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[ABSTRACT]

State Practice provides evidence that each international situation is capable of being determined as a matter of law. During an armed conflict, one can identify a variety of legal rights affected. Sometimes it is not easy to answer with certainty and tackle certain elementary questions. For example, whose rights are to be vindicated? Who is seeking justice? While the protection of cultural property during an armed conflict was not taken for granted in Hugo Grotius' times, state practice followed a quite different path after Vattel's treatise. That said the evolution of specific legal norms on the protection of cultural property, the elevation of the latter into cultural heritage and the dynamic presence of a novel and distinct legal order, namely the investment protection regime, initiated a sequence with a possible collision trajectory.

Undoubtedly, since 1990 the available *fora* (judicial and quasi-judicial) have already produced a far reaching and quite consistent case-law. A common feature is evident, namely the protection of cultural heritage albeit seen from different angles.

It is also true that while most, if not all, judgments rendered by the World Court contribute influentially to the legal process and the pacification of international society, for the Court enjoys a potentially unlimited scope of jurisdiction *ratione materiae*. State sovereignty, as far as these disputes are concerned, remained relatively free of any relevant conventional impingement. Still, the Court enjoys the authority and jurisdiction to hear and try this type of disputes. Out of 72 'optional clause declarations', 52 States have not included a 'war type' (or equivalent) reservation. The Court remains at the service of international community in its entirety and has been radiating through the entire global community a consciousness of the international rule of law. Access to the Court has become 'universal in nature'. Although there is no concrete and hard evidence to support the view that a multiplicity of international tribunals has impaired the unity of jurisprudence, what the legal audience focuses on is the influence of the Court on the system of substantive law. Future cases dealing with issues of cultural heritage law (whether during an armed conflict or not) should be referred to the World Court as a full Court, for a wide and comprehensive experience will be needed.

[KEYWORDS]
Different legal orders, cultural property/heritage protection in the event of an armed conflict, investor's protection, individual criminal responsibility, rule of law, optional clause, effectiveness of the World Court

Protecting an Investment while safeguarding Cultural Property in the Event of Armed Conflict: An essential Dialogue between Fora

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1. Introduction

It is with utmost pleasure to participate in this colloquium; first and foremost, one can easily discover a somehow latent value, namely an exciting scientific dialogue that is about to take place. Secondly, the issues to be raised are by definition complex. Irrespectively of their novelty, there can be no guarantee that straightforward solutions shall come to light and/or problems

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I am indeed indebted to *J. Crawford* (*Cantab. & I.C.J.*), ***Chr. Greenwood*** (*Cantab.* & *I.C.J.*) and ***V. Lowe*** (*Cantab.* & *Oxon.*). The usual disclaimer applies.

shall be tackled. Thirdly, alas, there is always the time factor or more accurately the pressure of time.

This brings me to the core of the problem, which is more or less defined by a set of preliminary questions: whose rights are to be vindicated? Who is seeking justice and before which forum? How is he to enforce any judgement rendered?

Given the coexistence of different legal orders and the so called (mainly) horizontal international society, I hold the view that when an armed conflict erupts, there is an ignition of a chain reaction. Its principal characteristics are the collision trajectory and the fall-out side-effects. Indeed everyone is mindful of the powers vested in the Security Council, under Chapter VII of the UN Charter. But, if I may put before You with sadness, having examined its recent practice (1990 to this date), coherency and a normal reading of the rule of law cannot be easily identified. After all, the Security Council is a political organ; considerations of international policy are the starting point, if not the finishing line.

The protection of cultural property during war is not a novel issue. In the 16th century **Hugo Grotius** was adamant: no mandatory norm was part of the Law of Nations wherewith cultural property was protected from the absolute power enjoyed by the victor.[1] The latter's subjective faith was the outer limit, especially on religious symbols, for, should he destroy symbols of Christianity,

[1] **Hugo Grotius,** Book III, Chapter V, I & II, *loc. cit.* (Liberty Fund, Indianapolis 2005).

his practice could be held to be an impious one.[2] Indeed, there were academics favouring the view that these acts violated the Law of Nations. Alas, State practice was on Grotius' side.[3] Following some twenty (20) major wars and two (2) centuries, ***Emer de Vattel*** claimed that hostilities ought to be kept away from buildings honouring human society, with no contributory, whatsoever, effect on the military strength of the adversary. He questioned seriously the military advantage gained upon their destruction. His contribution to taint the warring party that destroys art monuments without the imperative presence of military necessity has to be praised. Finally, an early and clear appearance of the pronouncement on being an "enemy of mankind" is vividly portrayed in his writings.[4]

With your permission, there is no time and indeed no need to refer extensively to the Hague System (1899 & 1907), the Report of the respective Committee for Responsibility following WW I, the Athens' Conference of 1931, the Roerich Pact (1935), the Geneva System (1949 & 1977), the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Additional Protocols.[5]

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[2] *Op. cit*. II. 4, p. 1309.
[3] *Ibid,* 4 & 5 *in fine,* p. 1312.
[4] **Emer de Vattel,** Book IX § 168 *loc. cit.*, emphasis added (Liberty Fund Indianapolis 2008).
[5] *Inter alia,* **A Roberts & R Guelff**, (OUP 2000) 699, **J Toman**, The Protection of Cultural Property in the Event of Armed Conflict (Dartmouth 1996), **F Bugnion**, 86 IRRC (2004) 313, **R O' Keefe**, The Protection of Cultural Property in Armed Conflict (CUP 2006) and **H van Houtte, B Delmartino & I Yi**, Volume I (CUP 2008) 193 *et seq.* On the comparison between the general and the special status of protection, **K J Partsch**, 'Protection of Cultural Property' (OUP 1995) 381 *loc. cit.* and **G Werle,** (TMC Asser Press 2005) 346 *loc. cit.* For the special issue of ownership or use, **L Brilmayer & G Chepiga,** 49 HILJ (2008) 413, **J Toman**, Cultural Property in War: Improvement in Protection (UNESCO 2009), **T Desch,** 2 YIHL (1999)

Notwithstanding the foregoing, I feel obliged to highlight the customary nature of almost all relevant norms, for I fully adhere to the view that general international law provides primary, if not archetypal answers.[6] It is my strong belief that, especially following the flames and ashes of the so-called "Balkan Wars" (1991 – 1995), state practice engulfed and admitted a solid normative attitude vis-à-vis the protection of cultural property.[7] The restrictions on targeting (prima facie no military target) and its special status of protection (against theft, pillage, vandalism and illicit export from an occupied territory, the latter being entangled with the affirmative duty of protection) are firmly based on the premises of general international law, too.[8] Moreover, the Statute of the ICC deepened qualitatively the content of the criminally prohibited acts and uplifted the individual's criminal responsibility. Finally, a representative sample of (domestic) *Military Manuals*[9] and *Criminal Codes*[10] provides a striking example on how States understand their commitments; one can easily

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63, **J Hladik,** 4 YIHL (2001) 419, **N van Woudenberg & L Lijnzaad (Eds.)**, Protecting Cultural Property in Armed Conflict (Martinus Nijhoff 2010), **M Frulli,** 22 EJIL (2011) 203.

[6] **C Weeramantry,** (Martinus Nijhoff 2004) 239 *loc. cit.*

[7] E.g. article 53 Add. Protocol I (1977), where no derogations are permissible, and article 3 of the Statute of ICTY. Also, articles 8 § 2 (b) sec. ix & 8 § 2 (e) sec. iv of the Statute of the ICC in **K Dörman, L Doswald–Beck & R Kolb,** (ICRC - CUP 2003) 215 *et seq.* and 458 *et seq.* Criminalization under customary international law has been affirmed by the ICTY since *Tađic* and followed in *Kordić & Cerkez, Brđanin* and *Strugar*.

[8] Rules 38–41 with state practice in **J-M Henckaerts & L Doswald–Beck (Eds.),** (CUP 2005) 126–138 *loc. cit.* For the customary character of the Additional Protocols of 1977, **C Greenwood,** (Martinus Nijhoff 1991) 93. For all issues of belligerent occupation, **Y Dinstein,** The International Law of Belligerent Occupation (CUP 2009) and **A P V Rogers,** Law on the Battlefield, 3rd Edition (Manchester UP 2012).

[9] Indicatively: Argentina (1969), Australia (1994), Canada (1999), Germany (1992), Israel (1998), Italy (1991), The Netherlands (1993), New Zealand (1992), Nigeria (1967), Sweden (1976), Switzerland (1987), United Kingdom (1956 as amended) and USA (1956 & 1997).

[10] Indicatively: Bulgaria (1968), China (1946), Estonia (2001), Italy (1938), Lithuania (1961), Luxembourg (1947), The Netherlands (1947, 2003), Nicaragua (1996), Poland (1997), Portugal (1996), Romania (1968), Spain (1985), Switzerland (1966) and Ukraine (2001).

detect the relevant and unequivocal state practice structured on a solid evidentiary basis.

As a matter of practice, it is well-settled that, in times of war, each State introduces domestic legislation imposing strict control over enemy business and prohibitions on trading with the enemy.[11] Investment treaties usually contain elaborate provision for compensation in the event of damage to the foreign investor's property as a result of war, civil unrest or other domestic emergencies. The very first modern BIT in the fifties tackled the matter, for Germany had lost the entirety of its foreign investment, as a result of WW II, making war losses an extremely sensitive subject to german investors.[12] Specific standards apply to a narrower range of circumstances e.g. restitution or compensation for losses sustained during and due to an armed conflict.[13] The new war and civil disturbance provisions in many BITs address seizures as well as destruction of property. The so called 'security provision', a U.K. innovation in BIT practice, set a precedent that was followed by many States, for it was codifying customary international law.[14] It is a common place that liability for such destruction is excluded where the destruction takes place during combat action or was required by the necessity of the situation.

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[11] **M Sornarajah,** (CUP Repr. 2007) 108. An alien owed a duty of allegiance to his State. Also, **M Domke,** Trading with the Enemy in WW II (NY Central Book Company 1943).

[12] It did not appear in the first BITs of other States e.g. the Netherlands, Belgium, Denmark, Finland, France *et. al*. Also no provision to this effect was included in the 1959 Abs-Shawcross Convention or the 1967 OECD Draft Convention on the Protection of Foreign Property.

[13] **K Vandervelde,** (OUP 2010) 309 and footnotes 350 - 351. The most common provision requires the host State to grant both MFN and National Treatment with respect to any compensation paid for losses sustained due to such conduct. **C Brown (Ed.),** Commentaries on Selected Model Investment Treaties (OUP 2013).

[14] **Denza & Brooks,** 36 ICLQ (1987) 908, 911 - 912.

In short, private actors are vested with enormous legal authority over host States, since the former enjoy the privilege of instituting proceedings, choosing the *forum* and, in some cases, applicable law.[15] State practice reveals that no absolute (strict) right to compensation exists, for a State does not become an essential guarantor or an insurer for all injuries that might befall a foreign investor or investment. The duty owed by host States to foreign investors is to exercise due diligence.[16] As the most famous *maxim* on the issue put it, a State acts with due diligence when it makes reasonable efforts and uses the forces at its command to protect the investor's interests to the extent practicable and feasible.[17] A preliminary conclusion on the protection of the investor can be summarised as follows: promotion of an investment runs along the threshold of due diligence practiced by a host State. That being so, while arbitral tribunals may be empowered to entertain certain investment disputes, problems of vital national interest may surface, sometimes not directly involved with the investment itself, due to the latter's inseparable connection with the protection of cultural property.

What I propose to argue is how the principal judicial organ of the UN[18] may, nonetheless, adjudicate successfully, today and as the law stands, disputes involving the protection of an investment tied up with issues of international

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[15] **J Gathii,** (OUP 2010) 167.
[16] **J Salacuse,** (OUP 2010) 336.
[17] **R Dolzer & C Schreuer**, (OUP 2007) 166.
[18] **M Sameh Amir,** The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations (Martinus Nijhoff 2003). **Bowett et al.,** The International Court of Justice: Process, Practice and Procedure (B.I.I.C.L. 1997). For a recent, concise and updated review of the Court's activities **S Murphy,** (Martinus Nijhoff 2012) 1.

cultural law during or after an armed conflict. Before doing so, I intend to briefly mention, arbitrarily no doubt, some thoughts on the effectiveness of the World Court. I will try to prove that, notwithstanding the existence of substantial rules, it is preferable to have justice delivered by a *forum* entrusted with general jurisdiction. I shall not refer to treaties for the Peaceful Resolution of Disputes, special agreements and *forum prorogatum* as jurisdictional bases of the Court.

In doing so, I propose to order my paper under three (3) distinct headings: (i) available *fora* and their contribution, (ii) any role for the World Court (?) and (iii), some concluding remarks.

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2. *Available Fora and their Contribution*

Should one leave aside 19th and early 20th century state practice on claims commissions reflecting an early enthusiasm for international adjudication,[19] disputes and subsequent case-law resulting from the application of the Laws of War were steadily anchored on (the protection of) state sovereignty and the latter's characteristics. Whether or not a victor's justice, case-law was usually the bi-product of a Peace Treaty and as such it was eulogised by the consent of the defeated sovereign State.

The Nurnberg trials broke new ground, following and as a result of ***Alfred Rosenberg's*** conviction and execution. It was held that when a monument of art is impounded and/or destroyed in occupied territory there is a clear breach of the laws of war, *ergo* the perpetrator may be indicted for crimes against humanity.[20] The same pattern was followed in the ***Karl Lingerfelder*** *case,* where the (standing) Military Court at *Metz*[21] found a civilian guilty of the crime of "destructing public monuments",[22] because he implemented an order of a German officer to this effect. The final touch was presented in ***Von Leeb (The High Command Trial)*** *case,* where the Military Order dated 17 September

[19] Numerous issues, incidents, conflicts and claims have been recorded as a matter of day in – day out state practice. For a recent re-introduction of the legal institution, **L Brilmayer, C Giorgetti & L Charlton,** (Elgar 2017), notwithstanding its lack on bibliography.
[20] Judgment of the IMC dated 14 November 1945 – 1 October1946, 64-65, 95-96 *loc. cit.*
[21] Constituted by France, 9 LRTWC (1947) 67.
[22] It was a War Memorial of Fallen Heroes during WW I.

1940, issued by ***Wilhelm Keitel***, was held to trigger (personal) criminal responsibility, too.[23] These quite novel legal pronouncements were left dormant for some fifty years.

During the last decade of the 20th Century, the so called "Balkan Wars" and, especially, the practice of the warring parties in the battlefield re-ignited major international concern. The public outcry and the subsequent "non-consensual" establishment of the ICTY uplifted, if not boosted, (individual) criminal responsibility on the protection of cultural property.[24] There is absolutely no doubt to my mind that the Tribunal acknowledged pre-existing norms and built upon the Nurnberg case-law. It examined, among other things, issues of indirect damage inflicted upon a site enjoying protection, due to its proximity to a lawful (military) target.[25] At a later stage, it emphasised that protected property ought not to be used for military purposes. It also highlighted the necessary subjective nexus between the alleged perpetrator and the alleged act, namely to have acted wilfully, his aim being the destruction of the property

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[23] 'On the use of valued Cultural Objects brought to Germany from occupied territory'. Judgment of the US Military Court in Nurnberg, dated 28 October 1948, 12 LRTWC (1949). Also, **J M Henckaerts & L Doswald – Beck (Eds.),** Volume II: Practice, Part 1 (CUP 2005) 798 – 799 *loc. cit.,* **A Cassese,** (OUP 2008) 70.

[24] *Inter alia*, **H Abtahi**, 14 Harv.H.R.J. (2001) 1, **M Lostal,** International Cultural Heritage Law in Armed Conflict (CUP 2017). Given the enormity of literature on ICTY, *inter alia*, **D Robinson & G McNeil,** 110 AJIL (2016) 191.

[25] *Blaškic* (§§ 157, 425, 467), followed in *Kordić & Cerkez* (§§ 331, 360) in **Archibold** – International Criminal Courts, **K Khan & R Dixon (Eds.),** (Sweet & Maxwell 2009) 972 *et seq.* Also followed in *Naletilic & Martinovic, op. cit.* 1009 *et seq.,* with a particular note on the difference of language *artis legis* used, between Hague Regulations (customary international law) and Add. Protocol I of 1977, *Strugar* (§§ 230, 310–312), *ibid* 1010.

protected.[26] Finally, the Tribunal's finding in ***Jokic***[27] merits special attention, for it was held that the bombardment of the old city of Dubrovnik in 1991 was an attack "[...] *against the cultural heritage of mankind*".[28] This evolutionary wording of the ruling resembles to 'crimes against humanity'. It has moved away from 'cultural property' trying to reach the more qualitatively rich concept of 'cultural heritage'.

Although no-one seems to suggest that a relay - race exists between different *fora*, it is clear that a somewhat indirect, if not hidden, dialogue takes place between them. I suspect this is quite evident, should one examine carefully the case-law rendered by the ICTY and the recent case-law of the ICC.[29]

The judgment in ***Prosecutor v. Ahmad Al Faqi Al Mahdi*** fits perfectly in the picture.[30] The situation was referred to the Court by the Government of Mali on 13 July 2012. Following a guilty plea entered by the defendant, Trial Chamber VIII unanimously found the defendant as a co-perpetrator of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion in Timbuktu, Mali, in June and July 2012. He

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[26] *Strugar* was upheld and confirmed by the Appellate Tribunal (§§ 278–9), where it was adjudged that (a) knowledge on the protective status must exist and (b) the wilful attack cannot be justified by reasons of military necessity.

[27] Judgment of 18 March 2004, § 46 *loc. cit.*

[28] *Ibid* § 51 *loc. cit*. Confirmed in *Strugar*: "*Even though the victim of the offence at issue is to be understood broadly as a 'people', rather than any particular individual, the offence can be said to involve grave consequences for the victim*", § 232.

[29] For a general overview, **R Arnold** in **O Triffterer (Ed.),** (C.H. Beck–Hart-Nomos 2008) 374–380 *loc. cit*. **W A Shabas,** (OUP 2010) 235 *et seq*. **F Lenzerini,** (OUP 2013) 40.

[30] Available at https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF (last visit, 2FEB2018). For a brief presentation and commentary: International Decisions, 111 AJIL (2017) 126.

was sentenced to nine years' imprisonment. Additionally, on 17 August 2017, Trial Chamber VIII issued a Reparations Order concluding that Mr Al Mahdi is liable for 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu for his acts. The notion of collective rights (of a particular community) is notably present, again.

Notwithstanding the evolving case-law on (individual) criminal responsibility, certain traditional, if not old-fashioned, war disputes are dealt with and resolved by (mixed) Claims Commissions. For example, in the post-conflict attempt to resolve the dispute between Ethiopia and Eritrea, the Claims Commission contribution towards the pacification of the region was outstanding. In its decision of 28 April 2004 a cautious approach was followed. No direct proof was presented before the Commission to substantiate the allegation against (and the liability of) the occupying forces for the destruction of the *Stela of Matara*.[31] That said, since the destruction itself took place during belligerent occupation, it was pronounced that the onus fell upon the occupying power to clear all allegations against it.[32] Not surprisingly,

> "[...] *the felling of the Stela was a violation of customary international humanitarian law"*.[33]

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[31] *Stela of Matara*. **E Ullendorff**, 1 J.R.As.Soc GB & I (1951) 26.

[32] EECC, Partial Award, Eritrea's Claims 2, 4, 6, 7, 8 & 22, §§ 111–112, available at http://legal.un.org/riaa/cases/vol_XXVI/115-153.pdf at p. 148 (last visit 2FEB2018).

[33] *Ibid.* This was utterly important, for no contractual bond existed as between the "litigants". **G H Aldrich,** 6 YIHL (2003) 435, 441 *loc. cit.* Also, **J Nafziger, R Peterson & A Renteln**, (CUP 2010) 345–347 *loc. cit*.

Last but by no means least, the comprehensive *corpus* of case-law rendered by Investment Tribunals cannot be overlooked. Numbers of disputes submitted and resolved and the participation and *locus standi* of individuals, physical and/or legal entities, make a true difference. In its very first award (*AAPL v. Sri Lanka*)[34] the ICSID Tribunal examined a situation of, mainly internal, armed conflict. The key question was whether the State was capable of preventing the destruction of an investor's installations. The Tribunal established all necessary standards on physical and regulatory protection as well as the diligence owed by the host State to the (foreign) investor, too. This leading case is confirmed in all subsequent disputes.[35] Avoiding overlaps with other papers, provides, I trust, ample justification for refraining from further analysis.

[34] Available at https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf (last visit 2FEB2018). **C Titi,** 8 JIDS (2017) 535.

[35] *AMT v. Zaire*, available at https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf (last visit 2FEB2018), *AMPAL v Egypt*, https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf (last visit 2FEB2018), *Azurix v. Argentina*, available at https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf (last visit 2FEB2018). Also, **S Alexandrov,** (Wolters Kluwer 2016) 319, **J Gathii,** (note 15) 170-178.

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3. Any Role for the World Court?

There is absolutely no need to spend valuable time stating the obvious: international community (unfortunately) rejected serious proposals for the compulsory jurisdiction of international disputes three times during the twentieth century, namely in 1907, 1920 and 1945.[36] ***Hersch Lauterpacht*** had, nevertheless, observed that,

> "[*T*]*he very existence of the Court in particular when coupled with the substantive measure of obligatory jurisdiction […] must tend to be a factor of importance in maintaining the rule of law.*"[37]

Currently, sovereign independence of States is indeed curtailed by the international rule of law. Its manifestation is twofold. First, no State has ever

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[36] **S Rosenne,** (Martinus Nijhoff 2007) 621. As per the concepts of statehood and sovereignty, *inter alia,* **J Crawford,** (OUP 2007) 31. The Court has stated that "[*I*]*t is sufficient to say that State sovereignty evidently extends to the area of its external policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State*", ***Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)****, Merits, Judgment of 27 July 1986, I.C.J. Reports (1986) p. 133 para. 265,* also available at http://www.icj-cij.org/docket/files/70/6503.pdf (last visit 2FEB2018). It had already observed that "*it is no doubt true that the Islamic Revolution of Iran is a matter 'essentially and directly within' the national sovereignty of Iran; […] however a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction*", ***United States Diplomatic and Consular Staff in Tehran (USA v. Iran)***, *Provisional Measures, Order of 15 December 1979, I.C.J. Reports (1979) p. 15-16 para. 25,* also available at http://www.icj-cij.org/docket/files/64/6283.pdf (last visit 2FEB2018). As per the so-called Treaties of Protection and their impact on sovereignty, the Court held that they amount to "*a form of organization of a colonial territory on the basis of autonomy of the natives [and] suzerainty over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations*", ***Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)***, *Merits, Judgment of 10 October 2002, I.C.J. Reports (2002) p. 405 para. 205,* also available at http://www.icj-cij.org/docket/files/94/7453.pdf (last visit 2FEB2018).

[37] (Grotius 2010) 3.

suggested that, since 1945, it is legally admissible to consider war – or better armed conflict, as an institution for changing the law. As ***Judge Sir Christopher Greenwood*** put it,

> "*[...] War is the antithesis of the rule of law. [...] The reality is that the rule of law in international society cannot be separated from the rule of law within the state [...] To me, respect of the rule of law is fundamental for preserving peace.*"[38]

Secondly, States accepted the legal duty to acquiesce in changes in the law decreed by a competent international organ.[39] The existence of such duty toppled with the obligation of States to settle their disputes amicably and in accordance with international law, if possible administered by a Court, constitutes a basic feature of the UN Charter. State practice reveals that most, if not all, judgments rendered by the World Court (henceforth, Court) are accepted as influential contributions to the legal process[40] and the pacification of international society.[41] Its *dicta* balanced successfully third party interests. States are not deterred from instituting proceedings. On the contrary, the current docket of the Court provides ample evidence for its 'popularity'.[42] After all, the Court enjoys a potentially unlimited scope of jurisdiction *ratione materiae,* as

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[38] The Rule of Law in International Society (The First Milon Kumar Banerji Memorial Lecture 16JAN2013), available at http://www.youtube.com/watch?v=JNaup3oQzxM (last visit 2FEB2018).

[39] All members of the UN are ipso facto contracting parties to the Court's Statute and (are) bound by the latter's pronouncements, not in the sense of *res judicata* but as authoritative findings as per the substantive rules and norms of international law. It must also be remembered that in February 1944 the Inter-Allied Committee on the future of the PCIJ adopted a Report. It was proposed that the revised Statute of the Court should not provide for any kind of obligatory jurisdiction, for any such step was considered premature.

[40] **C Tams,** (OUP 2013) 379. As per the future, **R Kolb,** (Hart 2013) 1211.

[41] **P Couvreur,** (Martinus Nijhoff 1997) 85.

[42] *Oppenheim's International Law – United Nations,* Edited by **R Higgins et al.**, Volume II (OUP 2017) 29.425, p. 1243.

witnessed by the substance – matter of the disputes brought before it. ***President Sir Robert Jennings*** was mindful that

> "*resort to third party settlement by definition transfers to others the direct responsibility. In a word, there is somebody else to blame. But there is another reason why the Court is good for hard cases: I refer to a quality that is part and parcel of the process of adjudication by a Court of Law*".[43]

Some States hesitate to refer any dispute to the Court, for they fear the solution to be rendered cannot be kept within their absolute control.[44] Even worse, the practice of other States (alas, this includes the majority of permanent members of the Security Council) indicates that they feel all-powerful, if not all-Mighty. Since adjudication applies mainly legal criteria, ***Nicolas Politis*** was quite right when observing that

> "*[t]he obligation of recourse to a Court is above all a question of confidence; and confidence either does or does not exist*".[45]

Presumably, the real question is how far States accept the actual need of the international community to employ a judicial mechanism for the settlement of international disputes. True, international law without adjudication has long been normal in international affairs and litigation might not be suitable for all

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[43] **Sir Robert Jennings,** (Martinus Nijhoff 1997) 83.
[44] **M Bedjaoui**, (note 43) 20. Also, **A Adede,** (note 41) 49, **V Lowe,** 61 ICLQ (2012) 209.
[45] League of Nations, Document Concerning the Action Taken by the Council of the League of Nations Under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court (1921) 243.

international disputes.[46] This clearly reflects past and present. I see no reason why it should dominate the future, given the tremendous advance of technology, the social awareness of international community and some States' legal awakening.

It is the refusal of States to submit their disputes to judicial settlement and not the nature of the controversy that matters. It is argued that disputes involving the use of force are a special category and one should not expect there will be an agreement between States to submit them, especially with on-going hostilities, to adjudication.[47] This argument rests well in practice that vindicated sovereignty (and indeed the fullest international capacity)[48] enjoyed by the States. Of importance also, during the late sixties and seventies many States announced a policy of denial to acknowledge customary international law bequeathed by nineteenth century Europe, let alone to submit their disputes to adjudication.[49] During the late nineties and onwards, most of the very same States regularly enjoy the services rendered by the ICJ, appear before it and resolve amicably their disputes.

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[46] **J Merrils,** (CUP 2014) 19 & 23, respectively.

[47] **C Gray,** (note 46) 305.

[48] It has been pronounced that "*[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extend of their legal rights, and their nature depends upon the need of the community*", ***Reparation for Injuries Suffered in the Service of the United Nations***, *Advisory Opinion of 11 April 1949, I.C.J. Reports (1949), p. 178*, also available at http://www.icj-cij.org/docket/files/4/1835.pdf (last visit 2FEB2018). The legal nature and status of a non-State entity, albeit in a limited context, was examined by the Court, its Opinion being that "*taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion [...] Decides [...] Palestine may also take part in the hearings*", ***Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,*** *Order of 19 December 2003, I.C.J. Reports (2003), p. 429, para. 2,* also available at *http://www.icj-cij.org/docket/files/131/1527.pdf* (last visit 2FEB2018).

[49] **S Rosenne,** (note 36) 561. It encapsulated the traditional belief that "*any surrender of the powers associated with sovereignty is an acknowledgement of national weakness and will indeed lead to a prerogative diminution of state power*", analysed by **C Weeramantry,** (note 6) 106.

Still, there is an imperative need for legal coherence. Despite the legal clarity of the respective rules, there is an obvious need for a more homogenous environment. Practice has proven that no real and imminent danger of 'judicalisation' of international law exists, for the Bench champions diachronically judicial restraint. Applying existing norms to novel and more complex international situations is a delicate work and has to be done under the legal authority of the Court.

Some fifteen years ago, ***Judge Oda*** rightly observed that

> "[*t]he idea that the optional clause should be accepted by all States with the least possible reservation and without any fixed period of validity seems to be a fairly popular notion.*"[50]

Given the authoritative pronouncement of the Court that

> "*the United Nations Charter contains no specific provision of itself conferring compulsory jurisdiction on the Court*",[51]

a more intimate look on the precise content of the so-called 'optional clause' declarations in force becomes necessary, in order to discharge the argument raised that States move away from the uncertain waters of general compulsory jurisdiction.

It is my profound belief that assessing the actual practice of each State in being prepared to entrust the settlement of its disputes to the Court remains the

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[50] **S Oda,** (2000) 49 ICLQ 251. Also **S Rosenne,** Volume II (Martinus Nijhoff 2006) 701, **J Merrills**, (Brill Nijhoff 2002), vol. 1, 438, **R Kolb,** (note 39) 447, **J Quintana**, (Brill Nijhoff 2015) 95, **C Tomuschat** (OUP 2006) 589, **G Törber**, (Hart 2015).

[51] ***Aerial Incident of 10 August 1999 (Pakistan v. India),*** *Jurisdiction of the Court, Judgment of 21 June 2000, I.C.J. Reports (2000), p. 32, para. 48*, also available at http://www.icj-cij.org/docket/files/119/8088.pdf (last visit 2FEB2018).

utmost priority. Not surprisingly, efficient machinery is available. A total of seventy three (73) States have deposited their declarations, albeit with reservations accompanying them.[52]

I hold the firm view the Court enjoys the authority and jurisdiction to hear and try disputes like the ones examined. The judgment of the Court in the *DRC v. Uganda case* provides an excellent reply to scepticism.[53] That said, out of those 73 declarations, some twenty (20) States have included a *war type* (or equivalent) reservation,[54] therewith excluding this type of disputes. This conclusion was reached by following strictly the relevant test set by the Court. The wording of this format for reservations, in the Court's own words,

> "*[...] exclude[s] not only disputes whose immediate 'subject matter' is the measures in question and their enforcement, but also those 'concerning' such measures and, more generally those having their 'origin' in those measures ('arising out of), that is to say those disputes which, in the absence of such measures, would not have come into being."*[55]

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[52] For the full list, please visit the official site of the Court at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visit 2FEB2018).

[53] ***Case Concerning Armed Activities on the Territory of the Congo (DR of the Congo v. Uganda),*** *Judgment of 19 December 2005, I.C.J. Reports (2005), p. 168,* also available at http://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf (last visit 2FEB2018).

[54] Namely the declarations of Djibouti, Germany (indirectly), Egypt (only Suez), Greece, Honduras, Hungary, India, Ireland (UK exception), Kenya (partially-occupation), Lithuania (on UN Chapter VII), Malawi (occupation), Malta (occupation), Mauritius (occupation), Nigeria, Pakistan, Poland (time bar), Romania, Spain (time bar), UK (time bar), Sudan. *Inter alia,* **S Alexandrov,** (Martinus Nijhoff 1995). Conditions and other 'generic' types of reservations (e.g. of domestic jurisdiction, multilateral, commonwealth etc) remain outside the ambit of this presentation.

[55] ***Fisheries Jurisdiction (Spain v. Canada)****, Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 432, para. 62,* also available at http://www.icj-cij.org/files/case-related/96/096-19981204-JUD-01-00-EN.pdf (last visit 2FEB2018).

A word of caution is needed. Indeed the compulsory jurisdiction of the Court is based on the law in force at the time of the institution of the proceedings and it is never possible to determine *in abstracto* whether a case of compulsory jurisdiction exists, without studying the application pending.[56] Consequently, I put before you that the Court enjoys a *prima facie* basis of jurisdiction with respect these disputes as between these 53 States, which is more than ¼ of the current members of the UN.

[56] **S Rosenne,** (note 50) 794.

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4. Concluding Remarks

So allow me to conclude with some more constructive observations, given that within the international community one essential feature of the rule of law, namely the command imposed from outside, is put in jeopardy by state sovereignty, which deduces the binding force of international law exclusively from the will of each State.[57]

Indeed litigation is not a panacea. That said, its products prove the interplay between the willing, namely the protagonists of international society. Engaging international responsibility of a State, a task closely connected to sovereignty, is a primary, not the sole goal of adjudication. Hence, an Investment Tribunal could find itself out of its depth when touching issues of general international law or the laws of war, for it is not designed to deal with such problems.[58] Moreover, inconsistent arbitration rulings in similar cases are not that unusual.[59]

What might form part of an "investment" continues to be part of a State's sovereignty. This is particularly so in cases when an investment touches upon (or even incorporates) cultural property located in a host State. It is beyond any plausible imagination for a State to waive or be alienated from the protection of

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[57] **Sir Hersch Lauterpacht,** (OUP 2011) 3.
[58] **M Sornarajah,** (note 11) 248.
[59] **S Franck,** 73 Ford. L Rev. (2005) 1521.

its cultural treasures. Sovereignty remains the primary shield for an effective protection. Surely, this is not a matter falling essentially within the State's prerogative or its *domain reserve,* but goes well beyond the aim and powers of any Investment Tribunal, whose jurisdiction is well-tailored.

Additionally, following the cataclysmic effects of the ICTY and ICC case-law, one can plausibly argue that this is not a matter of sovereignty strictly speaking. It has been shown there is a shift towards upholding notions of collective rights, enjoyed by either a particular community or by the international community as a whole. As for the exception, namely when non-state actors are implicated, international, *sui generis* and mixed Courts and Tribunals are catching up real fast, since their jurisdiction is criminal and extends over persons only.[60] At this point, one can find the imperative need for a fertile (and by no means patronising) dialogue between the Court and other Tribunals, e.g. where a State fails to grant protection and security, it fails to act and prevent actions by third parties that is required to prevent.[61]

Since the Court does not operate in complete isolation, I share the view that a cautious approach is truly needed.[62] The Court's rulings in *Nicaragua* as well as in the *Oil Platforms* address mainly issues of security. By contrast, in the investment context, issues of responsibility for war destruction take into serious consideration the view of protecting alien investors. During the last

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[60] **C Henderson, C Ryngaert**, and **J Paust,** (Bloomsbury 2015) 77, 163 and 273, respectively.

[61] *Eastern Sugar B.V. v. the Czech Republic*, § 203, p. 43, available at https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf (last visit 2FEB2018).

[62] **Judge P Kooijmans,** 56 ICLQ (2007) 741.

twenty five years, the record is quite clear: the Court has not excused itself out of the *exelixis* of the community it serves. On a number of disputes the Court has juxtaposed the traditional 'bilateralist' structure of international law with the notion of 'common', 'collective', or 'general interest'.[63]

Therefore, I am confident it will easily move forward e.g. from Cultural Property to Cultural Heritage, the latter being an indication of a newly formulated «*international public policy*»[64] and the outcome of a dialogue between fora, whether international or domestic.[65]

No one else but the Court has shown its unparalleled resolution to draw on the work of specialized institutions and tribunals (whether arbitral or special) and use their technical expertise and limited jurisdiction to bolster its own role. After all, specialized institutions and tribunals meet and tackle specific needs, either *ratione personae* or *ratione loci* and offer a *forum* to individuals and other private entities deprived of standing before the Court.

Elaboration and interpretation of cultural heritage rules in armed conflict do not derive only from contentious cases. There is also the instructive role of advisory proceedings, given the multiplication of instruments regulating the protection of cultural heritage and the inherent need for harmonisation. Right from the outset, an advisory opinion asked in the proper fashion by the UN

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[63] **V Gowlland-Debbas,** (note 41) 349.
[64] **J Vidmar,** (OUP 2012) 13, **V Gowlland–Debbas,** (OUP 2011) 241 and **S Villalpando,** 21 EJIL (2010) 387.
[65] **K J Keith,** 59 ICLQ (2010) 895, 907-908 *loc. cit.* **H Gross Espiell,** (Martinus Nijhoff 2005) 151, 160.

General Assembly or the Security Council may be of extreme value. Due to time limitations, in-depth analysis lies beyond the ambit of this presentation.[66]

It is also imperative for the Court to have a clear picture of the specific situation and its peculiarities. For example, since damage caused to cultural heritage is basically irreparable, the content of the so-called precautionary principle has to become stricter than usual. Would that be the case, the Court's practice could manifest its ability to react promptly - not at the expense of quality of reasoning. The Court remains at the service of international community in its entirety and has been

> "[…] *radiating through the entire global community a consciousness of the international rule of law*".[67]

The Court does not sit at the top of any jurisdictional pyramid. It does not enjoy the prerogative to adjudicate at will a preferential set of disputes. It is established to try any dispute whatsoever and produce a fair and objective reasoned solution to it. Its job is to apply the law. This may explain why it faced many novel situations and rendered, on a number of disputes, bold decisions, while maintaining a careful balance between competing considerations.

The Court seized many times the opportunity to shape and polish the law. It has also assisted States and the international community as a whole to change

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[66] *Inter alia,* **C Greenwood,** (Brill/Nijhoff 2012) 68.
[67] **C Weeramantry,** (note 43) 1.

international law, without derogating from its function and role. It is an essential part of the process and there is widespread agreement on this. Access to the Court has become 'universal in nature'.[68]

Although there is no concrete and hard evidence to support the view that a multiplicity of international tribunals has impaired the unity of jurisprudence, the legal audience focuses on is the influence of the Court on the system of substantive law. As a general matter its pronouncements are presumed to be of great value, notwithstanding its alleged role of the 'gatekeeper', that is to say overseeing and controlling the evolution of certain rules and principles of international law. The Court does not exercise a monopoly over the guardianship of the rule of law, but shares a concurrent responsibility with all other actors in the field.[69]

I hold the firm opinion that future cases dealing with such issues should be referred to the full Court, for a wide and comprehensive experience will be needed. I am confident that should any such case arise, States will appear before it. Such conduct will justify both loyalty and confidence in its rulings.

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[68] **A Zimmermann,** (note 66) 34. For a different approach, **P Bodeau-Livinee & C Giorgetti,** 15 LAPE (2016) 177, 179.

[69] **M Shahabudeen,** (note 41) 8. Also, **C Romano,** (2011) 2 JIDS 241.

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