate security to protect collections against theft or damage and to ensure that there are sufficient funds to carry out and develop the activities of the museum".[254] Even the Intergovernmental Committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation in its Recommendation No. 8 issued under the auspices of the 25th session of the UNESCO General Conference reiterated its conviction that "a healthy museum structure is one major rampart in efforts to maintain cultural property in its countries of origin and to ensure its return or restitution to them".[255]

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[252] UNESCO General Conference, 29 C/Resolutions (1997)*;* UNESCO General Conference*,* 38 C/Resolutions*,* (2015); ICOM-CC, *Terminology of conservation-restoration of tangible cultural heritage*, (2008);

[253] *Restituer des oeuvres d'art ... mais à qui ?* [Online] Le Monde; Crawford, J. (2003). *Les articles de la C.D.I. sur la responsabilité de l'Etat* …, p. 156; *Rapport sur la restitution du patrimoine africain. Vers une nouvelle éthique relationnelle* [Online]. Report.; *Restitution du patrimoine africain : quel accueil pour les œuvres de retour en Afrique ?* [Online] Jeune Afrique;

[254] ICOM (2004) *Code of Deontology for the museums*, principles No 1.3., 1.6., 1.7., 1.9;

[255] UNESCO, Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, Report, (1989), recommendation No. 8;

The issue of preservation of cultural property is so important that even the heads of the newly independent states admit it, as the President of the Democratic Republic of the Congo did in 2019 by stating that “we have other urgencies” rather than demanding immediate restitutions and by referring to the deplorable conditions of the museums in Kinshasa.[256] All of this clearly indicates that restitution is even more complicate ambition when the demanding countries fail to ensure proper museal conditions beforehand. All of these circumstances raise concerns that once the claimed cultural property is returned to the country of origin with deplorable physical conditions of conservation, it can be irreversibly damaged and forever lost for all human mankind.

Among the recent examples of refusal to return cultural property to the countries of origin, we may invoke the following. For instance, the United Kingdom refused to restitute to Egypt so-called ‘Rosetta Stone’ by stating that Egypt was not capable of ensuring the physical security and integrity of the stone in the museum of Cairo.[257] In fact, Egypt neglected the protection of cultural heritage, notably within the historic Cairo, which was threatened by the elevated level of groundwater, the miserable state of infrastructure and absence of the system of management and conservation – the situation which has not been changed even with the help of the UNESCO provided since 1979, according to the 2019 report.[258] Moreover, economic and political context, the state of unceasing civil war and guerrilla taking always place in Egypt contribute to complicating a possible favourable solution with respect to the return of the stone, as the United Kingdom states.[259]

Yet the problem is even more complicated than it may have already appeared, since even developed countries sometimes face challenges with physical conservation of cultural values in their museums. It is noteworthy that even Belgium, the country with the GDP of nearly 46 thousand U.S. dollars per capita, was faced with the financial

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[256] *La RDC inaugure son musée et temporise sur le dossier brûlant des "restitutions"* [Online] RTL.
[257] Gay, A. (2013). *La restitution des biens culturels à leur pays d'origine ...*; *L'Egypte réclame le retour de la pierre de Rosette.* [Online] Liberation; *Le Caire demande la restitution de la pierre de Rosette*. [Online] Le Journal Des Arts; *L'Égypte réclame la restitution du buste de Néfertiti*. [Online] Le Point.; *Restitutions d'antiquités : L'Égypte hausse le ton*. [Online] Le Figaro;
[258] World Heritage Committee, Rapport WHC/19/43.COM/7B.Add.3 (2019);
[259] Gay, A. (2013), *La restitution des biens culturels à leur pays d'origine ...*, p.51;

problems of ensuring the diligent protection of its cultural property conserved in the Royal Museum of Beaux Arts in Brussels. Since 2016, some water leakage in the celling took place, making the Museum's personnel to take down and to hide certain art objects in the other place. [260] However, separate sorrowful cases of irregularities with the preservation of cultural property cannot allow to assume an overall incapacity to ensure such preservation and, according to the current practice, cannot serve as a valid ground for refusing to restitute cultural heritage.[261] For instance, in 2018 the Switzerland did not hesitate to restitute around 550 ancient pieces of money to Egypt, notwithstanding the mediocre conditions of housing of cultural property in Egypt, notably of Abu Mena – a cultural site of the Ancient Egypt – endangered by the heightened level of the groundwater, collapse of several buildings, as well as the non-compliance of Egypt with the corrective measures prescribed before by the World Heritage Committee. [262]

Sub-Chapter 3.2 Legal analysis of the ICJ's jurisdiction ratione temporis on possible claims of the newly independent states.

In addition to the necessity for newly independent states to establish material grounds for claiming restitution of cultural property originating from their territories, certain procedural challenges are also presented with regard to addressing the issue before the International Court of Justice. One of them is the limitation of the ICJ's jurisdiction *ratione temporis* embodied in the unilateral declarations recognizing the jurisdiction of the Court as compulsory submitted by many UN Member States, including former colonial powers which present an acute interest for our analysis. For instance, Belgium limited the ICJ's jurisdiction by "legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date".[263] The United Kingdom did

[260] *Bruxelles: des infiltrations d'eau menacent les œuvres exposées aux Musées des Beaux-Arts* [Online] RTBF.
[261] Cornu, M., Renold, M. A. (2010). *New Developments in the Restitution of Cultural Property;* Lagarde, P. (2006). *Restitution Internationale des Biens Culturels en dehors de la Convention de I'UNESCO de 1970 et de la Convention d'UNIDROIT de 1995*; *Les États-Unis restituent des poteries à la Libye* [Online] UNESCO.; Kiwara-Wilson, S. (2013). *Restituting Colonial Plunder : The Case for the Benin Bronzes and Ivories, pp.* 375-426;
[262] Caflisch, L. (2004). *La pratique suisse en matiere de droit international public*, pp. 661-720;
[263] *Declarations recognizing the jurisdiction of the Court as compulsory* [Online] Belgium;

the same by referring to “all disputes arising after 1 January 1987, with regard to situations or facts subsequent to the same date”.[264] Portugal excluded “any dispute, unless it refers to territorial titles or rights or to sovereign rights or jurisdiction, arising before 26 April 1974 or concerning situations or facts prior to that date”.[265] Spain detailed its limitation even more by excluding “disputes arising prior to the date on which this Declaration was deposited with the Secretary-General of the United Nations [29 October 1990] or relating to events or situations which occurred prior to that date, even if such events or situations may continue to occur or to have effects thereafter”.[266] France withdraw its declaration at all on January 2, 1974, nearly 1 year prior to the final Judgment in the *Nuclear Tests Cases*.[267] As such, it is for the interested newly independent states to find valid legal arguments to bypass this limitation.

In order to establish the jurisdiction, it observes the date of the emergence of the dispute, which is marked by a refusal to the claims of a party on the right or fact.[268] The Court developed a rich and coherent practise of defining the notion of a dispute as " is a disagreement on a point of law or fact, a conflict of legal views or interests between parties".[269]

In addition, the Permanent Court of International Justice (also “PCIJ”) established for the first time,[270] and the ICJ developed a legal test to determine the situations or facts giving rise to the dispute, which are those which give rise to the subject of the dispute, [271] that is to say, a real issue at stake brought by the requests of the Parties.[272]

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[264] *Declarations recognizing the jurisdiction of the Court as compulsory* [Online] United Kingdom;
[265] *Declarations recognizing the jurisdiction of the Court as compulsory* [Online] Portugal;
[266] *Declarations recognizing the jurisdiction of the Court as compulsory* [Online] Spain;
[267] Scott, G., Carr, C., (1987). *The ICJ and Compulsory Jurisdiction*, p.65.
[268] ICJ, Judgment of 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, p. 260; ICJ, Judgment of 20 December 1974, *Nuclear Tests (Australia v. France),* p. 271, para. 55; ICJ, Judgment of 21 March 1959, *Interhandel (Switzerland v. United States of America)*, p. 6, 21; ICJ, Judgment of 26 November 1957, *Right of Passage over Indian Territory (Portugal v. India)*, p. 35; ICJ, Judgment of 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom)*, p. 27;
[269] PCIJ, Judgment of 30 August 1924, *Mavrommatis Palestine Concessions*, p. 11; ICJ, Judgment of 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom)*, p. 27;
[270] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, Memorandum of the Italian Government, p. 29; PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria,* p. 82;
[271] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, Memorandum of the Italian Government, p. 24; ICJ, Order of 6 July 2010, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 22, 26; ICJ, Judgment of 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, p. 35;

The PCIJ and the ICJ likewise labelled these facts and situations as "generating" the dispute when they constitute the real cause thereof.[273] In other words, they are "facts or situations which directly and without further intervening cause the dispute".[274] Moreover, in the *Right of Passage over Indian Territory* case, the Court found that the facts and situations directly causing the dispute are those which are appreciated by the applicant as the ones related to "the failure of a Respondent State to comply with its obligations, infringements of the claimed right".[275] Besides, in the *Electricity Company of Sofia and Bulgaria* case, the Court concluded that "a dispute may presuppose the existence of some prior situation or fact but it does not follow that the dispute arises in regard to that situation or fact".[276] In this particular case, the PCIJ declared that the fact giving rise to the dispute is not the arbitral award itself, but the official claim of the Belgian Government against its lawfulness, which was formulated after the critical date.[277]

All these findings of the Courts support the position that these are not the facts of seizure or of exportation of cultural property themselves which give rise to disputes concerning its restitution, but the facts of clear and ultimate refusal by required states to grant such restitution. As the Judge Jonkheer van Eysinga stated in his dissenting opinion in the *Phosphates in Morocco* case, this is the "continuity and permanence of an unlawful act certainly constitutes a situation with the regard the dispute at hand arose".[278] As such, these are the refusals to satisfy the claim of restitution of cultural property which constitutes such an unlawful act and the subsequent dispute is based on this act, thus the facts of refusal generate the dispute. In this light, the amount of time that has passed between the seizure of cultural values and the moment from which former

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[272] ICJ, Judgment of 20 December 1974, *Nuclear Tests (Australia v. France)*, p. 262, para. 29; ICJ, Judgment of 20 December 1974, *Nuclear Tests (New Zealand v. France),* p. 466, para. 30; ICJ, Judgment of 24 September 2015, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* para. 26;

[273] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, pp. 23-24; PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria*, p. 82; ICJ, Judgment of 12 April 1960*, Right of Passage over Indian Territory (Portugal v. India)*, p. 35; ICJ, Judgment of 10 February 2005, *Certain Property (Liechtenstein v. Germany*), para. 46;

[274]Toublanc, A. (2004). *Affaire relative à Certain Property (Liechtenstein v. Germany) (Lichtenstein c. Allemagne), exceptions préliminaires*, p. 386;

[275] ICJ, Judgment of 12 April 1960*, Right of Passage over Indian Territory (Portugal v. India)*, p. 35;

[276] PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria*, p. 82;

[277] Ibid;

[278] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, dissenting opinion of the Judge J. van Eysinga., p. 35.

colonial powers agree to recognize the ICJ's jurisdiction or the present moment is irrelevant for establishing the real cause of the dispute. From this perspective, claiming that only facts of seizure or exportation may lead to a dispute regarding the cultural property concerned is baseless and clearly contradicts the abovementioned case-law of the Courts. This is exactly what the Permanent Court of International Justice concluded in its case *Electricity Company of Sofia and Bulgaria*: "it is not enough to say … that if it had not been for these awards, the dispute would not have arisen, for the simple reason that it might just as well be said that, if it had not been for the acts complained of, the dispute would not have arisen".[279]

Furthermore, in order to conclude that the legal dispute actually exists, the Court is not limited by establishing of a conflict between the interests of the parties, yet "it falls to the Court to determine whether the claim of one party is positively opposed by the other".[280] In its judgement in the *Certain Property* case, the Court linked occurring of the dispute to refusal of Germany to approve the request of Liechtenstein to return paintings which Germany made by the decision in 1995 to apply the Settlement Convention to Liechtenstein property.[281]

According to the Court's conclusion in the *Jurisdictional Immunities of the State* case, it is necessary to distinguish the situations which generated the dispute from situations from those which produced the rights and obligations being examined in the Court.[282] In this particular case, the dispute occurred with regard to the existence of Germany's obligation to make reparation to certain Italian victims for the serious violations of humanitarian law committed by Nazi Germany between 1943 and 1945. [283] The Court used this legal criterion and held that the situations or facts giving rise to it, or, in other words, the "real cause" of the dispute, are to be found in the Treaty of Paris of 1947, which established the regime for the restitution of Italian property and property

[279] PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria*, p.82.
[280] ICJ, Judgment of 21 December 1962, *South West Africa (Ethiopia v. South Africa)*, p. 13; ICJ, Judgment of 10 February 2005, *Certain Property (Liechtenstein v. Germany)*, para. 24;
[281] ICJ, Judgment of 10 February 2005, *Certain Property (Liechtenstein v. Germany)*, para. 33;
[282] ICJ, Order of 6 July 2010, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 23; ICJ, Judgment of 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, p. 35; PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria*, p. 82;
[283] ICJ, Order of 6 July 2010, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 22, 26;

of its nationals.[284] Also, the Court stressed that the violations of the German Reich during the Second World War had constituted the source of the rights alleged by Italy or its nationals.[285]

Alternatively, the interested newly independent states may rely on the notion of continuing or continuous situation, which, even if having occurred before the date from which the ICJ's jurisdiction is agreed upon, persists in its legal effect after this day and thus grants the Court its jurisdiction *ratione temporis*. The core point of this argument is that the unlawful deprival of the colonized tribes and peoples of their property does not constitute an instantaneous fact.

As it was already discussed in the second chapter, even if the Court has not yet had an opportunity to examine continuous violations of international obligation in the context of the limitation of its jurisdiction *ratione temporis*, some of its findings formulated in the case-law can still be handy for our analysis. In the advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* the ICJ declared that South Africa was committing a continuous violation and bore its international responsibility "by maintaining the present illegal situation and occupying the territory without title".[286] Even if this finding concerned illicit possession (control) of the territory without legitimate title, we think that it is safe to apply it by analogy to illicit possession of tangible property since in both cases the violation continues to create legal effects up until it ceases to exist.

Then in the case *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* the Court repeatedly employed the concept of continuing violation by concluding that detention of hostages constitutes "continuing breaches of Article 29 of the 1961 Vienna Convention which forbids any arrest or detention of a diplomatic agent" and of the respective 1961 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for

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[284] ICJ, Order of 6 July 2010, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 8, 26-28;
[285] Ibid. p. 26;
[286] ICJ, Advisory opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, para.118;

diplomatic and consular staff.[287] As the International Law Commission indicated in its 1976 report, a concept of an act having continuing character applies to "cases in which the act of the State either began before the obligation came into force for the State and continued thereafter, or, conversely, the act began when the obligation was in force for the State and continued after it had ceased to exist for the State".[288]

By referring to general theory of law, the International Law Commission cited, "unlawful possession of others' property, receiving of stolen goods", as examples of continuous act (act having a continuing character) in its 1978 report.[289] In its 2001 report, it stated that a continuing wrongful act "occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period".[290]

This logic may allow newly independent states to argue that all the incidents of seizure or expropriation of cultural property, even if they took place long before the moment from which the opposing state recognized the ICJ's jurisdiction, produce their legal effects over time and thus remain contrary to rules of the international law as long as these opposing states hold in possession such property. In other words, as long as the cultural values relocated from the former colonies are kept by museums and other cultural institutions of the former colonial powers, a continuous unlawful situation exists and violates international law and prevents the concerned peoples from exercising their rights on cultural development.

While the International Court of Justice has never dealt with the issue of unlawful possession of property as a continuous wrongful act, we can still look at the practice of some other international courts examining their jurisdiction *ratione temporis* for the claims of illicit deprivation of property. For example, European Court of Human Rights (also "**ECtHR**") throughout its activity has developed the distinction between *de jure* expropriation, the one being the result of an expropriation based on a valid legal act, and

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[287] ICJ, Judgment of 24 May 1980, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, para. 77;
[288] ILC (1976), *Report of the International Law Commission on its twenty-eight session*, p. 88;
[289] ILC (1978), *Report of the International Law Commission on its twenty-eight session*, p. 90;
[290] ILC (2001) *Text of the draft of articles and commentary*, p. 60;.

de facto expropriation, the one being the result of factual deprivation of property based on an invalid legal act or in the absence of such an act at all. As to the first type of expropriation, in the *Blecic v. Croatia* case ECtHR concluded that the applicant's tenancy was terminated by virtues of the legal act (a decision of the domestic court in that case) and the latter constituted a single instantons act and did not produce a continuing situation of "deprivation" in respect of the rights concerned.[291] With respect to the second type of expropriation, this Court ruled in the case *Loizidou v. Turkey* that the case at stake concerned "alleged violations of a continuing nature if the applicant, for purposes of Article 1 of Protocol No. 1 to the Convention and Article 8 of the Convention can still be regarded as the legal owner of the land". [292] In this respect, the Court applied international law perspective while assessing the legality of the legal act at stake (Article 159 of the fundamental law of the so-called Turkish Republic of the Northern Cyprus) and concluded that it cannot attribute legal validity to it since the international community did not regard the this entity as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus.[293] As such, the applicant in that case remained a legal owner of the land regardless of existence of the provision for which the respondent claimed legal force. Similarly, in the *Papamichalopoulos and Others v. Greece* case, the ECtHR concluded that the violation of Applicants' property rights was continuous and pointed out that their lands were never formally expropriated, thus the deprivation took place without any formal act.[294]

Newly independent states may have a valid reasoning to argue that seizure of cultural property that they survive during their colonial history falls within the first category of expropriation. It is hard to imagine that such seizure was preceded by any legal acts or provisions in the legislation of respective countries, nor it was clearly authorized by the norms of the international law exciting at that time. In this regard, and in view of the material arguments of such states regarding illicit character of seizure of

[291] ECtHR, Judgment of 8 March 2006, *Blečić v Croatia*, paras. 59, 86;
[292] ECtHR, Judgment of 18 December 1996, *Loizidou v. Turkey*, para. 41;
[293] ECtHR, Judgment of 18 December 1996, *Loizidou v. Turkey*, para. 44;
[294] ECtHR, Judgment of 24 June 1993, *Papamichalopoulos and others v. Greece*, paras. 41,46;

their cultural property, such seizure constitutes a violation of continuous character since it has created a state of lawlessness which lasts even after the moment from which the former colonial powers recognize the Court's jurisdiction. Thus, the Court shall positively respond on the question of its jurisdiction *ratione temporis.* Moreover, this jurisdiction is even more solid with respect to the claim based on the obligation to cooperate in the matter of cultural development, which emerged entirely after the moment from which these powers recognize the Court's jurisdiction.

On the other hand, the Court's jurisdiction may not be interpreted that broadly and there are arguments counterweighting the position of the newly independent states. It was the PCIJ, the ICJ's predecessor, that stressed the importance of the limits imposed on its jurisdiction by the states in the *Phosphates in Morocco* case by stating that "this jurisdiction only exists within the limits within which it has been accepted". [295] It is also important to remind that the unilateral declarations recognizing the jurisdiction of the Court as compulsory often refer expressly not just to the disputes which should raise after a certain moment, but also to situations and facts subsequent to that date (Belgium, UK, Portugal) or even state explicitly exclude disputes "relating to events or situations which occurred prior to that date" with direct reservation "even if such events or situations may continue to occur or to have effects thereafter" (Spain). Moreover, to satisfy such a temporal reservation both the dispute itself and the situations or facts related to it must take place after the moment from which the State recognize the Court's jurisdiction.

On the one hand, it is almost completely unreasonable to assert that the dispute concerning displaced cultural property was born before the dates indicated in the unilateral declarations of the above-mentioned Western countries since the interested states got independence after many of these dates and thus could not have formulated their claims before. On the other hand, former colonial powers may argue that the facts of acquisitions shall be recognized as the ones related to the dispute, and for such an argument they seem to have a solid logic supported by reliable practice of various

[295] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 17;

international courts. The latter equally exists with respect to the notion of continuous violation making the issue less obvious than it may seem to be from the above analysis.

In the already famous judgement in case *Phosphates in Morocco*, the PCIJ concluded that it does not have jurisdiction *ratione temporis* since the dispute submitted by the Italian Government arose "with regard to situations or facts subsequent to the ratification of the acceptance by France of the compulsory jurisdiction".[296] In that case, the Court ruled that it cannot resolve the dispute without examining the decisions of the Departments of Mines, that presumably violated property rights and thus was the object of the applicant's claims of unlawfulness. At the same time, such an examination would not be possible "without extending the Court's jurisdiction to a fact which, by reason of its date, is not subject thereto and that was this decision which was the fact with regard to which the dispute arose".[297] To the same extent, it may seem impossible to examine the restitution claims without calling into question the facts of expropriation themselves which took place long before the dates indicated in the unilateral declarations of the former colonial powers.

It is true that based on the principle of reciprocity,[298] the Court determines, first of all, the date of the birth of the dispute, which begins when the claim of one of the parties comes up against the manifest opposition of the other.[299] With respect to the "real cause" of the dispute,[300] it is also correct to say that this cause lies within the facts the and situations giving rise to the subject of the dispute or being intrinsically linked to

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[296] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 23;
[297] Ibid;
[298] Statute of the International Court of Justice, 1945, art. 36 (2) (3); ICJ, Judgment of 20 December 1974, *Nuclear Tests*, paras. 267, 268; ICJ, Judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, p. 392; ICJ, Judgment of 22 July 1952, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, p. 144; ICJ, Judgment of 26 November 1957, *Right of Passage over Indian Territory (Portugal v. India),* pp.145-146;
[299] ICJ, Judgment of 30 June 1995, *East Timor (Portugal v. Australia)*, p. 99-100, para. 22; ICJ, Judgment of 18 November 2008, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, para. 29; ICJ, Judgment of 21 December 1962, *South West Africa (Ethiopia v. South Africa)*, p. 328; ICJ, Judgment of 21 March 1959, *Interhandel (Switzerland v. United States of America)*, p. 66-69; PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 24; ICJ, Judgment of 22 July 1952, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, p. 105; PCIJ, Judgment 30 August 1924, *Mavrommatis Palestine Concessions*, p. 11; ICJ, Judgment of 2 December 1963*, Northern Cameroons (Cameroon v. United Kingdom),* p. 27; Fitzmaurice, G. (1986). *The law and procedure*, p. 366;
[300] ICJ, Judgment of 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, p.39; ICJ, Judgment of 22 December 1986, *Frontier Dispute (Burkina Faso/Republic of Mali)*, para. 39; ICJ, Judgment of 20 December 1974, *Nuclear Tests*, para. 43,46,49;

it.[301] In its judgment in the *Right of passage over Indian Territory* case the ICJ admitted that the dispute submitted to it is with regard to the facts "of 1954 which Portugal advances as showing the failure of India to comply with its obligations, infringements of that right".[302]

If apply the same approach to the claims of the newly independent states regarding the cultural property originating from their territories, the facts that they assess as unlawful, namely the facts of expropriation or seizure of the property, shall be recognized as related to the dispute within the terms of the unilateral declarations. In the same judgment, the ICJ stressed that its predecessor "drew a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute", while "only the latter are to be taken into account for the purpose of applying the Declaration accepting the jurisdiction of the Court".[303] In the same spirit, the PCIJ found in the *Electricity Company of Sofia and Bulgaria* that in that case "the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities [the decisions of the Bulgarian State Administration of Mines and of the Bulgarian courts] … form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose."[304] In the *Phospates in Morocco* case, the Court concluded that that "if, by establishing the monopoly, Morocco and France violated the treaty *régime* …, that violation is the outcome of the *dahirs* [decrees] of 1920. In those *dahirs* are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization".

As such, the PCIJ consistently pointed out that the facts of violation of certain rules of international law, whatever their forms (acts of state institutions in the above-cited cases), constitutes the facts provoking the disputes and not the refusals of claims presumably aimed at indemnifying this violation. Moreover, in the same *Phospates in*

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[301] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 23-24. ICJ, Judgment of 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, p.36; PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria,* p. 82;
[302] ICJ, Judgment of 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, p. 33;
[303] Ibid;
[304] PCIJ, Judgment of 4 April 1939, *Electricity Company of Sofia and Bulgaria;*

Morocco case, the Court noted that "the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of " administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it". [305] Hence, even if we would assume that the expropriation of cultural property of the colonized territories violated certain rules of international law, those were the facts of expropriation that constituted the facts related to the disputed and not the subsequent denials of the former colonial powers to return such property. The ECtHR is of meme opinion, as it concluded in the *Blecic v Croatia* case that "to retain the date of the refusal to remedy the violation in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention came into force in respect of that State" [306] Clearly, such a situation would contravene the sovereign will of states to be bound by rules of international law, either substantial or procedural, whether it concerns the jurisdictions of the European or International Court.

In the *Interhandel (Switzerland v. United States of America)* case, the ICJ noted that "the facts and situations which have led to a dispute must not be confused with the dispute itself". [307] Applying this finding to our present analysis, the facts of expropriation and seizure of the cultural property should not be confused with the dispute concerning restitution or return of this cultural property.

In order to indicate the subject of the dispute, the Court examines the position of the two parties, seeking the precise nature of the claims.[308] However, it is important to differentiate these claims from subsequent situations, as the Court did in the *Certain*

[305] *Ibid.*, PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco,* p.22;
[306] ECtHR, Judgment of 8 March 2006, *Blečić v Croatia,* para. 79.
[307] ICJ, Judgment of 21 March 1959, *Interhandel (Switzerland v. United States of America)*, p. 20;
[308] ICJ, Judgment of 4 December 1998, *Fisheries Jurisdiction (Spain v. Canada)*, para. 30; ICJ, Judgment of 13 December 2007, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 38; ICJ, Judgment of 20 December 1974, *Nuclear Tests*, para. 29-30;

Property case.[309] In this case, Liechtenstein asked Germany to return the property of their nationals confiscated in 1945 by Czechoslovakia under the "Beneš decrees", which authorize the confiscation of German assets abroad seized in connection with the Second World War in terms of reparation.[310] The applicant argued that the "real cause" of the dispute lay in the decisions of the German courts in the 1990s declaring confiscated Liechtenstein property as German assets on the basis of the European Convention for the Peaceful Settlement of Disputes.[311] Yet the Court concluded that it is essential to observe the facts of the confiscation of the Liechtenstein property themselves, which are at the origin of other situations occurring in relation to this matter.[312]

With regard to the concept of continuous violation having its origin before the moment from which a State recognizes the ICJ's jurisdiction and persisting in its legal effects after it, this approach can be also arguably criticized and questioned. The main problem of this concept and the reason why international judicial institutions are reluctantly applying them to the disputes submitted before them is that it allows to extend the *ratione temporis* jurisdiction to almost unlimitedly long period of history and clearly contrary to the intentions of the states that expressly put the limitation on such jurisdiction in their declarations. As such, the principles of non-retroactivity of the rules of international law, invoked repeatedly in the previous chapters, suffer, as does the approach that appreciates an intention of the state concerned. In the *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* case, the Court carefully examined the Declaration of Iran regarding its recognition of the Court's jurisdiction and concluded that Iran "desired to exclude from that jurisdiction all disputes which might relate to the application of the capitulatory treaties, and the Declaration was drafted on the basis of this desire" and looked at "a decisive confirmation of the intention of the Government of Iran at the time

[309] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 24; ICJ, Judgment of 10 February 2005, *Certain Property (Liechtenstein v. Germany)*, para. 49; ICJ, Order of 6 July 2010, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*;
[310] ICJ, Judgment of 10 February 2005, *Certain Property (Liechtenstein v. Germany)*, para. 16;
[311] ICJ, Judgment of 10 February 2005, *Certain Property (Liechtenstein v. Germany)*, para. 51;
[312] ICJ, Judgment of 10 February 2005, *Certain Property (Liechtenstein v. Germany)*, para. 52;

when it accepted the compulsory jurisdiction of the Court"[313] The ICJ reiterated this position in the *Fisheries Jurisdiction (Spain v. Canada)* case by stating that "a declaration under Article 36(2) of the Statute, is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State".[314]

As the International Law Commission observed in its commentary to the Article 14 of the Draft of Articles on Responsibility of States for Internationally Wrongful Acts, " a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged". [315] In fact, almost every violation may have prolonged negative effects for its victims, even if it was relieved by a due reparation: for example, emotional or psychological consequences may persist for some time despite material indemnification. Yet it does not necessarily mean that these violations shall be automatically deemed to have continuing character.

Mr. Ago in its 1978 report for the International Law Commission also asserted it and added that "the concept of "continuing delict" (expressed in terminology which varies according to language and legal system) is commonly used to define precisely those acts which extend-remaining identical-over a more or less lengthy period of time".

However, the circumstances of seizure and relocation of cultural property at hand do not match with the description of the continuing wrongful act/violation reflected in the works of the International Law Commission. They were manifestly different in various aspects: the contexts, the goals, the impetus, the process and the subsequent actions. Indeed, some of them were looted during armed interventions, but other were bought or exchanged during peaceful and voluntary transactions, when the third ones were discovered by the scientific capabilities of the colonial powers without any input

[313] ICJ, Judgment of 22 July 1952, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, p. 16-17;
[314] ICJ, Judgment of 4 December 1998, *Fisheries Jurisdiction (Spain v. Canada)*, para. 48;
[315] ILC (2001) *Text of the draft of articles and commentary*, p. 60;

from the local inhabitants. As such, newly independent states cannot claim their return or restitutions on the same legal basis, in other words, asserting the same violation of the rule of international law. In this regard, these facts, even if we hypothetically assume that they infringed certain rules of international law, could not have led to one and the same violation of international law and thus the notion of "continuous violation" as defined by the International Law Commission is not applicable.

In the *Phosphates in Marocco* case, Italian government claimed that the monopolization and exploitation of the phosphates constitute "facts and situations taken together constitute an unlawful, continuing and progressive course of action", which gave rise to a situation of "wider aspect which still constituted a continuing violation of international law".[316] However, the PCIJ rejected this argument and declared itself lacking jurisdiction *ratione temporis*. As it was pointed above, the Permanent Court concluded that the violation claimed is lied within the 1920 *dahirs* adopted before the moment from which France recognized its jurisdiction,[317] thus it implicitly characterized these facts as instantaneous and refused to recognize their continuing nature. In its turn, the Human Rights Committee in its Views under Communication No. 516/1992 (*Alina Simunek, Dagmar Tuzilova Hastings et Jozef Prochazka v. the Czech Republic*) observed that "a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violation of the State party". [318]

In the same spirit, the ECtHR in a number of its cases refused to recognize continuing character of expropriation acts. For instance, in *Prince Hans-Adam II of Liechtenstein v. Germany* case, the European Court refused to examine the expropriation that had been carried out by authorities of the former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951. [319] In the *Canciovici and Others v. Romania,* this Court confirmed its "well-established case-law that

[316] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco* p. 14;
[317] PCIJ, Judgment of 14 June 1938, *Phosphates in Morocco*, p. 26;
[318] HRC, views of 19 July 1995, *Alina Simunek, Dagmar Tuzilova Hastings et Jozef Prochazka v. The Czech Republic*, p. 4.5.;
[319] ECtHR, Judgment of 12 July 2001, *Prince Hans-Adam II of Liechtenstein v. Germany*, para. 84;

deprivation of property constitutes, in principle, an instantaneous act and does not create a continuous situation".[320] In the *Sovtransavto Holding v. Ukraine* case, the Court expressly stated that deprivation of property is "indisputably an instantaneous act".[321] Moreover, contrary even to these or abovementioned cases brought before the European Court of Human Rights, where applicants possessed solid property title over the property at stake, those who might claim restitution of cultural property cannot produce any record or proof of their title whatsoever.

As such, declaring that the facts of expropriation of cultural property on the colonized territories as having continuous character will inevitably lead to extending the Court's jurisdiction to all of such facts, no matter their temporal remoteness, which will consequently deprive *ratione temporis* reservations in the unilateral declarations of the former colonial powers deprived of their sense.

Sub-Chapter 3.3 Legal interest of newly independent states to claim the restitution of cultural property originating from the peoples which inhabited their lands in the past

Yet the limitation of the jurisdiction *ratione temporis* is not the sole procedural challenge for the newly independent states, once they decide to bring the matter before the ICJ. Another important task is proving that these newly independent states have a legal interest to do so, which defines the admissibility of the claim and constitutes the characteristic of the claim itself, and not the one of the Court, as in the case with the jurisdiction.

In order to rule on the merits, the Court establishes the existence of the individual interest in bringing proceedings in relation to the subject matter of the dispute, particularly the rights or obligations of the parties provided for by the rule of international law of the conventional or customary character.[322] Moreover, the burden of

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[320] ECtHR, Judgment of 26 November 2002, *Canciovici and others v. Romania*, para. 36;
[321] ECtHR, Judgment of 26 July 2002, *Sovtransavto Holding v. Ukraine*, para. 58;
[322] ICJ, Judgment of 21 December 1962, *South West Africa (Ethiopia v. South Africa)*, dissenting opinion of Judges P. Spender and G. Fitzmaurice, p. 60; ICJ, Judgment of 15 June 1954, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, p. 29; Shani, Y. (2016). *Questions of jurisdiction and admissibility before international courts*, p. 92; ICJ, Judgment of 15 December 2004, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, individual opinion of Judge M. Kreca, p. 131;

proof of such an interest lies exclusively on the applicant party, which should demonstrate it along with submitting the claim.[323] In this regard, the territorial sovereignty of a state entails jurisdiction over its property and, for this reason, the interest in asserting their property rights over property originating from its territory.[324] In view of the damage inflicted during the colonial era, which remains present, the newly independent states ensures their sovereign rights through the restoration of cultural heritage, exported during the colonial era.[325]

In the cases related to our analysis, the subject of the dispute relates to the repatriation of cultural property originating on the formerly colonized territories and kept in the institutions of the former colonial powers, including underwater objects, works of art, archaeological remains and human bones of local origin. The newly independent states have an exclusive and individual interest in the subject of the application for the repatriation of their cultural heritage under the principle of state sovereignty. Based on this principle, they strive to recover their cultural values held by the former colonial powers to ensure its cultural development.

On the other hand, there is a position that in the context of decolonization, the newly independent state cannot ask the court to order reparation for damage caused by colonial powers in the past;[326] because they were an integral part of the sovereign country of their colonial administration and did not have international legal personality.[327] With respect to the legal personality of minorities,[328] including that of

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[323] ICJ, Judgment of 18 July 1966, *South West Africa (Ethiopia v. South Africa)*, p. 60; Kawano, M. (2012), *Standing of a State …*, p. 212; Mbaye, K. (1988), *L'intérêt pour agir …*, p. 226; ICJ, Judgment of 15 December 2004, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, individual opinion of Judge M. Kreca, p. 131;

[324] United Nations Charter, 1945, art 2(4); PCIJ, Judgment of 27 September 1927, *Lotus case (France v. Turkey),* p. 18; G.A.U.N., A/RES/2625(XXV) (1970), principle 6; G.A.U.N., A/RES/41/128 (1986), art. 1; G.A.U.N., A/RES/626(VII) (1952), art. 1 (2); PCIJ, Judgment of 5 September 1931, *Customs Regime between Germany and Austria*, individual opinion of the Judge M. Anzilotti, p. 57; Lauterpacht, E. (1970). *International Law: Being the Collected Papers of Hersch Lauterpacht*, p. 367-70; Crawford, J. (2019). *Brownlie's principles of public international law*, p. 193;

[325] ICJ, Judgment of 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, p. 5; ILC, *Summary of decisions of national courts,* A/CN.4/157 (1963), p. 117-126, para. 197-279; *Declaration and Program of Action*, A/CONF.189/12 (2001), p. 87, para. 13; Butt, D. (2012). *Repairing historical wrongs* , p. 230; G.A.U.N., A/RES/35/227 (1981);

[326] Posner, E. A. and Vermeule, A. (2003). *Repartions for Slavery …*, p.; Alhmri, A. (2013). *La responsabilité internationale …* , p. 172; Butt, D. (2012). *Repairing historical wrongs* …, p. 230;

[327] ICJ, Advisory opinion of 16 October 1975, *Western Sahara*, pars. 149, 152; ICJ, Advisory opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, p. 179; Crawford J. (2013), *State Responsibility …*, p. 441; Greig, D. (1976). *International Law*, p. 92; Crawford, J. (1979). *The creation of states …* , pp 176–84; Jennings, R. Y. (2017). *The acquisition of territory in International Law… ,* p. 4, 29 ILC, *Forth report of R. Ago*, A/CN.4/264/Add.1

indigenous people,[329] such a personality was not recognized until the second half of the twentieth century. In the *South West Africa* case, the Court explicitly ruled that in order to establish the interest in bringing proceedings it is important to examine the legal rights of Liberia and Ethiopia during their past state, when the violation in question was committed with regard to them.[330] According to the Court, while being the dependent territories, the applicant countries could not have had individual legal rights under the League of Nations Mandate system to challenge the actions of the Mandate Powers.[331] In addition, in the *Northern Cameroons (Cameroon v. United Kingdom)* case, the Court concluded that Cameroon failed to invoke the responsibility of the United Kingdom as the newly independent state for the failures of the administration of North Cameroon during the Trusteeship regime, which had already been terminated.[332]

Similarly to the countries and territories in the above-cited ICJ cases, former colonies did not have any legal personality at the moment of relocation of cultural property from their territories and were dependent from their metropolises. According to the legal criterion established by the Court in the *South West Africa* case, such claims (applications) of the newly independent states would be inadmissible, because at the time of the alleged violations the territories of these states were an integral part of the sovereign state of the former colonial powers, therefore the application of international law to purely domestic relations is excluded.

In conclusion to this Chapter, we can say that contrary to previous two chapters, it analyses defendant's standpoint. Regardless of the validity of the arguments exposed in previous chapters, former colonial powers can argue that restitution of cultural property to the countries of their origin would violate their own obligation to protect this property as belonging to the World Cultural Heritage from being damaged or lost.

(1972), para. 214; ICJ, Advisory opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* para. 118*;* Vattel, E. (1835). *Le droit des gens…*, p. 160;

[328] United Nations Charter, 1945, art. 1 (2);

[329] PCA, ruling of 4 May 1928, *Palmas Island case*, p. 845–846; PCIJ, Judgment of 5 April 1933, *Legal Status of Eastern Greenland*, p. 48;

[330] ICJ, Judgment of 18 July 1966, *South West Africa (Ethiopia v. South Africa)*, p. 60; Kelsen, H. (1966). *Principles of International Law,* p.234

[331] ICJ, Judgment of 18 July 1966, *South West Africa (Ethiopia v. South Africa)*, p. 65;

[332] ICJ, Judgment of 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom)*, p. 21;

Legally speaking, International Law Commission since quite a moment listed necessity as a circumstance excluding wrongfulness of the internationally wrongful act, namely "the only way for the State to safeguard an essential interest against a grave and imminent peril".[333] In its turn, obligation to protect cultural property from physical destruction is well-established in various international legal instruments, both conventional ones and the ones of soft-law character. On the other hand, most of newly independent states are known for various evidence and cases of poor museal cultural, deplorable state management, miserable infrastructure and physical conditions and irresponsible archeological diggings. Politically, this obligation to protect cultural property from harmful impact discourages public opinion of the former colonial powers from supporting restitution of cultural values to the countries of their origin.

Moreover, the fact that a plenty of cultural relicts are conserved in private entities, museums and universities complicate the matter since there is a well-established position in international law that the states cannot be hold accountable for actions or omissions of private parties if they are not directly obliged to intervene, especially it concerns the matters of private property.

On a procedural level, the prospects of returning cultural property through international judicial bodies and courts are even less realistic. We identified two hypothetical arguments by which the newly independent states may circumvent the limitation *ratione temporis* imposed on the ICJ's jurisdiction by the former colonial powers.

The first one is to assert that the dispute over cultural property emerged only in recent years and these are the refusals of the former colonial powers to meet restitution demands that constitute facts and situations related to the dispute. Hence, as the dispute itself and the facts related to it were born after the moment from which these powers recognize the Court's jurisdiction, the *ratione temporis* limit prescribed by the respective Declarations recognizing the jurisdiction of the Court as compulsory shall not apply.

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[333] ILC (2001), Responsibility of States for Internationally Wrongful Acts, Art. 25;

In response to that, the opposite parties may claim that the facts and situations related to the dispute are the cases of seizure of cultural property themselves, which took place long before such a moment. Since these parties limited the Court's jurisdiction not only by disputes emerging after this moment, but also by facts and situations taking place after it, this argument shall suffice. As demonstrated in our analysis, both perspectives can be supported with the diverse case-law of international courts.

The second argument alleges that since deprivation of victims from their property over seized cultural values has lasting effects and can be redressed only by restitution, it constitutes a continuous violation. Thus, even if it occurred before the moment from which the opposite party recognizes the Court's jurisdiction, it lasts in its effects after this moment and thus it falls within the Court's jurisdiction *ratione temporis*. The counterargument to this logic consists of referring to the Court's different approaches to these violations. Indeed, according to one of them, the deprivation of property may be recognized as a continuing violation, but it can be only in case where there was a *de facto* deprivation without a legal basis at the material moment. Yet according to the second approach, if a deprivation was based on a legal basis, it was a *de jure* deprivation and thus it was an instantaneous violation. In this light, seizure of cultural property that took place during colonial times was absolutely lawful according to internal legal systems of colonial powers and, on the other hand, it was not clearly prohibited by the international law existing at that time. As with respect to the first argument, the case law and the reasoning of international institutions can be found in support of both parties.

Finally, the very legal interest of the newly independent states to bring such claims is also questionable, which inevitably affects the admissibility of their claims. The newly independent states are not direct victims of the suggested violations of the international law, even if we assume that these violations took place. As such, they need to establish direct link between the victims – the tribes the peoples and, maybe, specific persons and themselves in order to legally succeed to the right to demand reparation. Yet this task is complicated since, as found in the above cited case law of the

international courts, colonized tribes and ethnic groups did not possess legal personality at the material time. Another way to handle the matter is to assert diplomatic protection within the international human rights perspective, though this argument is also yet to be evaluated in the practice of international judicial institutions.

CONCLUSIONS

For the sake of an overall conclusion to this analysis, we can say that there is no clear and uniformly recognized legal mechanism of requesting legally mandatory restitution of cultural property from the former colonial powers to the country of their origin seized and relocated during the colonial period. On the other hand, the claims of interested newly independent states are not entirely baseless and many legal rules that will hypothetically, one day, transform into such a clear and universally accepted obligation, are still emerging.

For the purpose of the present analysis, we identified and elaborated on several potential legal grounds for such restitution. Detailed remarks and conclusions with regard to legal soundness of these grounds follow each of the chapters, thus this overall conclusion summarizes them only briefly.

Within the first chapter, we analysed three bases for restitution which equally concern all cultural property regardless of the circumstances of its relocation: 1) restitution of cultural values in order to ensure the right to self-determination of formerly colonized peoples and the rights of their nationals to cultural life as a human right; 2) legal succession of the newly independent states to their cultural property; 3) return of cultural property under the obligation to cooperate in cultural matters. Regarding the first basis, we may say that the right to self-determination has been richly developed in the practice of international institutions, particularly, the UN bodies, but its cultural element remains unclear. With respect to the second basis, there is a separate track of rules concerning the property within the international law of state succession, but well-promising work of the International Law Commission toward shaping the rules of state succession in cultural property was faced with enormous opposition of the Western States which is evidenced by the fact that the specific 1983 Vienna Convention on Succession of States in respect of State Property,Archives and Debts has never entered into force. The third basis relying on the obligation of cooperate is an emerging and constantly developing one, thus we may say that the newly independent states shall

concentrate their efforts on elaborating it in the future. As for now, it is clearly lacking legally binding instruments (conventions or treaties) in its support.

Within the second chapter, we analysed the restitution mechanism prescribed by the international humanitarian law. Thus only those cultural values that were forcefully seized in the context of armed conflicts are concerned by this analysis. For this analysis, we have taken two-folded approach. The first one consists of analysing substantial rules of IHL and is called to answer three principal questions: 1) did IHL as it was existing at that time apply to the colonized tribes and ethnics groups? 2) did the rules of the IHL prescribe for protection of cultural property at the time when the cases of looting take place? 3) did the circumstances of seizure of cultural property during armed interventions fall within the scope of the notion of looting? The second approach is to look at the procedural aspects of addressing the respective claim to the competent international institution by analysing the concept of continuous violation allowing to circumvent temporal limitations of the institution's jurisdiction.

Within the third chapter, we examined the obligation to physically protect cultural property as a part of the World Cultural Heritage by which the former colonial powers may justify their refusal to restitute cultural property to the country of its origin. While the obligation to physically protect the cultural property does exist and with respect to that there is a great number of various legal rules, the state practice is not uniform, even among the Western States, since some of them approved some returns even to the countries with famous record of miserable museum conditions. Then we thoroughly examined two procedural obstacles for the newly independent states to bring the matter before the International Court of Justice.

The first one is the limitation of *ratione temporis* jurisdiction placed on the Court by the unilateral declaration of the Western States concerned. We established two possible reasonings for dealing with it: 1) by arguing that the dispute itself was born in recent years and the facts leading to it consist of refusals of the former colonial parties to satisfy restitution claims; 2) by asserting that deprivation of cultural property in colonial context was a continuing violation and while it occurred before the moment

from which these states recognize the Court's jurisdiction, it persisted in its effect after this moment and thus it renders the Court competent to consider the dispute.

The second obstacle consists of questioning legal interest of the newly independent states to bring the matter, since they are not victims of the presumable violation taking place in the past and thus, they need to legally succeed to the right to reparation after the victims. This is a separate challenge, since the existence of legal personality of tribes and ethnic groups at the time of colonization is disputed by significant part of the legal doctrine and in the case-law.

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