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A Changing Landscape in the Return of Cultural Property: Is a New Customary Rule in the Making?

Enabling the return of wrongfully removed cultural property has long been, and remains, a complex and challenging process. Legal battles, moral considerations, and public pressure constantly intersect in the scope of restitution and repatriation claims. This short contribution will highlight some of the most notable ethical and legal challenges in addressing the relocation of contested cultural property, exploring whether a new customary international law might come to the rescue in mitigating these shortcomings.

But before delving into any analysis, an essential clarification must be made. Although often used interchangeably, 'restitution', 'return', and 'repatriation' entail distinct legal and conceptual considerations, usually resulting in different implications and outcomes that evolve constantly over time (also due to the persistent lack of generally accepted definitions).[1]

Given these premises, 'restitution' can be outlined as a measure covering circumstances where a 'violation of the prohibition of theft and pillage imposed by the binding law'[2] has occurred, thus including also cultural property illegally stolen or pillaged in times of conflict, meaning contrary to the laws of war. Its aim, to the extent possible, is to restore the original circumstances that existed before the displacement of the object in question (*restitutio in integrum*), giving it back to its legitimate owner, whether an individual, a state, or a community.[3] To demonstrate the evolving nature of terminology and case law related to these issues, over time, 'restitution' has become an extensive term, applied not only to claims connected to unlawful takings, but also to appropriations that today are seen as unjust or morally questionable.[4]

[1] W.W. Kowalski, *Art Treasures and War*, (Leicester: Institute of Art and Law, 1998), p. 2.

[2] W.W. Kowalski, 'Claims for Works of Art and their Legal Nature', in The International Bureau of the Permanent Court of Arbitration (Ed.), *Resolution of Cultural Property Dispute* (The Hague: Kluwer Law International, 2004), pp. 31-51.

[3] Id.; F. Sarr and B. Savoy, *Rapport sur la restitution du patrimoine culturel africain. Vers une nouvelle éthique relationnelle* (2018), p. 25; C. Forrest, *International Law and the Protection of Cultural Heritage* (New York: Routledge, 2010), pp. 140–142.

[4] European Parliament, *Cross-border claims to looted art*. Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, (October 16, 2023), p. 14.

On the other hand, the more legally neutral term[5] 'return' is often used as an overarching concept concerning cultural property that left its country of origin either during colonial or foreign occupation or due to illegal exportation. Considering this wide range of circumstances, in contrast to what happens with restitution, breach of national or international legal norms is not always detectable in return claims.[6] Thus, these requests are generally based on a case-by-case basis involving both legal and ethical considerations, often resulting in unpredictable and sometimes contrasting results.[7]

Lastly, 'repatriation' is a sub-category of return or restitution (according to whether the removal occurred during belligerent or non-belligerent occupation) that results in the relocation of the contested object within its country of origin. It should be noted that the concept of 'country of origin' adds a further layer of dispute, since it often differs from the one where the object stems from (i.e., a new independent state occupying the same geographical territory as the ancient population that created the object in question).[8] Repatriation requests mainly involve indigenous, descendant, or local communities and minority groups living in the state of origin. Rather than strictly legal, these claims are also based on moral, political, or cultural grounds.[9] The very term 'repatriation' entails a political connotation, since it assumes that cultural objects carry with them a national character and homeland (*patria*).[10]

Aside from the challenge posed by terminology, further legal matters arise when dealing with cultural property with a contested past.

First of all, despite the efforts of UNESCO and other intergovernmental organizations to combat the illicit trafficking of cultural property and to promote a more consistent and standardized framework for the return and restitution of wrongfully removed cultural property – primarily through the adoption of key international instruments such as the 1954 and 1970 UNESCO, the 1995 UNIDROIT and 2017 Council of Europe Conventions – significant challenges persist in giving these objects back to their

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[5] A. F. Vrdoljak, 'Introduction', in A.F. Vrdoljak, A. Jakubowski and A. Chechi (Eds.), *The 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property. A Commentary* (Oxford University Press, 2024), p. 118.

[6] A. Jakubowski, 'Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP)', in A.F. Vrdoljak, A. Jakubowski and A. Chechi (Eds.), *The 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property. A Commentary* (Oxford University Press, 2024), pp. 758-759.

[7] W.W. Kowalski, n 2 above, pp. 31-51.

[8] J.H. Merryman, 'Two Ways of Thinking About Cultural Property' 80 *American Journal of International Law*, p. 845 (1986); Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England* (2023), p. 2.

[9] M. Cornu and M.A. Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' 17 *International Journal of Cultural Property*, pp. 1-2 (2010); W.W. Kowalski, n 2 above, pp. 31-51 (2004).

[10] J.H. Merryman, 'The Public Interest in Cultural Property', in J.H. Merryman (Ed.), *Thinking About the Elgin Marbles. Critical Essays on Cultural Property, Art and Law* (London: Kluwer, 2nd ed, 2009), p. 155.

rightful owners. This phenomenon is of particular interest in cases involving cultural property unlawfully acquired during World War II and European colonial rule, i.e., decades or hundreds of years before the enactment of these regulations, which are not retroactive and have been ratified by a limited number of countries.

Other major obstacles[11] lie in the absence of a uniform global (and national) legal framework to comprehensively address historically removed cultural property – which usually results in conflict between the law of the jurisdiction where the object is located (*lex rei sitae*) with that of the country from which the object was unlawfully taken (*lex originis*)[12] – combined with the inalienability burden that characterized many European jurisdictions, such as the UK, France, Italy, and the Vatican City which, save in specific instances,[13] are legally banned from permanently relinquish artifacts belonging to their national collections.[14]

Another key challenge is the issue of time. Being mainly linked to events that happened in the past, most restitution and return claims face legal hurdles due to the statute of limitations, which prevents cases from being pursued after a certain amount of time, thus making the acquisition, whether or not legitimate, legally barred despite the merits of the case. Following the (non-binding) 1998 Washington Principles, statutory exceptions[15] have been enforced in several jurisdictions for favoring the restitution of Nazi-confiscated art to its rightful pre-war owners[16]. This process is often supported by the establishment of

[11] L. Casini, *Advanced Introduction to Cultural Heritage Law* (Cheltenham: Edward Elgar Publishing, 2024), pp. 100-102.

[12] While, in general, *lex rei sitae* prevails, concerning restitution of cultural property, article 12 of the Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State seems to favor *lex originis*. On this topic, see E. Jayme, 'Globalization in Art Law: Clash of Interests and International Tendencies' 38 *Vanderbilt Journal of Transnational Law*, p. 937 (2005).

[13] Among them, Section 5(1) of the British Museum Act 1963; Article L115-1 of the French Code du patrimoine; Article 53 of the Italian Code of Cultural Heritage and Landscape.

[14] M. Cornu and M.A. Renold, n 9 above, pp. 9-10.

[15] Among them, LOI n° 2023-650 du 22 juillet 2023 relative à la restitution des biens culturels ayant fait l'objet de spoliations dans le contexte des persécutions antisémites perpétrées entre 1933 et 1945. For further details, see https://www.legifrance.gouv.fr/loda/id/JORFTEXT000047874541/ (last visited Apr. 25, 2025); Bundesgesetz über die Rückgabe von Kunstgegenständen und sonstigem beweglichem Kulturgut aus den österreichischen Bundesmuseen und Sammlungen und aus dem sonstigen Bundeseigentum (Art Restitution Act). For further details, see https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010094 (last visited Apr. 25, 2025).

[16] On this topic, see Dr. W. A. Fisher and Dr. R. J. Weinberger, *Holocaust-Era Looted Cultural Property: A Current Worldwide Overview*, 5 (2024), available at https://art.claimscon.org/wp-content/uploads/2024/03/4-March-2024-Holocaust-Era-Looted-Cultural-Property-A-Current-Worldwide-Overview.pdf (last visited May 22, 2025).

ad hoc independent panels[17] tasked with hearing claims of Holocaust victims (or their heirs) who lost possession of their collection. However, it is crucial to notice that these panels cannot release any legally binding decisions, just recommendations, whose implementation is left to the concerned parties.

On the other hand, proactiveness by national governments regarding cultural property acquired during colonialism or punitive expeditions has only recently started to rise. These efforts involve former European colonial powers, like Germany, France, the UK, the Netherlands, and Belgium, cooperating with the countries of origin of contested artifacts through bilateral agreements focused on their return. On the other hand, in terms of legislation, as of this writing, Belgium is the only country to have enforced the first legal framework enabling large-scale restitution and return of cultural property acquired during Belgian colonial rule, overcoming the principle of inalienability. Despite a pretty narrow scope, both in terms of the categories of objects it addresses (human remains and archival materials are not taken into consideration) and its geographical applicability (cultural property must originate only from former Belgian colonies), the enactment of dedicated regulation marks a turning point in the management of cultural return, leading to a more systematic approach.[18]

Amidst this background, many scholars and practitioners advocate for enforcing legal regimes expressly dedicated to cultural return and restitution, arguing that they would accelerate the process and lead to less inconsistent results. However, implementing every regulatory framework is a prolonged and complex process. In the meantime, how can this lack of legal basis be addressed? Would a new customary rule be the most appropriate strategy to support the return of looted artifacts while awaiting the enforcement of targeted legal norms? Before engaging with these issues, it is essential to define the concept of customary international law (CIL).

How Does Customary International Law Develop?

[17] Among them, Spoliation Advisory Panel (UK); Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz (Germany); Commission pour la restitution des biens et l'indemnisation des victimes de spoliations antisemites (France); Adviescommissie Restitutieverzoeken Cultuurgoederen en Tweede Wereldoorlog (The Netherlands); Kunstrückgabebeirat (Austria). Switzerland is also about to introduce its commission (Kommission für historisch belastetes Kulturerbe), which is set to mark a historic turning point. More specifically, Switzerland will be the first country to establish a committee mandated to address not only cases of Nazi-looted art but also instances of cultural property unlawfully acquired during the colonial era.

[18] M.S. de Clippele and B. Demarsin, 'Pioneering Belgium: Parliamentary Legislation on the Restitution of Colonial Collections' 2 *Santander Art and Culture Law Review*, pp. 277-294 (2022).

As the name suggests, customary law is based on international custom, which is recognized 'as evidence of a general practice accepted as law'.[19]

CIL evolves through a consistent state practice concerning a particular issue, accompanied by a sense of legal obligation (*opinio juris*). More specifically, rather than being driven solely by political convenience or diplomatic courtesy, states' actions should be motivated by a belief that they are complying with the law or, at least, the beginning of a new law;[20] otherwise, isolated state behavior remains mere state practice without acquiring the status of customary law.

Furthermore, by contrast to treaty law, customary law is unwritten and generally binds states irrespective of their formal consensus to such rules, hence the requirement of uniform and longstanding state practice.[21]

In terms of application, CIL has developed particularly within the context of armed conflicts: many crimes under international law are defined by customary norms.[22]

Regarding cultural property, Chapter 12 of the ICRC Customary Law Study identified four rules as part of CIL. Building upon the above-mentioned international treaties and national legislations concerning the protection of cultural property, these customary rules are mainly based on the duty of each party involved in a conflict or a military operation to respect cultural property, preventing it from being damaged, destroyed, stolen, pillaged, misappropriated, or illicitly exported. Finally, under CIL, occupying powers are required to return cultural property unlawfully removed from occupied territories.

Although being a significant source of international law and a valuable tool for addressing interstate disputes, especially by the International Court of Justice, the relevance of CIL remains controversial. Some scholars argue it is too vague and slow to adapt to contemporary legal challenges.[23] Conversely, others contend that CIL is key in shaping global norms, especially when treaty law is insufficient or ineffective.[24]

Regardless of the different tendencies, as previously mentioned, the criteria for establishing new CIL are state practice and *opinio juris*. To detect the presence of these requisites, the key questions to address are: What evidence constitutes state practice when dealing with the return of contested cultural property?

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[19] Article 38(1)(b) of the Statute of the International Court of Justice.

[20] M. N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2014), p. 62.

[21] Id., p. 72.

[22] H. Zhong, *China, Cultural Heritage, and International Law* (London-New York: Routledge, 2018), pp. 70-73.

[23] I. Detter De Lupis, *The Concept of International Law* (Stockholm: Norstedts, 1987), 112–116; W. Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964), 121–123.

[24] H. Zhong, n 22 above, pp. 71-72.

How do states demonstrate that their return and restitution efforts stem from legal obligation rather than mere courtesy? How long should these practices be followed before they become recognized as CIL?

Starting from temporal requirements, no specific time length is legally required to introduce a new CIL. In some cases, like the continental shelf and airspace, customary rules have formed through rapid consolidation,[25] meaning that the unanimous support of states may be more significant than the length and generality of a practice.[26] In any case, to unequivocally evaluate the establishment of CIL, an appropriate amount of state practice is preferable to be carried out: frequency and consistency are key.

Moving on to *opinio juris*, it traditionally represents the most ambiguous and challenging requirement, as it prescribes distinguishing state conduct undertaken out of a sense of legal obligation from actions motivated by other factors, such as cultural diplomacy. As a result, the prevailing approach nowadays is to infer *opinio juris* mainly from states' actual behavior, rather than seeking evidence of their psychological intent. This trend has also started to be followed by national and international courts, which occasionally prioritize uniform state practice over *opinio juris* when assessing the presence of CIL.[27] This change in emphasis has made state practice even more crucial in establishing CIL.

Detecting State Practice in Cultural Return

Despite, once again, the lack of a proper definition, in terms of return and restitution, state practice could be identified in the positive and proactive attitude toward these practices, underlined by national laws, judgments, and high-level official declarations. Moreover, consistent and uniform practice must be carried out by all, or almost all, states whose interests would be affected by introducing a CIL.

In terms of wrongfully removed cultural property, interested states can be divided into:[28]

- States of origin, or source nations (i.e., countries historically affected by looting and unlawful removal, which are now actively seeking the return of their artifacts).
- Market states (i.e., countries that often house cultural property with tainted provenance in their museums, private collections, and market venues).

Given their significant stake in the proposed customary rule, the endorsement of both origin and market states is essential for its formation. Nevertheless, diverging interests are still recurrent regarding the definitive location of contested cultural property, meaning that while some states advocate for return and

[25] I. Brownlie and J. Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012), pp. 6-7.

[26] M. N. Shaw, n 20 above, p. 57.

[27] H. Zhong, n 22 above, pp. 80-81.

[28] Id, p. 127; A. F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (New York: Cambridge University Press, 2008), p. 139; J. H. Merryman, n 8 above, p. 832.

restitution, others may resist such claims, fearing that widespread returns could deplete their national collections. For example, suppose powerful market states like the UK and the US continuously reject return requests. In that case, they can seriously hinder the establishment of the evolving norm (*persistent objector doctrine*).[29]

State Practice in Action

To ascertain the presence of uniform and consistent state practice and support the argument based on the establishment of a new customary rule for cultural return, one should start by examining case studies in which holding states or their institutions have voluntarily relinquished part of their collection, recognizing the state of origin's interest in having (at least part of) its cultural property back. Notable examples include the recent wave of transfer of ownership of several Benin Bronzes previously held by French, German, Dutch, and British Museums to the Nigerian government, or the once-Dutch colony Indonesia's recent success in retrieving part of their cultural property (including more than 280 objects from the Puputan Badung Collection) from the Netherlands. All these cases highlight an increasing trend by present-holding states of acknowledging the historical injustices tied to cultural property removal, and they can be considered significant evidence leading to the formation of ICL.

However, the journey of removed artifacts toward their legitimate owners has not always been smooth and successful, starting from the Parthenon Marbles, the protagonists of one of the most well-known and longstanding disputes for return, which, notwithstanding some progress, is still far from settled, at least as far as the British Museum is concerned. Interestingly enough, other countries such as Italy and the Vatican City had agreed to give back to Greece the fragments that had long been held in their collection, highlighting differing approaches in state practice.

Moving on to another rich source country in terms of antiquities, Italy has been particularly energetic in reclaiming artifacts illicitly excavated from its archeological sites, leveraging diplomatic pressure and legal avenues to secure the return of its cultural property. This is exemplified most notably by the Met-Italy accord[30] from 2006, by which the Metropolitan Museum of Art agreed to a transfer of title to the Italian government of a series of artifacts belonging to the museum's antiquities collection (including the remarkable Euphronios Krater), which were proven to have been illegally excavated or trafficked. In exchange for relinquishing ownership of the Krater, Italy agreed to provide the MET with a rotating series of four-year loans comprising a selection of archaeological artifacts of 'equivalent beauty and artistic/historical significance, mutually agreed upon'.

[29] H. Zhong, n 22 above, pp. 82-83.

[30] For further details, see A. K. Briggs, 'Consequences of the Met-Italy Accord for the International Restitution of Cultural Property' 7 *Chicago Journal of International Law*, pp. 623-653 (2006-2007).

When assessing whether this Model can be deemed strong evidence for establishing CIL, it should be noted that it was reached only after extended and complex negotiations, which had to lead to quite a successful outcome for both parties involved. In particular, it is doubtful whether, without these long-term exchanges, combined with waiving the possibility of litigation by Italy against the Met for any of the requested items, the Met would be persuaded to transfer ownership.[31] Regardless, the 2006 agreement undeniably served as a pioneering collaboration model between source nations and public collectors, setting an innovative approach to restitution claims. As evidence of this, almost twenty years later, a similar kind of collaboration has been renewed, this time with a reciprocal loan agreement between the Met and the Archaeological Regional Museum 'Antonino Salinas' of Palermo.

Going Beyond State Practice: The Role of Museums, Art Market Players, and Individuals

Although CIL is traditionally shaped by state behavior, a growing influence of non-state actors can also be detected, including:

- Public advocacy groups engaged in advancing restitution and return efforts, shifting their perception from a mere act of cultural diplomacy to an – if not legal – at least moral obligation to redress the unbalanced power relations that stemmed from the past.
- Private collectors who have voluntarily relinquished part of their collection, although sometimes under ethical or legal pressure.
- Museums and auction houses that, driven by ethical considerations combined, at times, with concerns over reputational harm, have voluntarily returned artifacts, following the growing calls for more careful handling of collections with contested provenance.

In short, while non-state actors cannot directly create CIL, their proactiveness contributes to shifting global attitudes, influencing public opinion and legal interpretations, thus paving the way for uniform legal developments across countries.

Has the Time Come to Affirm the Establishment of a New Customary Rule?

To respond to this question, we have seen how a pattern of voluntary return of wrongfully removed artifacts (state practice) represents the first step to take into consideration. Subsequently, state practice must unequivocally prioritize the interests of states of origin to regain their right to collective-cultural identity over the legal or fiduciary requirement to keep art collections intact (*opinion juris*). If that is the case, CIL would be recognized, leading to the legal acknowledgment of the connection between states of origin and their heritage, and providing a more substantial base for return and restitution claims.[32] Yet, what is the current state of this development?

[31] Id.
[32] H. Zhong, n 22 above, p. 86.

While many jurisdictions have shown increasing recognition of origin states' rights to their cultural property, there remains a lack of universal consensus, particularly among significant market countries and cultural artifact-holding nations, which adopt different legal strategies for dealing with this matter, leading to a shortage of consistent and uniform state practice.

This presence of persisting and contrasting interests lies in the fact that, apart from addressing historical injustices, strengthening national identity, and fostering cultural revitalization, restitution and return bring a sensible economic and sociological impact on museums, collectors, and the art market. As a result, many institutions fear that returning artifacts will set a precedent that could lead to the loss of their valuable collections and, ultimately, their visitors. Moreover, as previously mentioned, even if national museums are willing to take these risks, they are usually prevented from doing so due to statutory[33] or fiduciary[34] duties of keeping and preserving cultural property for the public benefit, which result in restrictions on disposal.

Despite this seemingly adverse scenario, it is undeniable how the growing number of voluntary return agreements by national governments, museums, auction houses, and private collectors suggests shifting ethical and legal attitudes toward return and restitution.

Serving as preservation spaces for a wide array of objects that have, for a range of historical or political reasons, unavoidably become detached from their original cultural contexts,[35] museums are finding compromises to restitution and return demands by developing long-term loans, as well as long-term partnerships and cultural exchange programs with origin states, such as the one between Yale University and the Universidad Nacional de San Antonio Abad del Cusco, whereby the two institutions agreed 'to collaborate and jointly develop an international facility and associated programs designed to serve as a base for the display, conservation and study of the Machu Picchu collections as well as for the interchange of students, scholars and scholarship regarding Machu Picchu and Inca culture'.

Likewise, many art market venues have responded to increased scrutiny of possible tainted provenance by introducing stricter due diligence guidelines; auction houses and private collectors are now more cautious about acquiring artifacts without clear ownership documentation. Each of these market shifts contributes to the broader ethical (and, in some instances, statutory) transformation regarding the management of unlawfully acquired cultural property.

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[33] Among them, Article 441-2 of the French Code du patrimoine; Section 3(1) of the British Museum Act.

[34] Smithsonian Institution. *Smithsonian Directive 600: Collections Management Policy*. (Washington, D.C: Smithsonian Institution, 2018). For further details, see https://www.si.edu/content/opanda/docs/SD600.pdf. (last visited Apr. 25, 2025).

[35] J. Cuno, 'View from the Universal Museum', in J.H. Merryman (Ed.), *Imperialism, Art and Restitution* (New York: Cambridge University Press: 2006), p. 29.

Lastly, the increasing formal recognition of states of origin's rights on their illegally removed artifacts as part of national identity, primarily through the recommendations issued via dedicated advisory panels, suggests that international and national norms are evolving in favor of restitution and return.

Considering all factors, while a new customary rule supporting cultural return is undoubtedly emerging, additional evaluation is still required to assess its widespread recognition unequivocally.
Notwithstanding the importance of long-term loans and collaborations among market and source nations in advancing the debate on relocation of contested cultural property, more voluntary restitution and return procedures still need to be carried out to establish with certainty the presence of a new CIL, which will favor overcoming legal barriers and fill the many gaps still left by the national and international regulations.

Turning Customary International Law into Action: What Stakeholders Can Do

With CIL still taking shape, to advance its establishment and reduce the number of conflicting claims, every stakeholder involved in cultural return should help highlight the ethical and legal responsibility to thoroughly address the disputed provenance of cultural property acquired without consent.
National governments should establish – or, if already in place, further strengthen – alternative dispute resolution mechanisms for reaching the most appropriate and balanced solution, which would, in turn, contribute to developing relevant case law. Furthermore, they should require the introduction of self-regulatory acquisition and return guidelines among museums and art market venues, as stated in the ICOM Code of Ethics for Museums and the UNESCO International Code of Ethics for Dealers in Cultural Property, while emphasizing the importance of treating such standards with the same weight as statutory obligations. Concerning this last point, academic venues can assist in achieving this aim, hosting regular international meetings and conferences, favoring the debate on cultural return, and highlighting the legal and moral duty connected to these issues.
On the other hand, museum professionals should raise public awareness about the contested past of part of their collection through thematic exhibitions and engagement initiatives that emphasize the ethical (and legal) significance of looking beyond mere display, offering instead experiences that inform visitors about connections between seemingly unrelated artworks and cultures. At the same time, art market venues should consider thorough provenance research, which is crucial for building the foundations of repatriation and return claims, as a statutory prerequisite for any acquisition and sale operation in general.
In conclusion, given the urgent and dynamic nature of cultural return, ongoing institutional development is essential to ensure that stakeholders are adequately equipped to respond to emerging challenges, contributing to building further state practice. This includes the effective application of existing

international and national legal frameworks, or, where lacking, acting in alignment with them as though they are already in force, consistent with the principles of customary international law.