Making the Case for the Restitution of Illicitly Acquired Cultural Objects under the Rules of *Jus Cogens*

**Abstract:** Over the years, our perspective on cultural heritage has undergone changes. The field has become more diverse, requiring solution-focused approaches to address the underlying problems associated with cultural heritage. One significant challenge is the issue of restitution, which is considered a major failure of international
cultural heritage law. How can international cultural heritage law completely heal historical wounds instead of merely offering empty hopes to those who have suffered? Simply acknowledging past wrongs by offending states is insufficient, and it does not align with the fundamental legal principle that where there is a wrong, there should be a remedy (*ubi jus ibi remedium*). Despite the considerable growth in the jurisprudence of international cultural heritage law, there remains a pressing need to consolidate the legal framework to facilitate the restitution of stolen or looted cultural objects. This article argues that the prohibition of plunder and pillage of cultural property constitutes a *jus cogens* rule of international law. Its violation therefore gives rise to an unconditional obligation to restitute such property.

**Keywords:** restitution, *jus cogens*, cultural property, cultural heritage, general international law

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**Introduction**

Cultural heritage is the summation of historical peculiarities of a given nation, community, or group, which are evidenced in artefacts, buildings, monuments, language, lifestyle, etc. From the broad description offered, it is inferable that “heritage may be built, written, recited, remembered, re-enacted, worn, displayed, and taught” (also comprising digital and digitally-born heritage).¹ Employing a *descriptive* conceptualization of cultural heritage avoids the pitfalls of relying on a *definitional* approach, which has plagued the field. Articulating the reason for this definitional discordance, Frigo explained that the difficulty in providing a uniform definition for cultural heritage is the challenge of developing a definition that encapsulates the protection of all relevant rights and interests.² Some international cultural heritage texts accentuate this conceptual dichotomy: the 1954 Hague Convention³ and the 1970 UNESCO Convention⁴ use the term “cultural property” to describe items


capable of being described as cultural heritage. However, the 1995 UNIDROIT Convention uses the term “cultural objects” to refer to objects unlawfully removed from their places of origin.\(^5\)

It is evident that the conceptual battle for supremacy in the field of cultural heritage law is gradually becoming a stalemate, and there is an emerging perception of “cultural heritage” as being a broader concept – one that encompasses every “form of inheritance, to be kept in safekeeping and handed down to future generations”.\(^6\) This is especially true today, when the concepts of “cultural property” and “cultural objects” are considered narrow and unable to accommodate the range of meanings and ideas encompassed in the term “cultural heritage”.\(^7\) Other instruments in the field of international cultural heritage law, such as the Council of Europe’s 1985 Convention for the Protection of the Architectural Heritage of Europe\(^8\) and the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage,\(^9\) as well as others, have referred to “cultural heritage” in their respective texts.\(^10\)

The pillage, theft, damage, and destruction of cultural heritage has adversely impacted Indigenous communities, distorted their history, and destabilized their futures.\(^11\) The scope of this article does not include damage to cultural heritage caused by natural disasters, but rather focuses on deliberate and intentional acts of theft, pillage, and destruction of cultural heritage. In the case of countries that heavily depend on their cultural resources as an economic advantage, such deliberate destruction of cultural heritage leads to great economic loss.\(^12\) Also, the deliberate destruction or theft of cultural heritage is a gross violation of the fundamental rights of the affected Indigenous communities and their people to cultural life, liberty, religion, expression, and due process.\(^13\) In essence, cultural heritage is

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\(^8\) 3 October 1985, ETS No. 121.


\(^10\) M. Frigo, op. cit., p. 369.


\(^13\) K. Nováček et al., The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights, Submission for the United Nations Special Rapporteur in the field of cultural rights by RASHID International e.V., 2016.
a tangible expression of the identity of a people, and when cultural heritage has been looted, damaged, or destroyed, it diminishes people’s culture, and in extreme cases leaves no culture for the people to participate in.\textsuperscript{14}

The focal issue this article addresses is to demonstrate that the prohibition of plunder and pillage of cultural property constitutes a \textit{jus cogens} rule of international law. Its violation therefore gives rise to an unconditional obligation to restitute illicitly acquired cultural heritage. The reality is that some of the existing international agreements on cultural heritage merely restate the moral and political commitments by contracting states to protect cultural heritage, without a corresponding legal machinery that will enforce such commitments.\textsuperscript{15} Thus, this article argues that in order to implement a compulsory legal framework for the restitution of looted cultural heritage, the rules of \textit{jus cogens} should be taken into account.

This article is divided into four parts. The first part is the introduction; the second part examines restitution as a political commitment; the third part explores a new legal basis for securing the restitution of pillaged cultural heritage; and the final part offers conclusions.

The Promise of Restitution and the Failure to Restitute

The coinage of the term “restitution” is from the Latin word \textit{restitutio}, which means to return, restore, or repair a damaged object with the objective of taking it back to its original state.\textsuperscript{16} A narrower definition of “restitution” is “returning an object that has been appropriated or obtained illegally in some other way”. In the context of cultural heritage, Anna Gerecka-Żołyńska’s construction of “restitution” is more apposite, as she explains the concept to mean an “obligation to make up for damage inflicted by one State on another, mainly through the return of illegally plundered property”.\textsuperscript{17} Thus, the obligation to restitute, as a result of the illegal appropriation of cultural artefacts in this context, is a form of reparation.

However, the given definitions of restitution are rather limited and lack a comprehensive understanding of its broader implications. While they correctly note that restitution involves returning, restoring, or repairing a damaged object to its original state, they overlook the more profound significance of restitution in the context of cultural heritage. The narrower definitions, by focusing solely on the return
of objects obtained illegally, fail to consider the complex historical and ethical dimensions involved in restitutions. They reduce restitution to a mere act of returning objects, without recognizing the importance of acknowledging and addressing the historical injustices and cultural heritage losses that often accompany illicit acquisitions.

Furthermore, the realities that have played out in the efforts towards restitution in the field of international cultural heritage have shown that restitution is a complex phenomenon that involves the interaction of multiple factors, such as provenance, ownership, balancing of interests, and the historicity of the cultural item in question. The restitution attempt involving the Rosetta Stone exemplifies the complexity of cultural property restitution. This case involves intricate negotiations between Egypt and the British Museum, complicated by the historical context of colonial acquisition, the international legal frameworks, and the balancing of cultural heritage preservation with rightful ownership claims. Furthermore, it highlights the nuanced interplay of politics, diplomacy, and the desire to advance historical and cultural understanding, underscoring the multifaceted nature of such restitution efforts.

Where the pillaged property has been damaged or destroyed, another school of thought has advanced the concept of “substitutional restitution” to cater to such a situation. Substitutional restitution simply means that the perpetrator of the harm to the heritage in question makes amends by returning a cultural object that is equivalent to the damaged one. While the idea of substitutional restitution is to provide some kind of justice, the fact remains that no substitute of a cultural property can wholly replace the originally damaged or destroyed one.

Basically, the idea of restitution presupposes that: there is an object; the object is/was owned by a party; the object has been illegally taken away from its original owner; and the original owner is entitled to make claims in law for the restitution of the object. For a cultural object to become the subject of a resti-


tution claim, such object must still physically exist and there must be knowledge of the location of the object of restitution.

Generally, one would assume that the idea behind making restitution claims is to secure the return of the pillaged cultural property. However, since the fact remains that not every claim for the restitution of a cultural object would achieve its intended object, the intent of a claimant for restitution could easily be characterized as the need for a recognition and declaration of the claimant’s inherent rights in the cultural property.22

It flows from the above that the reasonable expectation is that where the appropriation of cultural property is patently characterized as illegal, there is an obligation on the part of the appropriating party to return the property to its country of origin.23 This proposition forms the bedrock of this research. The truth is that we cannot have a civilized society when patently wrongful acts are not remedied. Deviation from this basic norm of a civilized society results in a gradual descent into anarchy. Phrasing this proposition in the context of this article, the argument is that a state that is responsible for an internationally wrongful act is bound, as a matter of law and ethics, to re-establish the conditions that existed prior to the occurrence of the wrongful act.24

The Sarr-Savoy report

On 28 November 2017, the President of France, Emmanuel Macron, during a visit in Africa, declared that within the next five years France would ensure that the necessary conditions are put in place to facilitate the “temporary or definitive” restitution of African cultural heritage to Africa.25 Macron’s declaration was globally embraced as the answer to the long-awaited calls for the restitution of pillaged cultural property. However, the enthusiasm with which the news was received has obscured the perception of many to the following facts:

i. the idea of restitution presupposes that the property has been improperly acquired;26

ii. the alienation of the cultural property by the French government did not erode the proprietary rights of the African states, and as such the Presi-

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dent’s commitment to restitute should not be construed as a political fa-
vour, but a normative requirement that wrongs must be remedied;
iii. the President’s statement is patently contradictory, as his suggestion of
a “temporary restoration” is not consistent with the idea of restitution; and
iv. the President’s statement is a sufficient admission to the world of France’s
illegitimate acquisition of Africa’s cultural heritage, and it is irrelevant that
the illegality occurred centuries ago.

Since President Macron’s declaration of France’s commitment to restitute,
there have been criticisms from different quarters, berating France’s staggering
failure to keep its promise to restitute pillaged cultural property to Africa within
the stipulated five-year time frame, especially when 28 November 2022 would
mark the end of the projected time-frame.27 It is no surprise that President Ma-
cron’s public declaration has not been complemented by progressive efforts geared
towards restitution, particularly given that the President’s declaration was largely
ambiguous. However, President Macron’s intent became clearer in the Sarr-Savoy
report, and from our analysis of the report it is reasonably fair to conclude that the
French government is in the conundrum of wanting to “restitute without restitut-
ing”. It would seem that France, like its European counterparts, eulogizes the idea
of restitution but without the commitment to restituting.

Based on the above, the Sarr-Savoy report can be criticized from three stand-
points: its ambiguity regarding restitution; lack of a legal framework; and its focus
on internationalization. First, insofar as regards the ambiguity with respect to res-
titution, a detailed review of the Sarr-Savoy report suggests it prioritizes the idea of
the circulation of cultural objects over their definitive restitution.28 This raises seri-
ous concerns as to whether the President of France genuinely supported the resti-
tution of illicitly acquired cultural objects to their legitimate owners. In her critique
of the report, Margareta von Oswald also corroborated the ambiguity surrounding
restitution and circulation by referring to an interview of the French Minister of
Culture, Franck Riester, where the minister explained that “young Africans should
have access to their heritage”, but that “we should not empty the museums but
work closely with them towards the objective to circulate the collections”.29 The
argument here seems to be that the restitution of cultural property would make glob-
al heritage cooperation and collaboration impossible, even though it is the reverse
that is true.

1 June 2022.
28 Restitution involves returning cultural objects to their rightful owners or countries of origin due to his-
torical injustices or improper acquisitions. Circulation, conversely, focuses on shared accessibility and display
of cultural objects worldwide, without a primary emphasis on returning them to their source. Restitution
seeks to correct past wrongs, while circulation emphasizes global access to cultural heritage; A. Glass, op. cit.
29 M. von Oswald, The “Restitution Report”: First Reactions in Academia, Museums, and Politics, 18 December
2018.
In addition, this argument by the French Minister of Culture is at variance with the overarching principle of restitution (and *jus cogens*, as will be explained later); implying that the authority over the ownership and maintenance of these properties will be exercised by the French authorities. Aligning with the position of the Belgian art historian Sarah van Beurden, this article argues that restitution is not a hurdle to collaboration and cooperation in the global cultural heritage space. The reason for this is not far-fetched, considering that co-curatorship and common exhibitions are possibilities that can be explored even after the restitution of these objects has taken place. It would be putting the cart ahead of the horse if these parallel initiatives are put forward before the physical return of these cultural objects. By restituting before exploring the possibilities of heritage collaboration and cooperation, market countries would be acknowledging the imperative of remedying wrongful past actions in cases where these cultural objects were illicitly acquired.

Second, the Sarr-Savoy report can be criticized on the premise that it does not provide legal frameworks through which interested parties can explore the opportunities for the restitution of cultural property to their source countries. The absence of clear legal guidelines undermines the potential effectiveness of the report’s recommendations, leaving significant ambiguity with respect to restitution claims. Interestingly, the report’s failure to provide a viable legal framework for the restitution of cultural property lends credence to the viability of *jus cogens* as the operative legal mechanism that should be applied in the restitution of cultural objects. As peremptory norms of international law, *jus cogens* does not inherently require specific legal frameworks to work. They are regarded as norms of fundamental principles from which no derogation is permitted, and they can be directly invoked without requiring a distinct legal framework.

Third, the report leans towards an internationalist perspective regarding the restitution of cultural property, and this brings into light the struggle for supremacy between the nationalist and internationalist perspectives about cultural heritage. This conflict has been summarized in the explanation that nationalists seek to employ legal and extra-legal means to protect their cultural heritage and facilitate their return and restitution, whereas internationalists sabotage these efforts on the grounds that cultural heritage is the common heritage of mankind that should be shared. The Sarr-Savoy report’s inclination towards an internationalist perspective, emphasizing the common heritage of mankind, can be criticized for potentially undermining the rights of source countries to seek the return and restitution of their cultural property. This bias highlights the ongoing struggle be-

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tween the nationalist and internationalist viewpoints, making a case for *jus cogens* as a more balanced legal framework that upholds the principles of restitution while also recognizing the importance of preserving cultural heritage for the international community.

Without real and progressive efforts backing up the proclamations of market countries to restitute pillaged cultural heritage when provenance has been established, source countries are left with empty promises, nursing the wounds of “colonial barbarity”. In an ideal world, redressing the impunities of the colonial legacy starts with restitution, and nothing less. Unfortunately, the scales are evidently tipped in favour of market countries, and the source countries are left to dance to the tunes dictated by them. One of such distasteful tunes is Felwine Sarr and Bénédicte Savoy’s proposition that France’s objective is to determine how pillaged cultural heritage can be made accessible to everyone by exploring a middle ground between “restitution and circulation” (demonstrating the flawed internationalist perspective). Logically speaking, which should come first, restitution or circulation?

It should not come as a surprise that the French government, through subtle modifications of its intents and objectives, has deviated from the 28 November 2017 proclamation of restitution. The ensuing arguments from various quarters of the French administration is that the ultimate objective is to create a system through which pillaged cultural property can be accessed by the international community.\(^{32}\)

It is submitted here that this proposition is antithetical to the idea of restitution. The international community should have a collective responsibility to protect cultural heritage, but it should not be used as a tool to shield restitution. Accordingly, the battle for primacy between “internationalism” and “nationalism” is misconstrued and utterly insignificant, as both concepts are flip sides of the same coin, i.e., the protection of cultural heritage. Therefore, a more synchronized version of internationalism and nationalism is that cultural heritage is the heritage of a nation, shared with others within a stipulated framework, and protected by all. In no way should the objective of internationalism prejudice the right of ownership vested in source countries.

The genesis of this antithesis can be traced to John Merryman’s dichotomous perception of cultural heritage.\(^{33}\) Merryman’s narrow construction of cultural property in terms of nationalism and internationalism, pitting both concepts against each other and with an obvious bias for “internationalism”, has played a key role in frustrating restitution efforts. The pretext that internationalism, unlike nationalism, advances the ideals of “preservation, access, and integrity”, does not blur the obvious fact that its retentionist approach is an attempt to actually promote

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\(^{32}\) G. Harris, *op. cit.*

\(^{33}\) J. Merryman, *op. cit.*
the nationalistic objectives of the retaining country. The truth is that cultural heritage should not be interpreted within the ambit of these narrow concepts, as they are tangential to the question of the legitimacy of restitution.

In reality, the restitution debate is more of a legal issue than a battle of concepts or politicization. Scovazzi aptly captures the role of international law in this tussle over restitution, as he observes that:

Moral and cultural principles that dictate the restitution are being progressively transformed into legal rules. The trend has probably not yet reached the final stage when a body of new customary rules on restitution of cultural properties is definitively created. But it can be considered as already being within the dynamics of the evolution of international law.

This article echoes similar sentiments as Scovazzi, proposing that the international principle of *jus cogens* is the evolutionary legal framework through which the restitution of illicitly obtained cultural property to its original owners can be actualized.

**A New Basis for Restitution under International Law**

The promise of an international order regulating cultural heritage was that it would be an effective platform that would facilitate the return and restitution of cultural heritage and overcome some of the constraints inherent in the domestic legal frameworks. The provisions of various international texts on cultural heritage law, such as the 1970 UNESCO Convention, the 1972 World Heritage Convention, the 1954 Hague Convention, the 1995 UNIDROIT Convention, etc., highlight the commitment of the international community to protect cultural heritage and facilitate the return and restitution of pillaged cultural heritage. However, the effective implementation of these conventions is fraught with many challenges: some states are outside the frameworks of these treaties; dualist states that are within the framework of these treaties do not have a corresponding national legislation to implement the treaties; and perhaps above all the treaties are non-retroactive. For example, Nigeria’s claim to the Nok statues

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35 T. Scovazzi, op. cit.
36 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.
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which was based on the 1970 UNESCO Convention, was rejected by the French court on the ground that the Convention was not applicable in France because no implementing legislation had been enacted in France.\textsuperscript{40}

\textit{Jus cogens} norms are the solution to the myriad of problems that characterize the use of the international legal framework to secure the restitution of pillaged cultural property. Essentially, \textit{jus cogens} norms are not subject to the pitfalls that characterize cultural heritage treaties. \textit{Jus cogens} norms are peremptory norms of international law that are accepted and recognized by the international community as being binding, from which no derogation is permitted, and can only be modified by another peremptory norm of international law.\textsuperscript{41} This definition does not however answer the fundamental question of how \textit{jus cogens} norms are formed, resulting in definitional ambiguity.\textsuperscript{42}

\textit{Jus cogens} norms mirror natural law principles, as they embody the salient characteristics of natural law – universality, superiority, and humanity-focused, as it focuses on human beings rather than the state-focused approach of early international law.\textsuperscript{43} These norms showcase and protect the fundamental values of the international community and enjoy primacy over other rules of international law – the same way that principles of natural law are foundational to legal systems and are universally applicable.\textsuperscript{44}

However, Charlesworth and Chinkin argued that there was an implicit genderization of the concept of \textit{jus cogens} which was antithetical to the fairness and justice it sought to achieve.\textsuperscript{45} The central point of their argument is that the development and application of \textit{jus cogens} norms have been influenced by patriarchal norms and biases, resulting in a skewed prioritization of certain issues over others.\textsuperscript{46} They contended that the current understanding of \textit{jus cogens} tends to prioritize issues related to state sovereignty, security, and territorial integrity, while overlooking or downplaying violations of women’s human rights.\textsuperscript{47}

The authors highlighted that traditional notions of \textit{jus cogens} have been shaped by a state-centric approach that focuses on protecting the interests and stability

\begin{thebibliography}{99}
\bibitem{43} A. Verdross, \textit{Jus Dispositivum and Jus Cogens in International Law}, “American Journal of International Law” 1966, Vol. 60(1).
\bibitem{46} Ibidem.
\bibitem{47} Ibidem.
\end{thebibliography}
of states rather than the rights and well-being of individuals, particularly women.\textsuperscript{48} According to them, this has led to an under-emphasis on addressing gender-based violence, discrimination, and systemic inequalities that disproportionately affect women in various contexts, including armed conflicts and societal norms.\textsuperscript{49} The arguments made by Charlesworth and Chinkin regarding the implicit gender bias within the concept of \textit{jus cogens} relate to the broader theme of fairness and justice in the research topic. Their critique highlights how the development and application of \textit{jus cogens} norms have been influenced by patriarchal norms, which is relevant to the examination of justice in the context of the restitution of cultural property. This perspective underscores the need to address systemic biases and inequalities in international law, including those related to cultural heritage restitution.

Despite the criticism noted, for a norm to qualify as a \textit{jus cogens} it must embody the following elements:

i. the norm is recognized under international law; and

ii. the norm is accepted by the international community as binding, permitting no derogation therefrom.

The question that immediately follows is thus: What constitutes the international community? It would seem that the rule of an “international community” does not presuppose that there is a consensus among all the states. It is sufficient that the majority of the states have recognized and accepted the potential rule as being of \textit{jus cogens} nature.\textsuperscript{50}

Evidence of recognition and acceptance of a norm as \textit{jus cogens} can be expressed through “official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference”.\textsuperscript{51} In \textit{Domingues v. United States},\textsuperscript{52} the Inter-American Commission on Human Rights (IACHR) considered the jurisprudence of \textit{jus cogens} norms in its decision when it stated that “[i]t has been said that the principal distinguishing feature of [peremptory] norms is their ‘relative indelibility’, in that they constitute rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect”. It further explained that “[while] customary international law

\begin{itemize}
  \item \textsuperscript{48} Ibidem.
  \item \textsuperscript{49} Ibidem.
  \item \textsuperscript{50} W.E. Conklin, \textit{The Peremptory Norms of the International Community}, “European Journal of International Law” 2012, Vol. 23(3).
  \item \textsuperscript{51} U. Linderfalk, \textit{Understanding Jus Cogens in International Law and International Legal Discourse}, Edward Elgar, Cheltenham 2020.
\end{itemize}
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rests on the consent of nations [...] [n]orms of jus cogens, on the other hand, derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence [...]. It held that “[t]herefore, while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of jus cogens is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole”.

The significance of the rules of jus cogens in international law is that they are the conscience of the international community, i.e., the global conscience. Jus cogens consists of laws created to preserve and safeguard the existence of the international community, and is an “indispensable minimum” for the existence of the international community. The delegates at the United Nations Conference on the Law of Treaties reasoned that:

The content of jus cogens would be defined progressively by the practice of States and international jurisprudence. Rules of jus cogens were indispensable for the protection of public order, the community of States and the maintenance of the standards of public morality, and [...] in order to acquire the character of jus cogens, a rule of international law must not only be accepted by a large number of States, it must also be regarded as indispensable for international life and be deeply rooted in the international conscience.

Unlike the nuances inherent in the operationalization of international treaties, the jus cogens peremptory norms have a special framework of operation. In the case of international treaties, the treaties would only be applicable to signatory states, and would require a corresponding national legislation to be effective in the case of dualist states. However, in the case of rules of jus cogens, the rules are sacrosanct and self-executing. The implication of this in the context of international cultural heritage law is: (i) the requirement of a corresponding national legislation is dispensed with for rules of jus cogens to operate; (ii) the relevant rules of jus cogens would apply to all states regardless of the treaties that they are signatory to. These implications are the foundation upon which the crux of this article is anchored.

53 Ibidem, paras. 47-50.
The jurisprudence of the International Criminal Court on crimes against humanity and the protection of cultural heritage

The International Criminal Court (ICC) is a supranational judicial forum that exercises jurisdiction over four major forms of crime: crimes against humanity, genocide, war crimes, and the crime of aggression. Since its inception, the ICC has been seized with the jurisdiction to determine salient questions of international criminal law, including the nexus between international criminal law and the protection of cultural heritage. The adoption of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, and its description of cultural heritage as the heritage of mankind, echoes the fact that the Convention’s overriding purpose is to “protect the cultural heritage of all peoples for future generations”. In its policy document on cultural heritage, the ICC affirmed that the Office of the Prosecutor characterizes cultural heritage as a “broad expression that includes tangible and intangible expressions of human life”. The ICC further affirmed that where crimes against these expressions of cultural heritage would have an adverse impact on the shared sense of humanity and the daily lives of the affected population, it is the responsibility of the Office of the Prosecutor to prosecute these crimes when they are within the ambit of the jurisdiction of the Court.

Cultural property enjoys protection under international criminal law in two respects: the war crime of attacking protected objects; and crimes against humanity. The development of this jurisprudence of international criminal law has been credited to the foundations laid out during the American Civil War. In the wake of the Civil War, President Abraham Lincoln commissioned Francis Lieber, a German-American legal theorist, to draft the operational guidelines for the Union Army, which would later be referred to as the “Lieber Code”. The Lieber Code prescribed the seizure and destruction of cultural property, and its provisions on the proscription of offences against cultural property were later incorporated into the Brussels Declaration of 1874 and the Hague Conventions of 1899 and 1907.

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60 Rome Statute of the International Criminal Court, Arts. 7(1)(h) and 8(1)(h).
The unfortunate incidents surrounding the Second World War, which featured Nazi Germany’s pillage and destruction of cultural property, demonstrated the weaknesses in the enforcement of international laws protecting cultural heritage. The trial and conviction of Alfred Rosenberg during the Nuremberg Trials set the stage for the strong enforcement of international criminal law and the protection of cultural property. Following the Nuremberg trials, the 1954 Hague Convention codified the morals deriving from the Second World War and created a robust framework for conceptualizing the destruction of culture as a war crime. However, exceptions for military necessity were carved out by delegates to the 1954 Hague Convention, and the concept of “military necessity” was not clarified until the codification of the Second Protocol to the 1954 Hague Convention. Article 6(a) of the Second Protocol to the 1954 Hague Convention only permits an act of hostility against protected cultural property if that object was made, by its function, a military objective and if there is no feasible alternative available to obtain a similar military advantage. Article 6(b) adds that the use of cultural property in a manner that puts it at risk of damage or destruction is only possible for as long as there is no other means to gain a similar military advantage. It should be added that only commanding officers may invoke “imperative military necessity”.

The jurisprudence of the Nuremberg Trials and the International Criminal Tribunal for the Former Yugoslavia (ICTY) was crucial to consider the protection of cultural heritage in the context of international criminal law. The ICTY adopted international laws that prohibited destruction of historic and religious buildings/monuments. Although most of the cases the ICTY considered were secondarily


65 A.L. Fabris, Military Necessity under the 1954 Hague Convention, “Santander Art and Culture Law Review” 2015, Vol. 2(1). The discourse as to what should constitute an “imperative” and “unavoidable” military necessity has resulted in divergent opinions. Some delegations were of the opinion that the exception for military necessity permitted belligerent states to destroy cultural property, while others are of the opinion that the exception for military necessity helps further the military advantage of states during an armed conflict.


67 The Nuremberg trials, held after the Second World War, played a significant role in shaping the protection of cultural heritage against intentional destruction. Although the primary focus of the trials was to bring war criminals to justice, the cases also addressed the destruction of cultural property. The trials of Reichsmarschall Hermann Göring and Einsatzgruppen are relevant in this context. Also, the ICTY was an ad hoc Court created under the United Nations to prosecute persons responsible for the commission of war crimes in the territory formerly known as Yugoslavia.
related to the destruction of cultural heritage,\(^{68}\) the Tribunal nevertheless significantly contributed to the development of the jurisprudence of international criminal law and cultural heritage.\(^{69}\)

In the ICC Al Mahdi case, the defendant, Ahmad Al Mahdi, was charged as a co-perpetrator of war crimes that included intentionally attacking religious and historic buildings in Timbuktu, Mali between June and July 2012.\(^{70}\) The ICC convicted Al Mahdi of being a co-perpetrator of a war crime by attacking protected objects under Articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute. The decision of the ICC in the Al Mahdi case marked a significant turning point in the international community’s recognition of cultural heritage, and further highlighted the collective responsibility of the international community to prosecute violators of cultural heritage. Reacting to the decision of the ICC in the Al Mahdi case, Pinton highlighted the contrast between the jurisprudence of the ICTY and provisions of the Rome Statute.\(^{71}\) Pinton argued that in the Al Mahdi case, the ICC could not have resorted to the ICTY’s jurisprudence for guidance because the ICTY punishes intentional and unintentional destruction of cultural heritage, whereas the Rome Statute only sanctions intentional attacks on heritage sites.\(^{72}\) Clearly, the legal contexts of the ICTY and the Rome Statute are different.\(^{73}\)

A careful perusal of the reasoning of the ICC as evinced in the Court’s judgment and the arguments of the prosecutor reveals the significance of cultural heritage to the international community. The Trial Chamber of the ICC considered the wilful attacks against the mausoleums and mosques to constitute an affront to the values which these cultural, religious, and historic buildings embody and portray to the Indigenous community. The prosecutor further argued that the attacks against historic buildings and monuments symbolized a frontal assault on the roots of the native people, which distorts their social structures and practices. Dubuis surmised that “cultural destruction is a systematic assault on the spirit and soul of a people.”\(^{74}\)


\(^{72}\) Ibidem.


Supporting the restitution of looted cultural heritage through the norms of *jus cogens*

*Jus cogens* norms are fundamental in international law, absolute, and non-negotiable.\(^{75}\) Their breach has severe consequences. The creation of international law rules like *jus cogens* norms involves a complex process, relying on state practice and *opinio juris*, with scholars analyzing customary practices. Identifying *jus cogens* norms is a crucial task, requiring a comprehensive analysis involving states, international bodies, scholars, and the judiciary. Elevation of a norm to *jus cogens* status demands strong *opinio juris* and practice, reflecting broad acceptance. Certain norms, like the prohibition of plunder and looting, have attained *jus cogens* status due to their recognized significance in preserving cultural heritage,\(^ {76}\) and this has been carefully demonstrated in the jurisprudence of international courts in the paragraphs above.

Moreover, in ICOM’s 1977 *Study on the Principles, Conditions and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages*,\(^ {77}\) the organization affirmed that the reassembly of dispersed heritage through the restitution of cultural objects should be universally recognized as an ethical principle. On the premise of this affirmation and the jurisprudence of the ICC considered in the previous paragraphs, this article argues for the elevation of protection of cultural heritage from three standpoints. First, the recognition of the protection of cultural heritage as a *jus cogens* norm guarantees justice and the remediation of past wrongs. It recognizes the historical wrongs done to the source countries in the era of colonization, theft, and illegal appropriation of cultural assets. This is consistent with the tenets of international law, which place the defense of fundamental rights and ideals above those of states.

Second, the elevation of the protection of cultural heritage to the pedestal of *jus cogens* status secures the protection of cultural heritage for future generations. This research has drawn attention to the destruction and dispersion of cultural objects brought about by armed conflict, illicit trade, and the unauthorized purchase of cultural objects. The necessity to stop the further loss and dispersion of cultural artefacts would be highlighted by acknowledging the notion of restitution as *jus cogens*, assuring their preservation and accessibility for future generations.

Third, elevating cultural heritage protection to the status of *jus cogens* serves to promote respect for cultural diversity and the right to self-determination among communities. This elevation acknowledges the vital role cultural objects play

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\(^{75}\) U. Linderfalk, op. cit.


in the identity, spirituality, and heritage of these communities. By recognizing the principle of restitution as *jus cogens*, it reaffirms the rights of individuals and communities to their cultural heritage, empowering them to make decisions regarding the preservation and display of their cultural objects.

Furthermore, Francioni and Zhang Yue in their works pointed out the value of characterization of the norm protecting cultural heritage as a *jus cogens* norm. Francioni argued that cultural heritage protection has transcended the domain of traditional treaties and has become a fundamental principle of international law that the international community recognizes. Implicit in Francioni’s argument is the idea that the wide acceptance of the international community’s duty to protect and preserve cultural heritage testifies to the growing customary nature of the norm, thus making it suitable for elevation to a *jus cogens* norm. Also, the inherent value of cultural heritage extends beyond national boundaries. It contributes to the enrichment of humanity as a whole and fosters mutual understanding and respect among different cultures. Recognizing the protection of cultural heritage as a *jus cogens* norm would further solidify its significance in the global context, encouraging international cooperation and collective responsibility for its preservation.

As can be gleaned from the preceding paragraphs, it is discernible that the ICC is very much inclined towards interpreting the destruction of cultural sites and buildings as a violation of *jus cogens*. This interpretative jurisprudence begs the question of why *jus cogens* cannot be adopted by plundered and pillaged states to pursue return/restitution at the national level, instead of only in supranational judicial fora? It is submitted here that the characterization of cases brought before the ICC as being “criminal” does not preclude the extension of rules of *jus cogens* to “civil cases” for the return/restitution of illicitly acquired cultural heritage. Such a preclusion would run counter to the fundamental notion of *jus cogens* in the first place – principles that do not admit any exception.

Moreover, the recognition of the need to protect cultural heritage at both the international and domestic levels demonstrates the importance and significance ascribed to it, and the existence of an implicit obligation on all persons to protect it. If the laws that protect cultural heritage in times of armed conflict are loud and clear about the international responsibility of everyone to seek their protection and preservation, there is no reason why these laws should be silent in times of peace when claims for restitution are made. An argument often made to shut down the claims for restitution of cultural property illicitly acquired before the operationalization of the 1970 UNESCO Convention is the principle of non-retroactivity. This principle blindly draws from the presumption of non-retroactivity enshrined

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in the Vienna Convention on the Law of Treaties,\textsuperscript{80} without appropriately considering the peculiarities of cultural heritage matters and the need to mete out substantive justice to affected parties. However, \textit{jus cogens} norms do not succumb to the limitation imposed by non-retroactivity clauses, as such clauses are inconsistent with the character of \textit{jus cogens}.

Labadie distinctively lamented the situation in her seminal research, where she bemoaned the limitations of international law in the fight for the restitution of illicitly acquired cultural heritage. She noted that “[d]espite an abundance of international instruments devoted to the restitution of illicitly exported property, their usefulness reveals its limits when it comes time to examine claims relating to cultural property looted during the colonial period”. She also commented that such claims “are in fact confronted with various obstacles, whether it concerns the restricted scope of the agreements, their non-retroactive nature or even the expiry of the limitation periods”. Thus she concluded that, considering the lack of international standards in this regard, “claimants must then refer to the national laws and courts of the States involved in the dispute”\textsuperscript{81}

The case of \textit{R v. Heller}\textsuperscript{82} illustrates and animates the problem of non-retroactivity and how it could impact the case for return/restitution of cultural property. This challenge can be effectively addressed when aggrieved states or Indigenous individuals skilfully combine the norms of \textit{jus cogens} and the right to self-determination. This strategic approach helps bypass the constraints imposed by the principle of non-retroactivity within cultural heritage conventions.

Based on the collective premises of the gravity of cultural heritage destruction; the universal recognition of the protection of cultural heritage as a customary practice; the interconnection of norms protecting cultural heritage with other \textit{jus cogens} norms; and the imperative to protect human rights, a compelling case can be made for the elevation of cultural heritage protection to the status of \textit{jus cogens}. The history of mankind is replete with many instances of how irreversible loss and damages of cultural artefacts occurred as a result of illicit art trade and armed conflicts (as discussed in the preceding sections). Additionally, norms protecting cultural heritage have gained immense notoriety in the global landscape, such that they are widely recognized and acknowledged within the international community through conventions like the 1972 UNESCO World Heritage Convention, the 1954 Hague Convention, and others. National legal frameworks and state practices also underscore the customary nature of these norms and their acceptance by the international community.

\textsuperscript{80} 23 May 1969, 1155 UNTS 331.
Also, norms protecting cultural heritage do not exist in isolation, and have often been interpreted in the context of cultural rights – a jurisprudence that has been expounded by Vrdoljak to encompass the rights to identity, self-determination, and dignity. Thus, the recognition of these norms protecting cultural heritage as *jus cogens* reinforces the connection between cultural heritage and human rights, thereby underscoring the obligation of states, in the comity of nations, to protect and preserve cultural heritage as a vital component of the promotion of and respect for human rights.

**Conclusions**

The elevation of the protection of cultural heritage to the status of *jus cogens* represents a pivotal step in rectifying historical injustices and ensuring the preservation of humanity’s diverse cultural legacy. Understanding the creation of international legal norms and the challenges involved is crucial to appreciate the significance of this development.

International legal norms are typically established through a combination of doctrinal analysis, which involves the interpretation and synthesis of legal texts and principles, and the observance of *opinio juris* and state practice. This dual process involves a doctrinal foundation supported by the consistent belief (*opinio juris*) among states that a particular norm is legally binding and their actual practice in accordance with that norm.

The classification of cultural heritage as a norm of *jus cogens* is, in essence, the culmination of these processes. It acknowledges the significance of cultural heritage beyond its mere material value, recognizing its role as the repository of collective memory, identity, and spirituality for communities. This elevation aligns harmoniously with the global consensus regarding its importance and reinforces respect for fundamental principles such as cultural diversity, self-determination, and human rights.

When a state or organization goes against the law by eradicating or forcibly removing cultural heritage, this standard is broken. The international legal community has a responsibility to act quickly and effectively in the event of a breach, frequently using international institutions and legal instruments to remedy the breach, such as by pursuing legal remedies, negotiations, or diplomatic resolutions.

The parties injured by such breaches are the affected communities and nations whose cultural heritage has been compromised. These injuries extend beyond material losses and encompass the erosion of cultural identity, historical memory, and spiritual connections. Therefore, the elevation of cultural heritage protection to *jus cogens* status underscores the international community’s commitment to addressing these injuries and ensuring the safeguarding of cultural heritage for present and future generations.
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