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ARTICLE

Restitution of African Cultural Heritage: Revisiting Natural Law Concepts of Statehood and Property in the Context of Colonial Spoliation

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Abstract

In the late nineteenth century, Western Powers launched military campaigns in sub-Saharan Africa resulting in the colonization of vast territories and the spoliation of cultural property. To justify the conquest, they asserted the supremacy of Western culture and disregarded principles of international law in their dealings with African states, communities, and individuals. This article examines colonialist legal justifications such as the denial of statehood of pre-colonial sub-Saharan African societies, the notion that conquest and spoliation were justifiable, and the belief that African legal systems lacked concepts of property. The article details why these arguments contradict well-established nineteenth-century legal principles, particularly state sovereignty and private property, which together form the conceptual basis for the prohibition of spoliation. The universal nature of those principles allows for the nondiscriminatory application and interpretation of historical law and consequently the protection of African pre-colonial states and private as well as public cultural property.

Keywords: restitution; spoliation; property; statehood; international law; colonialism; precolonial Africa

Introduction

Following the Napoleonic Wars and the restitution of numerous works of art seized by the French army, the Allied powers established a prohibition against the spoliation of cultural property at the Congress of Vienna in 1814–15. However, during nineteenth-century colonialism, parts of the scholarship argued that these norms could not apply to most non-Western states. They contended that the states affected were not fully integrated into the international legal order, culminating in the denial of their international protection in various contexts, including the spoliation of cultural property.

The article argues that this position contradicts nineteenth-century principles of international law and property theory, which originated from natural law. Those principles provided the grounds for the development of the prohibition of spoliation. The line of argument is complex and leads through several legal domains that could appear as detours. However, to provide well-founded arguments, a comprehensive analysis of selected fundamentals of international law becomes a necessity. First, I will argue that precolonial sub-Saharan African societies often fulfilled the traditional requirements for statehood and should have, therefore, been recognized as such. Secondly, I will show that the colonial

conquest and accompanying unequal treaties violated the doctrine of just war and the accepted rules regarding peace treaties, which include provisions regarding transfers of cultural property. Thirdly, I will examine and support the position that the prohibition of spoliation was established (at least) with the Congress of Vienna in 1814–15. Finally, I will go into detail with the decisive argument that international law and its protective norms applied to African states at the time. This argument is based on the understanding that both historical international law and property theory were conceived under natural law as universal, which had a lasting effect on the law of the nineteenth century. To further substantiate this claim, I will additionally examine the interaction between colonial property regulation and African customary private law, which demonstrates that these natural law principles were not merely of theoretical relevance, but had a major and lasting effect on legal practice in the protectorates and colonies.

The line of argument takes historical natural law principles as the standard and refrains from a retroactive application of today's legal concepts. Instead, it will show that colonial administrators, state officials, and scholars disregarded universal legal principles in pursuit of their imperial objectives. If, instead, these principles are applied in a universal and nondiscriminatory manner, one can reasonably argue that historical African societies and their cultural property were subject to the protective norms of international law. Additionally, Lockean property theory, which also found broad support in the nineteenth century, supports the recognition of Africans' ownership of their cultural heritage.

Statehood of sub-Saharan African societies

In this first section, I discuss whether precolonial sub-Saharan African societies met the criteria for sovereign states according to the scholarship and state practice of the nineteenth century, considering shifts from earlier natural law doctrine. The protection of cultural property under nineteenth-century international law depends on characterizing these societies as sovereign states or at least international legal persons. In the following, I will examine traditional criteria for statehood and specifically address the standard of civilization as well as the relevance of recognition by other states. The question of whether international law had a universal effect in general and could apply to African societies is examined in more detail below.[1]

Pre-colonial sub-Saharan societies and the requirements for statehood

At the end of the nineteenth and the beginning of the twentieth centuries, the majority of legal theorists made a strict distinction between states that were organized along the lines of Western societies and those that had diverging political structures or simply different cultural expressions. Within this framework, states such as Japan,[2] Turkey,[3] and Persia[4] were recognized as "semi-sovereign,"[5] while sub-Saharan African societies were denied legal personality and statehood at the time. This rationale legitimized the occupation of vast African lands as *res nullius* under international law and private property theory.[6] Scholars argued that such societies could not be subject to equal standards under international law,

[1] See below, Chapter on 'The Conceptual Foundation of the Prohibition of Spoliation in Universal International Law Principles,' particularly the Subchapter on 'Universality and Non-Retroactivity.

[2] Tzouvala 2020, 51.

[3] Nuzzo 2017, 268 and 272.

[4] Spira 2020, 334.

[5] Tzouvala 2020, 52.

[6] Compare the passage on occupation in Martens 1883, 351.

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but only to a different strata of international law or *sui generis* imperial law.[7] In the following, I will argue that these characterizations were untenable in light of the principles of international law originating from natural law, and later firmly established in the nineteenth century.

Traditional requirements for statehood

In the aftermath of the Peace of Westphalia of 1648, the requirements for state sovereignty were effective control over a territory, a permanent population, and a government.[8] Looking at accounts of the social and political structures of sub-Saharan African societies at the time, they typically appear to have met those requirements. Contemporary ethnological scholars and historians classify these societies as monarchies with well-established political structures.[9] *Ojo/Ekhator*, for example, contend that Benin's legal framework at the time was "[...] well thought out, practicable, and immensely useful in the consolidation of peace [...]."[10] Similar descriptions were given by early explorers such as *Olfert Dapper*, a Dutch geographer and historian. In 1670 he wrote on the historic Kingdom of Benin, reporting on architecture comparable to European cities[11] and complex social hierarchies with provincial rulers subordinate to the king.[12] As another example, Thomas Edward Bowdich, an explorer of the African Company of Merchants, wrote about the Ashantee court in 1817. He compared the kingdom's political structure to European constitutions, concluding that it implemented an effective separation of powers.[13] Monarchic rule was often legitimized based on dynastic or divine origin, as was the case in Europe at the time.[14] *Wallace-Bruce*, writing specifically on the question of statehood, concludes that "it is palpably clear that Africa had various independent states on the eve of colonialism."[15]

The standard of civilization

Despite meeting the traditional requirements for statehood, African states were consistently denied international legal personality and statehood. This was in part based on the argument that they were at a lower level of civilization.[16] Whilst disregarding traditional criteria for statehood, racial stereotypes were used to reinterpret idiosyncratic cultural expression in art, religion, and broader culture, defined as the decisive metrics. *Tzouvala* sees a combination of a "logic of biology," which characterized Africans as less adaptable, and a "logic of improvement," which asserted that they needed education.[17] From the perspective of third-world approaches to international law (TWAIL), the criteria of civilization represent a central aspect of horizontal inequality in international law, which exerts its effects today.[18] However, a closer analysis of the legal term of civilization shows that a shift in interpretation had taken place and that the colonialist's emphasis on cultural expression as the decisive criterium deviates from the original concept. In its early modern meaning, it denoted a universal ethical standard for all states to *act civilized.* The concept did not focus

[7] Saksena 2019, 10; Sylvest 2008, 410 et seq.
[8] Gebeye 2021, 15.
[9] For example, Kochakova 1996, 49; Edo 2010, 1–7; cf. also Bradbury 1957, 42 et seq.
[10] Ojo and Ekhator 2020, 40.
[11] Dapper 1670, 486.
[12] Ibid., 491.
[13] Bowdich 1819, 252 et seq.
[14] Cf. Van der Linden 2017, 74.
[15] Wallace-Bruce 1985, 583.
[16] Van der Linden 2017, 72 et seq.
[17] Tzouvala 2020, 48 et seq.
[18] E.g. Anghie 2006, 742.

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on the cultural expressions of a society but posed a set of universal ethical norms. For example, *Vattel* defines any aggressive state that neglects the rules of just war as savage and uncivilized.[19] *Grotius* even argues that the opponent's cultural expressions are irrelevant in international affairs: "Therefore it was unjust on the part of the Greeks to say, that the Barbarians were their natural enemies, merely on account of the diversity of manners, or because they seemed to be inferior in intellect."[20] Much later, *Bluntschli*, who certainly supported the superiority of Western states, sometimes argued that cultural differences had no place in international law and that the aggressor was the uncivilized actor: "the war of destruction against the godless peoples of Palestine, [...] is considered *barbarous* in the humane legal thinking of today's world."[21] For some, the adherence to such universal ethical norms was even linked to the legitimacy of a state. In this sense, *Lormier* argued in 1884 that the "measure of ethical life" [...] "characterizes civilization," to then conclude that if a state "ceases to be a State ethically, it ceases to be a State altogether."[22]

Accordingly, instead of arguing that the standard of civilization was introduced to legitimize colonialism,[23] it seems more accurate to say that colonialist scholars tried to *transform* the norm to suit their colonial aspirations. They shifted the emphasis of the universal ethical norm to cultural forms of expression and technological knowledge. At the same, they did not shy away from raising ethical arguments as a pretext for interventions and conquest, in particular, regarding the continuation of the slave trade in Africa. Whilst Western scholars criticized African States for the practice, they failed to note that Western powers not only had created the transatlantic slave trade but had taken considerable time to abolish it. In the colonies of the British Empire, slavery persisted until the conclusion of the apprenticeship system under the Emancipation Act of 1838.[24] France abolished the slave trade in their colonies only in 1848, while in Brazil, it endured until 1888.[25] Germany, on the other hand, never fully abolished slavery in its colonies until it lost control over them in the early nineteenth century.[26] Moreover, taking violations of human rights under continuing colonial rule into account, the *uncivilized* behavior of Western States lasted well into the twentieth century. Despite the perpetuation of slavery and oppression to a certain degree, the Western states considered themselves to be civilized nations. Nevertheless, in order to still be able to exclude sub-Saharan African societies from the international order, scholars ultimately had to place cultural expression above ethical conduct. Reference to unethical conduct was merely used as a façade to enforce a discriminatory doctrine.[27]

Recognition of statehood

Legal positivists also argued that African societies could only achieve statehood or international legal personality through recognition by Western states.[28] This position infers that recognition replaces all other criteria for statehood. In practice, however, statehood rarely depends on recognition alone – it rather follows social realities. Historical analysis also

[19] Vattel 2008 [1758], book III, chap. IX § 167; Book III Chap. III § 34.

[20] Grotius [1625] 1853, book III chap. XXII, nr. X, 353.

[21] Bluntschli 1872, 298.

[22] Lormier 1884, 71.

[23] The Institute de Droit International exemplifies this shift of the universal standard to a mere designation for Western culture by describing itself as the organ of "legal conscience/consciousness of the civilized world" (Art. 1 Statue of the Institute of International Law, Ghent 1873).

[24] Green 1991, 158.

[25] Kolchin 1987, 49.

[26] Mann 2010.

[27] Compare Vázquez-Bermúdez 2019, 53.

[28] Oppenheim 1905, 110; van der Linden 2017, 73. For an introduction to the theories about the legal nature of the Congo Free State see Smets 2020.

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shows that nineteenth-century scholars considered both the classical criteria as well as recognition in their assessments,[29] which indicates that the concepts of sovereignty, international legal personality, and statehood were not coherent during that period.[30] It is also telling that the element of recognition had not been considered as an indispensable requirement under Art. 3 of the *Montevideo Convention of 1933.*[31]

Even if we assumed for a moment that recognition had become the essential criterium under nineteenth-century international law, such a shift could not have invalidated already binding international norms established by practice. Regarding historical African-Western relations, *Tzouvala* speaks of "alternative forms of international normativity and ordering that had been in operation for centuries both in and beyond Europe."[32] African States had longstanding trade and diplomatic relations with Western States,[33] which supports their recognition as international legal entities.[34] Taking this perspective, later protectorate agreements appear as the continuation of existing trade relations in the regions.[35] *Van der Linden* points out that African rulers were also actively taking part in the creation of treaties.[36] Moreover, protectorate agreements were not considered to have dissolved the protected state under nineteenth-century doctrine,[37] further implying international legal personality.[38] The arising contradictions then resulted in the denotation of "semi-sovereignty."[39] *Koskenniemi* instead argues that the protectorate was merely chosen as a front to avoid the application of undesired legal norms and to prevent uprisings.[40] In fact, many scholars at the time considered colonial protectorate treaties to be ineffective under international law, arguing they were only promises in the moral sense.[41] Consequently, they were not discussed at the Berlin conference.[42] In this regard, both *Martin*[43] and *Nuzzo*[44] point to a further contradiction in the practice of Western states on the international level. If African societies were unable to grant rights in the first place, how could Western states acquire sovereignty and base their territorial claims on these agreements?[45] Art. 34 General Act of the Berlin Conference on West Africa[46] further proves that these agreements were used by the Western powers to assert their territorial claims and trade privileges.

In order to underpin the argument, we will examine selected English, French, and German protectorate agreements closed with sub-Saharan African rulers. Typically, they

[29] Crawford 2006, 12.

[30] This resembles the overemphasized dichotomy of natural law and legal positivism. In this regard see Vec 2017 who argues that in the late nineteenth century, there was a methodological pluralism of natural law and positivist approaches.

[31] Inter-American Convention on the Rights and Duties of States, signed on December 26, 1933 in Montevideo.

[32] Tzouvala 2020, 47.

[33] Wallace-Bruce 1985, 582.

[34] Concerning restitution Schöneberg 2021, 34; compare Martin 2021, 51 et seq; Raič 2002, 35.

[35] Martin 2021, 49.

[36] Van der Linden 2017, 79 et seq.

[37] Jellinek 1882, 18 et seq and 53; Westlake, 1894, 184. The British Foreign Jurisdiction Act of 1843 commonly grounds territorial claims in derivative acquisition: "Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty`s dominions." Cf. Grotius, 1625, Book III Chap. 3 XXII argues in favor of the sovereignty of protected tributaries.

[38] Jellinek 1882, 29 and 55, Korman 1996, 129; Lindley 1926, 181 et seq.

[39] Van der Linden 2017, 90.

[40] Koskenniemi 2004, 124–125.

[41] Cf. the references at van der Linden 2017, 74.

[42] Nuzzo 2017, 281.

[43] Martin 2021, 52.

[44] Nuzzo 2017, 282.

[45] Lindley 1926, 173 acknowledges this tension.

[46] General Act of the Berlin Conference on West Africa, 26 February 1885.

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did not overtly encroach on internal sovereignty but regulated trade relationships and other aspects of external sovereignty.[47] British agreements repeatedly acknowledged the internal sovereignty of African societies. For example, one agreement refers to "the principal chiefs holding authority on the south Bank of the River Congo."[48] However, *Van der Linden* points to the vagueness of the language regarding internal aspects.[49] Sometimes, such agreements granted extensive influence over internal affairs: "The Chiefs [...] hereby engage to assist the British Consular or other officers in the execution of such duties as may be assigned to them."[50] French agreements typically did not extend to the cession of internal sovereignty: "The French Republic will not interfere in the government or in the internal affairs of Baol. The rights of the Teigne (king) and his successors remain absolutely the same as in the past."[51] German agreements also repeatedly left internal sovereignty untouched. The agreement with Mlapa, King of Togo, says the following: "so that [King Mlapa] may be enabled to preserve the independence of his territory. [He] will not cede any part of his country with rights of sovereignty to any foreign power [...]."[52]

Besides such agreements closed in the context of trade relations, Western Powers also recognized African states in the aftermath of military campaigns, which illustrates that recognition often followed military realities rather than legal assessments. This was the case when the British recognized Ashanti sovereignty in the *Anglo-Ashanti Treaty of Friendship of 1817*.[53] The same accounts for the *Treaty of Wuchale of 1889*, in which Italy recognized the Ethiopian empire.[54] Western powers also acknowledged sovereignty when they saw no contradiction to their economic and political interests.[55] These scenarios all suggest that sub-Saharan African states were already sovereign beforehand. It had just been the case that they were forced to prove it militarily. This approach ultimately results in the doctrine of the *right of the strongest*, which is beyond legal argumentation.

In conclusion, given that the traditional criteria for statehood were often fulfilled by African sub-Saharan Societies and that recognition of their sovereignty took place within early trade and protectorate relations as well as after military conflicts, the argument can be made that these societies had been sovereign states. Therefore, both unilateral annexations as well as treaties such as the General Act of the Berlin Conference on West Africa of 1885[56] could not affect their sovereignty. As a second consequence, only those territorial acquisitions or cessions of sovereignty that were based on valid legal agreements could be considered effective.[57] As we have already seen, the protectorate and other colonial treaties generally only provided for the transfer of external sovereignty. However, in order to cover other scenarios, the next chapter will also take unequal treaties in the context of military threats and occupations into account.

[47] Such was the case for the Kingdom of Benin, see Kiwara-Wilson 2016, 6.

[48] Engagement with chiefs holding authority on the South Bank of the River Congo. Slave Trade. Commerce. Humans Sacrifices. Religion, 27.3. 1876, cited from Hertslet 1880, 36.

[49] Cf. Van der Linden 2017, 220 et seq.

[50] Cited in Hertslet 1967, 120.

[51] Agreement between the King of Baol and the French Republic of March 1883, cited after Lindley 1926, 184.

[52] Erster Schutzvertrag Togo 1884.

[53] Commentators of the nineteenth century acknowledged that the negotiations and the treaties could be seen as grounds for recognition of sovereignty, see e.g. Ellis 1893, 143.

[54] For details see Elliesie 2017 [1889].

[55] An interesting example – outside of the African context – is the recognition of the Kingdom of Hawaii. To prevent occupation, the kingdom gave itself a Western-style constitution and was subsequently recognized by the United States from 1826 to 1893 (see Merry 2000, 77 et seq).

[56] General Act of the Berlin Conference on West Africa, 26 February 1885.

[57] Alexandrowicz 1973, 80.

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The colonial conquest and accompanying treaties under historical international law

Taking a closer look at the legality of colonial conquest and colonial treaties

Colonial conquest and the just war doctrine

Western powers frequently found themselves dissatisfied with the external control that they gained through protectorate agreements. Consequently, they sought to expand their influence by directly conquering territories or asserting further dominance over internal affairs.[58] Regarding the legal effect of conquest, there were two competing legal doctrines discussed in nineteenth-century scholarship. The first argues for an unconditional right to go to war (*liberum ius ad bellum*),[59] which is sometimes related to the Hobbesian state of nature paradigm where human interaction unfolds in the absence of any reciprocal rights and obligations.[60] Historically, however, the *liberum ius ad bellum* typically represented an aspect of internal sovereignty. For example, *Bodin* introduces the right to wage war in his discussion on internal sovereignty. Only a legitimate ruler could declare war, as opposed to any private undertaking.[61] Against this historical background, the nineteenth-century doctrine of *liberum ius ad bellum* appears to overemphasize a preliminary aspect of internal sovereignty when dealing with the much broader question of the legality of the war. More important, however, is that this reading introduces contradictions into the existing framework. It not only runs against the right to self-determination of other states, but it generally disregards the fundamental peacekeeping function of international law altogether. *Simon* examined the development of *liberum ius ad bellum* in detail and came to the conclusion that it never gained enough prominence in state practice and the political discourse to be considered predominant.[62] Instead, he suggests that its relevance had been overstated by twentieth-century legal historians.[63]

The much older *bellum iustum* doctrine dictates to the contrary, that wars are only lawful in situations of self-help or self-defence. It can be traced back to Roman law,[64] and was later upheld by natural law scholars such as *Grotius*[65] and *Vattel.*[66] *Simon* argues that this principle remained dominant during the nineteenth century.[67] As a central source, he refers to *Bluntschli*, who wrote that the legitimacy of wars remained a question of international law,[68] rejecting unrestrained acts of war. *Simon* also describes a "*discourse of legitimacy*," which means that wars always had been justified politically throughout the late eighteenth and nineteenth centuries.[69] For example, the French campaign of 1792 had been legitimized as a "just defense of a free people against the aggression of a king."[70] The same accounts for the political justifications of the Franco-Prussian war of 1871.[71] Applying the same rationale, Western powers tried to legitimize their colonial military campaigns based on self-defense. *Westlake* writes in 1894 that "except in the case of unprovoked aggression justifying

[58] Van der Linden 2017, 145 et seq.
[59] For details see Hendrik 2018.
[60] Hobbes 1650, Pt. I, Ch. 14, II. The principle does not take into account the bilateral and multilateral realities that emerged after the end of the state of nature.
[61] See Bodin 1592, First book 1–2; compare Lee 2021, 193.
[62] Simon 2018, 135.
[63] Simon 2018, 124.
[64] Draper 1964, 82 et seq.
[65] Grotius [1625] 1853., book III chap. XXII, nr. X, 353.
[66] Compare Vattel 2008 [1758], book III, chap. XI; in the context of restitution O'Keefe 2006, 5 et seq.
[67] Simon 2018.
[68] Bluntschli 1868, 289.
[69] Abel 1871, 137 cited in Simon 2018, 131.
[70] War declaration of the French National Assembly, 20 April 1792.
[71] Simon 2018, 130.

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conquest, an uncivilized population has rights which make its free consent necessary to the establishment over it of a government possessing international validity."[72] Accordingly, military operations were typically referred to as *punitive expeditions*, implying retaliation for the violation of the rights of Western powers such as those agreed upon in a protectorate agreement. The Sack of Benin of 1897, for example, was explained as a retaliation for the violation of bilateral trade agreements and the killing of members of a British mission to Benin. Whatever the historical assessment of those incidents ultimately might be,[73] the submission of the entire Kingdom of Benin can hardly be considered a proportionate retaliatory response.

In summary, given the unbroken tradition of a discourse of legitimacy, it is sound to argue that the *bellum iustum* doctrine was considered to be the predominate doctrine, which, at the same time, puts the relevance of *liberum ius ad bellum* into perspective. Acknowledging the necessity of a just cause for war fundamentally alters the legal assessment of any conquest and occupation. Regarding spoliation in particular, it is often overlooked[74] that the doctrine of just war precludes the unlawful occupier from acquiring private and public cultural property. This specifically excludes legitimations based on military necessity and compensation for war expenses. Hence, the spoliation and confiscation of both private and public cultural property during the period of colonialization of sub-Saharan states requires historically sound justification. In general, it seems unlikely that such a justification can be provided.

Validity of protectorate and cession treaties in colonial contexts

Western powers also tried to acquire territory and sovereignty by means of cession of territory. To name some British examples, this was the case with the Lagos Treaty of 1861,[75] the treaty with the King of Bagroo and his chiefs of the same year, and the treaty regarding the territory of Badagry.[76] The French concluded various cession treaties with African rulers starting from the beginning of the nineteenth century.[77] The violent colonial context necessitates the historical analysis of each agreement and the intricate discussion of the requirements of valid international treaties in the nineteenth century. According to *Lindley*, the validity of international agreements requires the absence of fraud or coercion.[78] However, this intuitive rationale is challenged in the context of peace negotiations. In addition, the agreements must have been comprehensible to the local representatives in terms of language and the legal concepts used.[79] The support for these requirements was not necessarily motivated by a desire to protect Africans, but, rather, to create a title that the Western powers could recognize as valid among each other. However, as a consequence, colonial agreements still required free and informed consent from the perspective of legal doctrine.[80] *Van der Linden* additionally points out that some protectorate treaties were kept

[72] Westlake 1894, 139.

[73] The mission is now commonly acknowledged by historians as a provocative act by the British in the wider strategy to overthrow the King (Oba). As direct proof for this theory accounts James Phillip's dispatch to the Foreign Office before the mission: "I therefore ask for His Lordship's permission to visit Benin City in February next, to depose and remove the King of Benin and to establish a native council in his place and to take such further steps for the opening up of the country as the occasion may require." cited from Kiwara-Wilson 2016, 6 et seq.

[74] O'Keefe 2006, 5 goes straight into the discussion of the *ius ad bello.*

[75] Smith 1979, 140–141 Appendix C; Van der Linden 2017, 109.

[76] Van der Linden 2017, 110.

[77] Hertslet 1967, 634 et seq.

[78] Lindley 1926, 166.

[79] Lindley 1926, 173.

[80] Van der Linden 2017, 89.

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vague in order to give Western powers a margin of discretion in the "twilight zone between cession and protectorate,"[81] which again introduced challenges to interpretation.[82]

The most problematic treaties are undoubtedly those imposed on African societies through threats of force. In theory, peace treaties served the goal of ending the cause of war[83] – typically the alleged aggression by the enemy. The peace treaty would then arrange for compensation for the costs of war. Hence, the validity of peace treaties was based on the just war doctrine.[84] *Vattel* provides a corresponding passage in his writings: "[The aggressor] must restore what he has unjustly taken, must reimburse the expenses of the war, and repair the damages."[85] However, taking practical consideration into account, he also argues that the *pact sunt servanda* principle prevails over fairness.[86] Only "forced submission to conditions which are equally offensive to justice and all the duties of humanity" cannot be tolerated.[87] *Grotius* follows the same line of thought, arguing that peace treaties serve to end the cause of war and provide for compensation.[88] At the same time, they are binding even if concluded under coercion. However, the validity of unequal treaties always remains undetermined to some degree: "It does not follow that the party who has extorted some such promise by an unlawful war can retain what he has received without violating the honor and duty of a good man, or even can compel the other to hold to the agreement, whether sworn or not. For, essentially and in its nature, the transaction remains unjust."[89] Whilst both scholars emphasize the imperative to achieve peace even by tolerating unequal peace agreements, they still provide a pathway for (later) revocation based on unfairness. Despite repeated invocation of *pacta sunt servanda*, revisions remained thinkable.[90] This was certainly the case where the cession of territory threatened the existence of a state.

Specifically, in the context of spoliation and translocation of cultural property, the doubts regarding the validity of unequal treaties resurface. The inclusion of cultural property in peace agreements in the nineteenth century reveals that the dispossession of cultural property already required justification. Acquisition by mere occupation was already rejected at the time.[91] For example, the Armistices of Bologna and the later Treaty of Tolentino signed in 1796 and 1797 between the Papal States and the French Republic, foresaw the transfer of more than one hundred paintings and other works of art to the French.[92] Relevant parts of the European public and even French military personnel still opposed the confiscations.[93] In the context of colonial treaties, both the lack of legitimate cause for war and coercion were often present. *Vattel* specifically refers to treaties concluded between Cortés and the Empire of Mexico, arguing that all subversive countermeasures by the Mexicans would have been legitimate.[94] Regarding cultural property specifically, the

[81] Van der Linden 2017, 158.
[82] Cf. Westlake 1894, 139 et seq.
[83] Halleck, 1861, 852.
[84] This is also the unanimous view today, cf. Chechi 2008, 173 fn. 68.
[85] Vattel, 1883, Book IV, Chap. I, § 18, cf. also § 14 on "unjust conquerors."
[86] Vattel, 1883, Book IV, Chap. I, § 11 and 19, Chap. IV § 36.
[87] Vattel, 1883, Book IV, Chap. 4, § 19; cf. Halleck, 1861, 861.
[88] Cf. Grotius 1625, Book III, Chap. XIII, III.
[89] Grotius 1814 [1625], book III, chap. XIX, 11.
[90] From a more theoretical standpoint, one could argue, that occupations accompanied by spoliation and unequal contracts were merely tolerated given the political realities, but never granted everlasting legal effect as they contradicted fundamental legal principles. In this sense, political power may obfuscate the legal realities, but this effect vanishes with the oppression. The restitutions after the Congress of Vienna give an example of this deeper logic underlying the somewhat harsh doctrine on peace treaties.
[91] Zhang, 2018, 965; Gilks, 2013, 115 et seq.
[92] See *Verri* 1985, 84.
[93] Zhang, 2018, 966 et seq; Verri 1985, 84.
[94] Vattel, 1883, Book IV, Chap. I, § 18, cf. also § 14 on "unjust conquerors".

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Congress of Vienna and the subsequent restitutions provide the blueprint to understand the inner workings of unequal peace treaties. The peace treaties with the French were initially tolerated to achieve peace. However, the transfers were still considered illegitimate,[95] and their restitution did not require a new legal basis (*actus contrarius*).[96] In particular, restitution clauses were not deemed a necessity.[97] A main negotiator at the Congress of Vienna, *Lord Viscount Castlereagh*, argued that the spoliation had been "contrary to every principle of justice and the usages of modern warfare" and that the concluded armistices did not provide a valid title for the acquisition of spoils.[98] These same principles apply to colonial conquest. The analysis will typically lead to the conclusion that the agreement concluded during an unjustified occupation under duress is invalid.

The protection of cultural property under nineteenth-century international law

The prohibition of spoliation

The origins of the prohibition of spoliation

Having explored the relevance of the just war doctrine for the assessment of colonial conquest and unequal treaties, I will shortly turn to the already well-studied development of the prohibition of spoliation. Throughout ancient and medieval times, conquest and taking spoils to compensate for war expenses were considered lawful.[99] *Grotius*, for example, argued in favor of acquisition by occupation.[100] However, while he held that enemy property was not protected under Roman or modern international law,[101] he pleaded for moderation based on moral grounds.[102] It should also be noted that he repeatedly contextualizes claims for compensation with just causes for war,[103] which completes the contradiction. How could the aggressor legally acquire spoils in an unlawful war? *Vattel* then draws the consequence from this, declaring that cultural property may only be seized to weaken the enemy's military efforts or for punishment in just wars.[104] He unambiguously connects compensation by spoliation to just causes of war.

Much later, the Congress of Vienna (see above) implicitly adopted this rationale, representing the first distinct historical moment where the practice of unjustified spoliation was rejected as a means of acquisition during unjust wars.[105] Accordingly, *Jenschke*[106] and *Sandholz*[107] argue that the norm was established in the aftermath of the Napoleonic campaigns and at the Congress of Vienna.[108] In addition to the repatriation of their cultural property, the Papal State and Austria,[109] as well as Egypt under Ottoman rule,[110] passed laws

[95] Naturally, French scholars had a different point of view on the matter, cf. Pradier-Fodere 1897, 986 et seq.
[96] Bluntschli 1866, 52 et seq.
[97] Scovazzi 2012, 11; Quynn 1945, 447 adds that this "could be more tactfully handled by the king privately."
[98] Stahn 2023, 25.
[99] Such was held by Roman and Medieval scholars, e.g. Thomas Aquinas, for details see Hartung 2009, 25.
[100] Grotius 1625, Book III, Chap. VI, II.
[101] Grotius 1625, Book III, Chap. V, I et seq.
[102] Grotius 1625, Book III, Chapters XII and XIII, cf. O'Keefe 2009, 8.
[103] Grotius 1625, Book III, Chapters VI, I and XIII, I.
[104] Ibid, § 161, 162.
[105] Savoy 2010, 188; Zhang 2018, 965 argues that restitutions in this period confirm the existence of the already established prohibition of spoliation.
[106] Jenschke 2006, 362 et seq.
[107] Sandholtz 2010, 149.
[108] Cf. Chechi 2008, 165 "first substantial effort of the modern era to develop a legal framework for this issue."
[109] In particular the Papal state (Lex Pacca of 1820) and Austria (Bestimmungen über die Ausfuhr und den Verkehr mit Kunstwerken und Seltenheiten von 1818).
[110] Compare Ali Pascha 2021 [1835], 188–194.

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restricting the export of cultural goods, which further supports the argument. However, contemporary scholars in part reference older state practices when trying to determine the adoption of the prohibition as a binding norm.[111] They date it to the mid-eighteenth century[112] or the beginning of the nineteenth century.[113] This article does not go into the details of this discussion, it simply supports the majority opinion that the ban was at least introduced with the Congress of Vienna, which is sufficient for the argument regarding the period of colonization of sub-Saharan Africa.

The prohibition of spoliation in the second half of the nineteenth century

A legal text often cited as the central source regarding the protection of cultural property during the second half of the nineteenth century is the Lieber Code of 1863.[114] Its articles, 31, 34, and 36, mainly provide that "ownership is to be settled by the ensuing treaty of peace," mirroring the primary peacekeeping function of peace treaties discussed above. Aligned with national provisions on lawful conduct during the seizure of property,[115] the Code further provides that "in no case shall [such works] be sold or given away [...] nor shall they ever be privately appropriated, or wantonly destroyed or injured." The provisions reflect traditional concepts regarding the seizure and acquisition of cultural property by means of negotiation. Hence, the Lieber Code did not introduce an all-encompassing prohibition of spoliation of cultural property, it referred to peace treaties. It is also silent in regard to protecting existing private property positions in peace negotiations.

Scholars at the time, instead, emphasized the significance of safeguarding private and cultural property during times of war.[116] *Bluntschli* explains the underlying rationale for the protection of private property: "Since the war is not being waged against civilians, there is no reason in the law that private law should perish or be subjected to the whim of the enemy."[117] Given its peaceful cultural purpose, cultural property cannot be seized.[118] However, he also considers private cultural property to be the subject of peace treaties.[119] Like his predecessors, he emphasizes the principle of *pacta sunt servanda* in the context of peace treaties,[120] but makes an exception where the existence and development of the conquered state are at stake.[121] The argument regarding the development of the state is potentially linked to the much later reference to the doctrine of self-determination in the twentieth century.[122] *Bluntschli's* contemporary *Fiore* held a similar view, arguing that cultural property cannot be seized,[123] and that coerced contracts are invalid where physical

[111] Cf. O'Keefe 2006, 8.

[112] Hartung 2009, 32.

[113] Zhang 2018, no. 93; Nahlik 1976, 1071–1072; Sandholtz 2007, 39 et seq. Arguing for recognition with the Hague Convention II 1899 Visscher 1949, 827–828; against the existence of the norm in the nineteenth century Miles 2017, 14–17.

[114] Lieber 1863.

[115] 1. Theil, 9. Titel § 193 General State Laws for the Prussian States from 1794; Phillimore 1901, 230; *Proudhon*, 1901 no. 2, p. 230.

[116] Bluntschli 1868, 289; cf. Vidari 1865, 138, cf. Twiss 1875, 124.

[117] Bluntschli 1868, 289.

[118] Bluntschli 1874, 68.

[119] Bluntschli 1866, 27.

[120] Bluntschli 1870, Arts. 408 and 704.

[121] Bluntschli 1870, Arts. 411, 412, 415.

[122] See Arts. 1(2), 55 UN Charter; Art. 2 Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Resolution 1514 (XV), 4 December 1960) includes the free development of culture within the framework of the right to self-determination; cf. Chechi 2008, 171

[123] P. Fiore 1884, 1664 and 1747.

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violence is involved.[124] Just as with *Grotius* and *Vattel*, the tension between banning spoliation and unequal peace treaties is tolerated by these later authors, given the greater political goal to end violent conflicts. However, the fundamental legal principles of just cause and free consent cannot be set aside completely. *Bluntschli* was, therefore, forced to uphold the just war doctrine whilst dissociating it from the practical consequences of war and unequal treaties.[125]

Leaving the question of unequal treaties unanswered, the *Brussels International Declaration concerning the Laws and Customs of War of 1874*[126] at least clarified the questions of spoliation during an ongoing war. What we discover is an idiosyncratic convergence of the protection of private and cultural property. The *Brussels Declaration* provides that "[...] Private property cannot be confiscated" (Art. 38), and that "the property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences even when State property, *shall be treated as private property*" (Art. 8). The declaration differentiates between state property usable for military purposes (Art. 53) and public property designated for cultural activities, civil functions, or religious practices that fall under the protective framework of private property and, therefore, cannot be seized (Art. 56). This understanding extends the rationale that wars are not waged against civilians and their private property, extending it to public goods that serve civilian use remaining consistent with the civilian-combatant dichotomy.[127] Hence, cultural property is not only protected by (international) public law but also under national private law, holding significance for the causes of action for restitution (e.g. replevin or the *rei vindicatio*). These provisions and the underlying concept were later incorporated, identically, in the *Hague Conventions of 1899 and 1907* (Arts. 46 and 56). The seamless continuation indicates that the ban on the spoilation of private and public cultural property was perceived as a firmly established norm. Since international conventions were often regarded as the formal recognition of already established customary norms,[128] it is perfectly reasonable that the Brussels provisions only codified already binding customary norms.

In summary, looking at state practice we find restitutions taking place in parallel to a discourse of legitimacy, reaffirming just cause as the fundamental requirement for war, spoliation, and compensation.[129] Positivists later stressed the necessity of conventions,[130] a requirement met through the incorporation of the ban on spoliation in the *Brussels Declaration of 1874* and the later *Hague Conventions of 1899 and 1907.* Hence, the norms safeguarding cultural and private property were established prior to the Berlin Conference of 1884-85,[131] which marked the onset of the most aggressive phase of colonial conquest of the nineteenth century. Scholarly doctrine and conventions seem to undermine these principles by tolerating the transfer of cultural property based on unequal peace treaties. However, they also provide exceptions for cases of straightforward violent coercion, or where the existence and development of a state are under threat. Concerning colonial cessions, protectorate treaties, and resulting transfers of cultural property, their validity should,

[124] Borchard/Fiore 1918, Arts 756 et seq.

[125] Bluntschli 1868, 290.

[126] Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874.

[127] Chechi 2008, 173 draws the parallel conclusion that privately owned cultural property becomes "distinct from other civilian property."

[128] Cf. Nüremberg International Military Tribunal 1946 [1947], 248–249; Wheaton 1916, 22–23; Verdross 1955, 362. In this context, nineteenth-century positivistic demands should generally be understood as calls to transpose customary norms into formal conventions rather than as one for immediate reliance on positive law alone.

[129] Simon 2018, 130.

[130] Zhang 2018, 950 et seq.

[131] Sarr and Savoy 2018, 48.

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therefore, be evaluated case-by-case to establish whether requirements for consent were fulfilled or whether exceptions apply.

The conceptual foundation of the prohibition of spoliation in universal international law principles

Universality and non-retroactivity

After the examination of the temporal scope of the prohibition of spoliation, I will now turn to the pivotal and overarching question, asking whether African societies were subject to international law and the prohibition of spoliation. First, the article argues that due to the universal claims of natural law, international law had at least a self-binding effect on Western states, including their interactions with non-Western states. Second, the article argues that the prohibition of spoliation specifically represents an expression of universal natural law principles; in particular, those of state sovereignty and the right to property. The prohibition was introduced during a period that directly relied on natural law as the central source of international law.[132] By limiting the universal principles of state sovereignty, private property, and, subsequently, the protection of cultural property to Western states, scholars and statesmen in the nineteenth century disregarded the universal and, therefore, nondiscriminatory structure of natural law. Natural law principles could not simply be abrogated to the detriment of third parties by agreements *inter partes* or later positivist demands. This even aligns with the central goal of TWAIL to achieve "a more just international legal order."[133] However, we should not reject Western international law, but rediscover and insist on the nondiscriminatory character of its natural law concepts. It is crucial to address fears that such an endeavor contradicts the principle of non-retroactivity.[134] However, it seems clear that we cannot equate the interpretation of nineteenth-century law from the perspective of natural law principles with the retroactive application of today's laws. The reference to universal principles of natural law does not obscure the history of international law but outlines its conceptual foundations.

International law as a universal framework

Whether based on the notion of an international community *(civitas maximas)* or the self-interest of states, natural law provides universal rights and obligations equally applicable to all states *erga omnes.* Regarding the topic of sovereignty, the standard for civilization has already been uncovered as a universal ethical concept (see above). *Vattel* describes natural law in this universal and equal manner: "Since men are naturally equal [...] nations composed of men [...] are naturally equal, and inherit from nature the same obligations and rights."[135] In addition to this universal nature, natural law principles were in part also thought to be binding *jus cogens* vis-à-vis conventions and customs. *Vattel* states that "every nation is bound to relinquish [an unjust or unlawful custom] since nothing can oblige or authorize her to violate the law of nature."[136] This concept of universal *jus cogens* was later upheld by many scholars in the nineteenth century.[137] *Halleck* writes in 1874: "Customs [...] which are unjust and illegal, and in violation of natural and divine law, have no binding force."[138] The same accounts for *Bluntschli*, who held that treaties contradicting recognized

[132] The necessity of natural jus cogens is later again emphasized by Bluntschli 1872, 237.
[133] Eslava and Pahuja 2011, 108.
[134] Labadie 2021, 9.
[135] Vattel 2008 [1758], Preliminaries, § 11.
[136] Vattel 2008 [1758], Preliminaries, § 26.
[137] Alvik 2018, 218.
[138] Halleck 1874, 9.

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human rights or *jus cogens* are void.[139] This specifically applies in times of war, as noted by *Lorimer* in 1884: "The rights of civilisation, as *jura universalia*, impose corresponding duties, *officia* or *debita universalia*, which limit not only the means which belligerents may jurally employ, but the manner in which they may employ them."[140] Nineteenth-century international lawyers took the universal application of fundamental ethical principles for granted. However, they failed to recognize the consequences of this concept in the context of colonialism. They simply ignored arising contradictions; in particular, when they held African states and communities accountable for alleged violations of universal ethical and legal principles – particularly the practice of slavery – while denying them equal enjoyment of universal rights.[141] It should also be noted that universality and non-discrimination are relevant in the context of the persistent objector rule, which could be brought up as a defense for the Western states in this context. While the objection to a custom by a state – in our case the prohibition on spoliation – is tolerated, it cannot be effective against individual states. Furthermore, if the prohibition is, instead, considered to be a peremptory norm (*jus cogens*) – as is the case today[142] – the consistent objector argument would not be available in the first place.

Private Property as a universal right

Modern private property theory finds its fundamentals in universal natural law reasoning. First, from the perspective of international law, the protection of property is mediated through the state. Accordingly, foreign acts related to property in the state are ineffective. This also follows from the notion of state sovereignty. During times of war and when spoliation occurs, however, the protection of property as a mere derivative of the state's sovereignty seems insufficient. In my view, it is also the underlying understanding of the *Brussels Declaration* and the *Hague Conventions* – which determine that public cultural property follows private property protection – and that the prohibition of spoliation finds its ultimate foundation not in a state's sovereignty but in universal property rights. Early modern doctrine maintained that private property emerged from a state of nature before communities started to hold land and goods in common. This was also the understanding of both *Grotius*[143] and *Vattel.*[144] However, it was still debated whether property could be considered a natural right based on labor (natural right theory)[145] or if it originated from the social contract of the community (contract theory).[146] The latter concept suggests that the existence of property depends on a society's sovereignty, meaning the attribution of land and goods by the state. In this debate, however, important scholars and sources supported the natural rights theory. This includes, for example, scholars like *Blackstone*: "[...] Every m[a]n [is] entitled to enjoy [property] whether out of society or in it."[147] and Art. 2 of the French Declaration of the Rights of Man and of the Citizen of 1789, which conceives property as a natural and imprescriptible right.[148] *Thiers* reaffirmed the theory in 1848, stating that "property is a permanent fact, universal in all times and in all cultures."[149]

[139] Bluntschli 1872, no. 410.
[140] Lormier 1884, 71; compare Reddie 1851, 347.
[141] Mihatsch and Mulligan 2022, 43.
[142] The prohibition of spoliation is considered jus cogens today, see Loucaides 2004, 685.
[143] Grotius 1814 [1625], Book II, chap. II, II
[144] Vattel 2008 [1758], Book I, chap. XVIII, § 203.
[145] Locke, 1823 [1690], Chap. V. § 27.
[146] Grotius 1814 [1625], Book II, Chap. II, II.
[147] Blackstone 1796, 134.
[148] However, in other important human rights documents of the time direct reference to natural rights theory is hardly to be found. See for example, the Fifth Amendment to the United States Constitution from 1791 and Art. 8 § 32 of the short-lived Imperial Act guaranteeing the Basic Rights of the German People of 1848.
[149] Thiers 1848, 10.

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However, I do not contend that the natural rights theory prevails over the contract theory. Instead, they potentially complement each other: During times of peace, the fate of property depends on its regulation by the state. At this stage, the international law dimension of private property remains mediated through the state's sovereignty. Natural rights, however, come into the foreground where unjust expropriations or conflicts between states occur. This is particularly true whenever a society collapses because of an internal conflict, war, or occupation. In such scenarios, individual rights require protection beyond mediation via sovereignty. As said, this rationale underlies the concepts formalized by the *Brussels Declaration* and the *Hague Conventions.* The important contribution of these documents was to emphasize the extension of protection to public cultural property used for civil purposes. Based on natural rights, the ban on spoliation offers protection irrespective of the recognition of the host state's sovereignty. From this follows for the colonial context, that both the private property of Africans and their public cultural property should have been recognized as such, even when the sovereignty of their state was rejected!

Customary African law and colonial regulation

Examining the tension between colonial regulation and African customary private law

Western scholars certainly struggled to understand African customary law and relate it to the universal principles of sovereignty and property, as discussed above. However, scholars still granted local inhabitants basic protection over their possessions – another tacit recognition that universal natural law concepts applied. However, the main issue of colonial regulation and the scholarly debate concerned the redistribution of land, whilst movables, including cultural property, were typically not discussed or regulated. Following Lockean and natural law property theories, they mostly agreed that cultivated land and movable property belonged to the inhabitants,[150] which is reflected by British, French, and German colonial land regulations.[151] Before we look at European scholarship and colonial regulation, we should first have a look at African private and communal rights, which were the topic of the (often misled) discussion.

African customary property and possessory rights

Precolonial African states and communities had established complex legal rules regarding individual, tribal, and familial property. Our knowledge of the historical details, however, remains somewhat limited given the oral tradition.[152] These legal positions were sometimes characterized by Western scholars as mere relative obligations between chiefs, communities, families, and individual members in the context of status relationships.[153] However, we now understand that they were instead conceived as communal or familial property[154] administered by an elder leader.[155] Individual rights were often designed as possessory rights, which were not freely tradeable.[156] However, the systems always allowed determining the possessor of a specific right in the land (*usus fructus*, administration rights)[157] or a

[150] Compare Danquah 1928, 198.
[151] Van der Linden 2017, 205 et seq.
[152] Ojo and Ekhator 2021, 39 et seq; German Museums Association 2013, 153.
[153] Elias 1956, 168.
[154] See, for example, Chinwuba Obi 1963, 66.
[155] Liversage 1945, 5.
[156] Such an obligation-based system is reminiscent of the European feudal and the modern federal systems.
[157] Plessis 2011, 53 et seq.

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movable.[158,159] The right to use land could also be subject to sale or mortgage if the members of the community were involved.[160] Ultimately, control lay with the community and not with the individual when it came to valuable goods. This solution mirrors European concepts of public property, property held in trust, the medieval dominium of a guild or a house,[161] and, specifically, cultural property understood as an inalienable heritage.[162] Western Scholars recognize art collections as aggregated assets, arguing for the restitution of individual pieces to restore their integrity.[163] Moreover, non-individualistic forms of property were rarely subject to abolition in the West, a prominent exception being the *Fideicommissum*,[164] which, in turn, shows that even in modern times, forms of common property or possession are by no means alien to Western law. In summary, collective forms of property were recognized in domestic Western settings and the same recognition should have been afforded to African customary rights. To simply assume that there were no sufficient rules and rights regarding land and property seems discriminatory *per se.* Instead, the modification of the well-known Roman law principle to "*ubi societas, ibi proprietas*" appears more intuitive.

The relation of African customary law to colonial treaties and regulation

Colonial treaties often acknowledged the property rights of local inhabitants, which aligned with the principle in international law that mere cession of territory did not affect land ownership.[165] For example, while the German-Cameron agreement foresaw complete cession of territory and sovereignty, it guaranteed the continuation of land rights: "The land now cultivated by us and the land on which cities are built shall remain the property of the present owners and their legal successors."[166] When read in context, the same is inferred by the Lagos Treaty of 1861 regarding the cession of Lagos Island to Britain: "[...] in the transfer of lands, the stamp of [the souverain] affixed to the document will be proof that there are no other native claims upon it [...]."[167] Similar provisions can again be found in the treaty regarding the cession of the Badagry territory to Britain.[168] The broad recognition of private positions within colonial treaties was then transposed into internal colonial regulations, but the latter did not typically override local law. The relationship was, rather, one of continuity and subsidiarity. Under English law, only local laws that conflicted with Western moral standards were considered invalid, which, for example, included laws concerning slavery. In this regard, a Privy Council decision from 1722 is commonly cited: "The laws and customs of the conquered country shall hold place unless where they are contrary to our religion, or enact anything that is malum in se or is silent, for in all such cases the laws of the conquering country shall prevail."[169] *Blackstone* also endorsed the continuity concept.[170] It then persisted into the late nineteenth century and was followed by the Supreme Court Ordinance of

[158] Elias 1956, 168.

[159] Common law and civil law doctrine also struggle to develop a coherent theory of property that does not subdivide property into mere rights of usage (bundle of rights theory); cf. Holdsworth 1925, 465.

[160] Danquah 1928, 198.

[161] Tomba 2019, 99.

[162] O'Keefe 2006, 5.

[163] Yves Huguenin-Bergenat 2010, 256.

[164] Cf. Beckert 2004.

[165] Cf. Westlake 1894, 130.

[166] Erster Schutzvertrag Kamerun 1884.

[167] Smith 1979, 140–141 Appendix C; Van der Linden 2017, 109.

[168] Van der Linden 2017, 110.

[169] Privy Council *Anonymous* [1722] 2 P Wms 75 cited from Turton 1836, 182; also referenced by the Supreme Court of Georgia in *State v Campbell, T.U.P. Charlton* 166, 1808.

[170] Blackstone 1765–1769, 105.

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1876 regarding the Gold Coast Colony,[171] and in Nigeria and Ghana.[172] It is reasonable to assume – but is subject to further case study – that the customs on cultural and private property typically fulfilled the requirements.

Following the same logic of subsidiarity and continuity, German regulation left customary law to the local inhabitants.[173] The contemporary scholar *Gerstemeyer* went further and asserted that customary laws also applied in private relations between local inhabitants and German citizens.[174] As far as individual rights were concerned, the land ordinances in German East Africa required that customary law positions be taken into account and that agreements should be concluded with local communities.[175] Anyone could acquire land ownership by providing proof that they had enclosed the land for two years. Similar arguments hold for German-occupied Cameroon,[176] where the Kronlandgesetz[177] and the Enteignungsverordnung[178] acknowledged customary rights. However, since the *terra nullis* doctrine was applied, land distribution was still often enforced violently, and legal uncertainties prevailed in practice.[179] Decisive for the case of cultural property, however, was that movables were not regulated, which means that potentially discriminatory regulation in the context of ownership of land[180] did not extend to movable cultural goods.[181] Following the continuation principle, local customary law applied to these goods.

Recognition of individual rights by scholarship

However, in some cases, treaties and internal regulations remained silent on the question of individuals' rights.[182] Relevant answers must, therefore, be derived from the scholarly literature of the nineteenth century. Following the above-described natural law concepts and the Lockean notion of acquisition of property by labor, individuals could acquire rights over land by cultivation and movables by their production. *Nuzzo* has provided us with an overview of the scholarship on this question.[183] Nineteenth-century scholar *Fiore* argued that land could not be occupied if it had already been cultivated by Africans.[184] *Catellanis* stated that private rights persisted despite the right of the colonial powers to occupy empty territory.[185] Even *Bluntschli*, who denied Africans their property rights, admitted that local

[171] Sinitsina 1987, 45; for details see Fenin-Addo 1990.

[172] Elias 1963, 144; for more details on legal pluralism in Africa see Quashigah 2008.

[173] Cf. Art. 4 Schutzgebietsgesetz in der Fassung der Bekanntmachung vom 10. September 1900, Deutsches Reichsgesetzblatt 1900, no. 40: 812–817

[174] Gerstemeyer *1910*, 26; Kuprechta 2020, 154.

[175] See § 2 Verfügung des Reichskanzlers, betr. die Ausführung der Allerhöchsten Verordnung vom 26. November 1895, 27.11.1895: "so ist den Rechten der Eingeborenen nach Möglichkeit Rechnung zu tragen und zunächst auf eine Vereinbarung im gütlichen Wege Bedacht zu nehmen [...]."

[176] Van der Linden 2017, 202 et seq.

[177] Allerhöchste Verordnung über die Schaffung, Besitzergreifung und Veräußerung von Kronland und über den Erwerb und die Veräußerung von Grundstücken im Schutzgebiete von Kamerun, vom 15. Juni 1896, Kolonialblatt 1896, pp. 435 bis 437.

[178] Kaiserliche Verordnung über die Enteignung von Grundeigentum in den Schutzgebieten Afrikas und der Südsee, vom 14. Februar 1903, Kolonialblatt, p. 121.

[179] Van der Linden 2017, 205 et seq.

[180] For French legislation compare the loi du 26 Juillet 1873 (loi Warnier) regarding immovable property; for German law see the Allerhöchste Verordnung, betr. die Rechtsverhältnisse an unbeweglichen Sachen in Deutsch-Ostafrika, vom 24. Juli 1894; compare also Bennett 2004, 375.

[181] Surun 2020, 127.

[182] Van der Linden 2017, 108 et seq.

[183] Nuzzo 2017, 274.

[184] Fiore 1882, 105–106.

[185] Catellani 1885, 579–580 and 588–590.

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inhabitants could not be displaced against their will.[186] In general, the scholarship agreed that arbitrary occupation of cultivated land was generally unlawful. This strongly suggests that rights to movable property persisted – cultural property is typically the result of labor or the cultivation of a specific site.

Rejection of African claims by Western courts

However, Western courts often rejected property claims and justified spoliations or expropriations, creating not only tension with natural law principles but, as we have seen, also with colonial treaties, colonial regulation, and scholarly opinion.[187] Whilst this is a topic of national law, some aspects should be noted here. In general, there appears to be a problematic link between the historical denial of African private property claims and some decisions by today's courts. The infamous 1919 UK Privy Council decision in *Re Southern Rhodesia* exemplifies the discriminatory rationale: "It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."[188] Without relying on the underlying racist rationale, later decisions have sometimes rejected restitution claims based on private property.[189] Typically, they argue that restitution is a question of diplomacy and public law only. However, in most systems, such court decisions can only affect the parties involved due to the subjective constraints of the *res judicata* doctrine.[190] Hence, the decision may be limited to the specific case at hand without establishing a broader effect. In jurisdictions with binding precedents, however, such decisions can be overruled by arguing human rights violations under the *per incuriam* rule. Decisions such as in *Re Southern Rhodesia* clearly stood in contradiction to international legal principles, colonial treaties and regulations, and scholarship, which undermines their relevance within the system.[191]

Conclusion

The argument for the restitution of African cultural heritage leads through many legal fields. This article revisits the treatment of African states and their private or public cultural property under the international law of the nineteenth century. Typically, African states were denied international recognition, and their communities, families, and individuals were deprived of their private rights. The article argues that the colonialist interpretation of international law at the time was not compatible with nineteenth-century law. Instead, natural law principles regarding state sovereignty and property were already well-established and perceived as universal by early modern international legal scholars. The formulation of these principles and Europe's own experience of spoliation culminated in the prohibition of spoliation of cultural property. Western natural law scholars had already established a nondiscriminatory universal framework that was only later adapted to imperial interests. However, the Western powers still struggled to deny the natural law foundations of international law when it came to the questions of African sovereignty and

[186] Bluntschli 1872, 168.

[187] Ibid, 170 et seq; Sylvest 2008, 416.

[188] *Re Southern Rhodesia* [1919] AC 211.

[189] Cour d'appel, Paris, 5th April 2004, arrêt 2002/09897, The Federal Republic of Nigeria, c/ M. X., aff.; confirmed by the Cour de cassation, 20th September 2006, N° 04-15599; Cour d'appel Paris, 6th of June 1989, arrêt 88/20267, M. Y. c/ The Islamic Republic of Iran,; and Cass. Civ. 1re, 04 avril 1991, pourvoi n°89-18020.

[190] Compare for example Chand 1894, 493 et seq.

[191] In 1931 a British government report accordingly concluded that *Re Southern Rhodesia* was not in accordance with the company's charter, since it required legal agreement with the local representatives, see Maugham 1932, 2. Compare also the Southern Rhodesia Order in Council of the 20 October 1898.

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customary private law. The conclusion of colonial treaties and the subsidiary application of African private law are proof of these tensions. Established universal natural law principles and state practice of the late nineteenth century, therefore, allow for an interpretation of nineteenth-century law that provides equal protection for African cultural property under both international law and African customary private law.

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