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The Human Dimension of International Cultural Heritage Law: An Introduction

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1. In introducing this *EJIL* symposium, I cannot help but recall a much debated article published in 1986 in the *American Journal of International Law*. The author of that article, Stanford professor John Merryman, theorized that there are 'two ways of thinking about cultural property'.[1] The first, he argued, is the national(istic) way, which conceives of cultural property as part of the nation, with the attendant desire of governments to jealously retain it within state boundaries and to limit its international circulation. The second is the international way, which views cultural property as the heritage of humankind and supports the broadest access and circulation to facilitate exchange and cultural understanding among different peoples of the world. The author left no doubt that the latter view was to be preferred for its alleged capacity to contribute to a cosmopolitan order, in which cultural property can be freely accessed and thus contribute to the intellectual and moral progress of humanity.

One may wonder whether this dual perspective accurately reflected the spirit of the law and the policy attitudes of the time when the article was written. Certainly, it cannot adequately explain the present state of the law and, in particular, of international law. Today, there are more than just two ways of thinking about cultural property. Cultural property may be seen as part of national identity, especially in the post-colonial and post-communist context, but it can also be looked at as part of the 'territory', the physical public space that conditions our world view and which is part of what we normally call 'the environment' or the 'landscape'. Cultural property may be seen as moveable artifacts susceptible to economic evaluation, and for this reason subject to exchange in international commerce; but it may also be thought of as objects endowed with an intrinsic value as expressions of human creativity and as part of a unique or very special tradition of human skill and craft that today we call 'intangible cultural heritage'. Cultural property may be seen as the object of individual rights,

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[1] Merryman, 'Two Ways of Thinking about Cultural Property', 80 *AJIL* (1986) 831.

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property rights, but also as 'communal property' or public patrimony, which governments have a duty to safeguard and transmit to future generations. Further, cultural property may be seen as an essential dimension of human rights, when it reflects the spiritual, religious and cultural specificity of minorities and groups. This specificity, which is actually antagonistic to Merryman's idea of the nation, finds it most pointed expression in the cultural rights of indigenous peoples set down in the 2007 United Nations Declaration.[2] Finally, another way of thinking about cultural property is to place it in the context of the evolving structure of the international law of armed conflict. In this regard, cultural property has become an element for innovation and the progressive development of the law in at least three distinct directions: 1) the elevation of attacks against cultural property to the legal status of international crimes, especially war crimes and crimes against humanity; 2) the consolidation of the law of individual criminal responsibility *under international law*, not only under domestic law, for serious offences against cultural objects;[3] 3) the progressive development of the law of state responsibility for the intentional destruction of cultural heritage.[4]

This increasing complexity in the ways of thinking about cultural property has been accompanied by an increasing complexity of the law. Since the creation of the United Nations Educational, Scientific and Cultural Organization (UNESCO),[5] numerous multilateral treaties have been adopted, which have contributed to developing a precise meaning of the concept of 'cultural property' and 'cultural heritage', previously considered elusive and fragmented.[6] International humanitarian law has been complemented by specific rules on the protection of cultural property in the event of armed conflict, both international and internal.[7] Obligations to prevent and repress

[2] United Nations Declaration on the Rights of Indigenous Peoples, GA Res. of 13 September 2007, Sixty-first Session, Supplement No. 53 (A/61/53), especially Articles 11, 12,13, 14, 15 and 16.

[3] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted 26 March 1999, published in 38 ILM (1999) 769, especially Articles 15–18; Article 3d of the Statute of the International Criminal Tribunal for Yugoslavia, 32 ILM (1993) 1192, and Article 8 of the Statute of the International Criminal Court 37 ILM (1998) 999.

[4] See the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage adopted by the General Conference of UNESCO at its 33rd session, Paris, 19 October 2005, reprinted in *Standard Setting in UNESCO*, vol. II (2007) 733. See also Francioni and Lenzerini, 'The Destruction of the Buddhas of Bamyan and International Law', 14 *EJIL* (2003) 619.

[5] UNESCO was created on 16 November 1945 by the representatives of 37 countries who signed the Constitutive Act (entry into force 4 November 1946, available at www.unesco.org/new/en/unesco/about-us/who-we-are/history/constitution/).

[6] The synthetic expression 'cultural property' was used for the first time in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html. In earlier international instruments there was no unitary notion of cultural property, but rather an empirical indication of objects of historical, monumental or humanitarian interest that should be spared from acts of war. See Articles 27 and 56 of the Annexed Regulation of the IV Hague Convention of 1907, as well as Article 5 of the IX Hague Convention.

[7] See the 1949 Geneva Conventions (Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War) as well as their Additional Protocols of 1977, particularly Articles 52(1), 53 and 86 of Protocol I and 16 of Protocol II.

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the illicit traffic of moveable cultural property[8] have been recognized by a growing number of importing and exporting states.[9] The innovative concept of 'world heritage' has provided the basis for the development of a system of international cooperation for the conservation and valorization of certain cultural and natural properties of outstanding universal value.[10] More recently, at the threshold of the 21st century, the scope of international treaty protection has been extended to underwater heritage[11] and intangible cultural heritage.[12] Some of these treaties have acquired a near-universal character, as almost all states have become parties to them. Such is the case of the 1972 World Heritage Convention, for which there are currently 187 states parties. Other treaties, even if they have not yet gained a universal scope of application, have met with a constant increase in the number of states parties in the past 10 years; this is the case of the 1970 Paris Convention 'on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property'[13] and the Hague Convention on the protection of cultural property in the event of armed conflict,[14] with its two additional protocols.[15]

2. What is the impact of this complex movement on international law? Does international law on the protection of cultural heritage remain confined to treaty law (and, to some extent, soft law) or has it matured into a body of customary rules and general principles applicable independently of states' consent to be bound by ad hoc treaties? And if a body of general norms of international law has emerged, or is in the process of emerging, what is its relation to other branches of international law? In spite of the increasing relevance of culture in contemporary international law discourse about pluralism, multiculturalism and the clash of cultures, the answer to these questions has been rather opaque in international practice.

8 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in Paris on 14 November 1970, available at http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

9 See http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha. This Convention has been ratified by 120 states, among which the largest importers and exporters of cultural objects, such as the United States, the United Kingdom, Switzerland, Japan , Italy and France.

10 Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972, available at http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html.

11 Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on 2 November 2001, available at http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&\URL_SECTION=201.html.

12 Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in Paris on 17 October 2003, available at http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html.

13 See *supra* note 9.

14 There are 123 states parties to the 1954 Hague Convention, the last being the United States, which ratified the Convention on 13 March 2009 after more than half a century; see http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha.

15 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999.

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The International Court of Justice (ICJ) has only rarely been in a position to address these questions. Four decades ago, the Court dealt with the case of the *Temple of Preha Vihear*,[16] although the cultural property in question was not the subject matter of the dispute *in se et per se* – it was only the point of reference for the establishment of a controversial boundary – the Court ruled that Thailand was under an international obligation to return parts of the cultural property that had been removed from the site of the temple. Another case, brought by Liechtenstein against Germany in 2004 for the return of certain works of art confiscated after World War II in a third country, never moved beyond the preliminary objection phase when the Court declined to exercise jurisdiction.[17] More recently, the ICJ has had the opportunity to elaborate on the relevance of cultural heritage in the context of genocide,[18] and in the 2009 case of *Navigational and Related Rights (Costa Rica v. Nicaragua)* it upheld the cultural traditions of the local indigenous population (fishing) as a component of their right to the preservation of a form of subsistence economy.[19]

The European Court of Human Rights, for its part, has adjudicated a few cases involving the difficult accommodation of the individual right to private property and the public interest in the conservation of cultural goods. But, unfortunately, in these cases[20] the Court has not gone beyond a strict application of the provision of Protocol I on the protection of the individual right of 'every natural or legal person to the peaceful enjoyment of his possessions'.[21] Thus, the public interest in the conservation of a collective cultural patrimony or of the public value of the landscape has been left in the shadow of the law.

3. This scarcity of jurisprudential elaboration notwithstanding, a careful examination of international practice shows that certain general principles are beginning to be expressly recognized as part of a growing body of international law that builds on the human dimension of cultural heritage. The first and foremost of such principles concerns the general obligation to respect – i.e., to abstain from acts of wilful

16 *Case Concerning the Temple of Preha Vihear (Cambodia v. Thailand)*, judgment of 15 June 1965, ICJ Reports (1962), at 6 *et seq.*

17 *Certain Property (Liechtenstein v. Germany)*, judgment of 10 February 2005.

18 *Genocide case (Bosnia-Herzegovina v. Serbia)*, judgment of 26 February 2007. Here the Court was presented with the applicant's argument that the documented systematic destruction of religious buildings, libraries and other cultural properties was evidence of the respondent's plan to accomplish a deliberate act of obliteration of all traces of life and culture of the Muslim population in the targeted territory, so as to amount to genocide. The Court, although recognizing the character of international crimes of such acts, declined to consider them as evidence of the special intent to commit genocide (paras 335–344).

19 Judgment of 13 July 2009, paras 134–144.

20 See particularly *Beyeler v. Italy*, Application n. 33202/96, decision of 5 January 2000, concerning the compatibility of Italy's pre-emption and export control law on art works with Protocol 1 to the European Convention on Human Rights, and *Sud Fondi Srl c. Italia*, application n. 75909/01, decision of 20 January 2009, where the Court found that the Italian decision to demolish a large building erected in a protected coastal area in violation of national landscape regulation amounted to a breach of the principle *nullum crimen sine lege* (Article 7 of the Convention) and of the right to property.

21 Article 1 of Protocol I.

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destruction and damage – cultural heritage of significant importance in the event of armed conflict. The rationale underlying this principle is eloquently expressed in the Preamble of the 1954 Hague Convention, which states that '. . . damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'. It is interesting to note that this statement speaks of 'people' and not states, and of 'the cultural heritage of all mankind', so as to underscore its connection to human rights and to foreshadow the idea of an integral obligation owed to the international community as a whole (*erga omnes*) rather than to individual states on a contractual basis. This principle has been given further legal strength and scope by the adoption in October 2003 by unanimous vote of the UNESCO General Conference of the Declaration on the Intentional Destruction of Cultural Heritage,[22] which applies in times of war as well as in peacetime. It is interesting that just a year after the adoption of the 2003 Declaration, the Claims Commission established by the peace accords to end the 1998–2000 war between Eritrea and Ethiopia reached the conclusion that the intentional destruction by the Ethiopian army of the *Stela of Matara,* an object of great historical and cultural importance for Eritrea, was an internationally wrongful act for which Ethiopia was to be held responsible. As neither party to the conflict was a party to the 1954 Hague Convention, the Commission relied in this ruling on customary international law. And, as a matter of fact, paragraph 113 of the decision expressly states that '. . . the felling of the stela was a violation of customary international humanitarian law'.[23]

It would be wrong to think that the principle of respect for cultural heritage has remained confined within the classic scheme of state responsibility for wrongful acts. What is interesting for the purpose of this symposium on the human dimension of cultural heritage law is that the obligation to respect has transcended the static scheme of state responsibility and has implicated the international criminal liability of individuals for grave acts of destruction or damage to cultural heritage. This principle, besides being recognized in Articles 15–18 of the Second Protocol to the 1954 Hague Convention, has been enforced in the jurisprudence of the International Criminal Tribunal for Yugoslavia, which has gone beyond the specific provision of Article 3(d) of its Statute, placing offences against cultural property in the category of 'violations of the laws or customs of war', to expressly recognize that the criminalization of the wilful destruction of cultural heritage is sanctioned by customary international law.[24]

4. In addition to the risk of destruction, armed conflict and military occupation present the risk of looting, unauthorized appropriation and illicit transfer of cultural objects. The prohibition of pillage in an occupied territory has a long pedigree in international treaty law, starting with the 1907 Regulations annexed to the IV Hague Convention

[22] *Supra* note 4.

[23] Partial Award – Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22, 28 April 2004. reprinted in Daly, 'The Potential for Arbitration of Cultural Property Disputes', in Permanent Court of Arbitration, *The Law and Practice of international Courts and Tribunals* (2005), at 261 *et seq.*

[24] *Prosecutor v. Kordic and Cerkez,* ICTY Case No. IT-95-14/2-T , 26 February 2001, para. 207.

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on land warfare, to the 1943 London Declaration and the First Protocol to the 1954 Hague Convention. It would be hard to maintain today that this principle applies exclusively as a matter of treaty law. A growing body of domestic case law has developed in the past two decades, which interprets and applies domestic law consistently with the international obligation to prevent spoliation and ensure the return of cultural heritage of occupied territories.[25] But, most importantly, this principle has been elevated to the rank of a mandatory rule by Security Council Resolution 1483 of 2003 concerning the occupation of Iraq. This resolution was adopted in the shadow of the disgraceful looting of Baghdad National Museum, the National Library and other sites in Iraq as a consequence of the institutional collapse of the country following its invasion by the United States and the United Kingdom.[26] With this Resolution, binding upon all UN Member States by virtue of Chapter VII of the Charter, the Security Council has contributed to the affirmation as a matter of general international law of the obligation of occupying powers to act in such a way as to ensure that cultural property in an occupied territory is not illegally appropriated and transferred, and that in the event of illegitimate transfer, it is to be returned.

5. Moving from the law of armed conflict to peacetime international law, we can see that in this context the human dimension of cultural heritage becomes even more palpable and legally relevant. This is made evident by the increasing cross-fertilization between human rights and cultural heritage law. The safeguarding of living cultures has emerged in the past decade as one of the new dimensions of international cultural heritage law. The link with human rights, and in particular with the collective dimension of the right to access, perform and maintain a group's culture, underlies the adoption in 2003 and the remarkable success of the Convention for the Safeguarding of Intangible Cultural Heritage. This is the first binding instrument to extend the scope of international protection from tangible cultural property to oral and immaterial heritage.[27] The qualitative shift of this convention consists in bringing the focus from the protection of the cultural object to the social structures and cultural processes that have created and developed the 'intangible' heritage. States remain the contracting parties to the convention but the substantive addressees are the cultural communities and human groups, including minorities, whose cultural traditions are the real object of the safeguarding under international law. Similarly, the interconnectedness between cultural heritage and human rights is informing the recent movement toward the protection and promotion of cultural diversity,[28] which is motivated by the

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[25] See the seminal case *Church of Cyprus and the Republic of Cyprus v. Goldberg*, judgment of the 7th Circuit, 1990, 917 F. 2d 278.

[26] UN Doc. S/RES/1483 (2003).

[27] The Convention for the Safeguarding of Intangible Cultural Heritage was adopted by the UNESCO General Conference on 17 October 2003 and entered into force on 20 April 2006. It is now in force for 133 states.

[28] See the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on 20 October 2005, reprinted in *Standard Setting in UNESCO*, *supra* note 4, at 326 *et seq*.

desire to preserve the multiplicity of cultural and artistic expressions of the peoples of the world so as to counterbalance the powerful levelling force of economic globalization. These different human dimensions of cultural heritage law have found a new synthesis in the recently adopted UN Declaration on the Rights of Indigenous Peoples, whose *raison d'etre* is the preservation and development of the cultural identity of indigenous peoples, so closely linked to their natural environment and their material and intangible cultural heritage.[29]

6. Now, back to the symposium. Without claiming to cover all aspects of the complex development of international law in this field, the eight articles published in these pages contribute to an elucidation and deeper understanding of the most significant aspects of the 'human dimension' of cultural heritage law. The first two articles both deal with the intractable subject of genocide and restitution of cultural property. Ana Vrdoljak revisits this subject in light of the century-long evolution of the law on the protection and restitution of cultural property and of its interaction, first with minority protection, and then with the prevention and punishment of genocide. She argues convincingly that, beyond the monolithic concept of the nation-state, the driving force of these different strands of the law is the continuing concern of the international community to ensure the effective contribution of each people and group to the cultural heritage of humanity.

Thérèse O'Donnell places her contribution in the context of the dark legacy of Holocaust looting and of the contemporary development of principles of transitional justice. She examines the persistent difficulties posed by claims and programmes for the restitution of Nazi-looted art and argues that, to the extent that restitution should aim at the reintegration of individual and group identities, the process cannot be divorced from the objectives of reconciliation and transitional justice. These objectives, she concludes, can hardly be achieved by the current zero-sum-game inherent to the adversarial-judicial process followed in restitution claims: a more nuanced approach is needed, in her view, which transcends state and individual interests in the cultural objects and recognizes the inherently expressive power of art as a medium for collective memory and reconciliation.

The contributions by Lucas Lixinski and Federico Lenzerini discuss the recent introduction of the concept of 'intangible heritage' in the constellation of cultural expressions worthy of protection under international law. Both authors recognize the innovative character and remarkable success of the 2003 Convention; yet at the same time they lament its shortcomings, particularly in that it leaves entirely to states the determination and presentation of a type of heritage that is deeply entrenched in community traditions and identities not necessarily coinciding with those of the nation-state. Here the human dimension of cultural heritage lies in the accommodation between sovereign rights at the international level, on the one hand, and community

[29] Cf. *supra* note 2.

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and group claims within the national arena, on the other hand. For Lixinski this accommodation is possible by means of increased community participation in the implementation of the Convention; for Lenzerini, it can be enhanced by a creative resort to the law of international human rights.

The three contributions by Siegfried Wiessner, Karen Engle and Gaetano Pentassuglia concentrate on the human dimension attached to the cultural and natural heritage of indigenous peoples.

Wiessner's article robustly champions the cause of indigenous peoples and looks at the 2007 Declaration as a meaningful first step in the quest for an international legal order that ensures the preservation and flourishing of a culture that, in the words of the author, has survived 'the indignities of colonization and the lure of modern society'. Engle takes a harder look at the Declaration and tends to see the glass half empty rather than half full. Recalling the debate and criticism that followed the adoption of the 1948 Universal Declaration of Human Rights, she criticizes the attempt to 'normalize' the rights of indigenous peoples by mainstreaming them within the liberal human rights paradigm. She cautions against building the cultural and social development of indigenous peoples on the fragile foundation of the UN Declaration. Looking beyond the Declaration into the emerging body of international judicial practice, Pentassuglia provides an in-depth comparative analysis of the jurisprudence of the Inter-American and African human rights bodies, and argues that a cross-fertilization between international human rights law and specific entitlements of indigenous peoples offers a more realistic prospect for indigenous development than does the elaboration and advocacy of a separate set of internationally binding principles on indigenous peoples' rights.

Finally, the article by Micaela Frulli provides a valuable contribution to an understanding of the human dimension of cultural heritage law from the point of view of international humanitarian law and criminal law. Her comparative analysis of the International Criminal Court Statute and of Protocol II to the 1954 Hague Convention highlights the rather conservative 'civilian-use approach' of the former as opposed to the 'cultural-value oriented' approach of the latter. She concludes with a plea for the adoption of the more progressive model employed in Protocol II and for a widespread implementation of its advanced jurisdictional criteria.

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