9-2020

Cooperation in the International System: An Interdisciplinary Investigation at the Intersection of International Relations and International Law

Kalyani Unkule

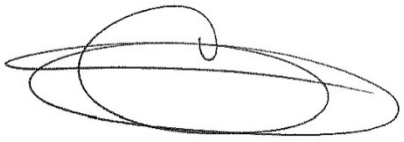
COOPERATION IN THE INTERNATIONAL SYSTEM: AN INTERDISCIPLINARY INVESTIGATION AT THE INTERSECTION OF INTERNATIONAL RELATIONS AND INTERNATIONAL LAW

Kalyani Unkule

Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

Doctoral Committee

Professor Jayanth Krishnan
Chairperson



Professor Christiana Ochoa

Professor Joseph L. Hoffmann

October 1, 2020

COOPERATION IN THE INTERNATIONAL SYSTEM: AN INTERDISCIPLINARY INVESTIGATION AT THE INTERSECTION OF INTERNATIONAL RELATIONS AND INTERNATIONAL LAW

Kalyani Unkule

Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements

for the degree

Doctor of Juridical Science

September 2020

Contents

1. **Introduction……. 3**
2. **Seeking: Research Methodology……12**
3. **Protecting Cultural Heritage: Game Theory…….. 55**
4. **Protecting Cultural Heritage: The Human Security Paradigm…. 83**
5. **Protecting Cultural Heritage: Constructivism…….. 109**
6. **Protecting Cultural Heritage: Responses in International Law… 142**
7. **Conclusion……. 194**

Chapter 1

Introduction

When Columbus lost his head

In June 2020, demonstrators marched in the UK in solidarity with the Black Lives Matter demonstrations ongoing in the US. A group of demonstrators in Bristol brought down and dumped in the river the statue of Edward Colston who was involved in the slave trade in the 17th century.

In the German language, a distinction is drawn between Denkmal – which is a monument and Mahnmal – which is a structure memorialising a painful chapter in history which serves as a reminder that such history must not be repeated.

The uproar surrounding events in Bristol saw much discussion around the life and legacy of Colston. But long after the controversy has blown over, the question that will remain with us is this: What does heritage stand for and why it matters so much to us? Those who oppose the toppling of the statue condemn such actions as erasure of history and those that support its removal decry it as an affront to those at the receiving end of historical injustice and marginalisation. Both parties agree that the statue – in both standing there for 125 years and in no longer – serves the purpose of educating future generations. Referring to similar takedowns of statues in cities across the United States, one commentator viewed the events as "protest against the current neoliberal policies that simultaneously expel the lower classes from urban centers, and transform them into

frozen vestiges. The symbols of old slavery and colonialism are combined with the dazzling visage of real estate capitalism — and these are the protestors' targets"[1].

Boaventura de Sousa Santos describes these events as statues leaping from the past into our present. He perceives the attacks against them as an expression of discontent against "unjust power (which) favors the rise of racism, the negation of other stories, violence against women, and homophobia"[2]. The answer, for Boaventura de Sousa Santos, lies in a creative liberation pedagogy, based on a recognition that the oppressor too now seeks liberation.

The artist Banksy came forward to propose a compromise: Reinstate the Colston statue to its plinth at an angle with the addition of tugging protestors on the ground having halfway uprooted it.

Some debating the issue have taken a different angle: should the removal of the statue have proceeded in a more orderly manner rather than what can now be considered unlawful destruction of public property? The charged polemics of the episode directly confront politics – domestic and international – with this question: Should order always be privileged over justice?

****

[1] Traverso E (2020), Bringing Down Statues Doesn't Erase History, It Makes Us See It More Clearly, THEWIRE.IN
https://thewire.in/world/statues-racism-history-protests
Accessed June 27, 2020

[2] De Sousa Santos B (2020), The Statues of our Discontent, Critical Legal Thinking website
https://criticallegalthinking.com/2020/06/20/the-statues-of-our-discontent/
Accessed June 23, 2020

US withdrawal from UNESCO

Recognising the International Committee on Intellectual Cooperation, which was active in Europe in the 1930s and 1940s, as the precursor to UNESCO, Lynn Meskell characterises the latter as "embedded within modernist principles of progress and development and similarly subscribes to the liberal principles of diplomacy, tolerance, and development"[3]. The role of international organisations is a key consideration in this study and UNESCO is heavily focused on in this regard, due to its mission in the field of heritage.

In 2017, the United States of America withdrew completely from UNESCO, having discontinued funding to the organisation since 2011. Israel also withdrew from UNESCO along with the US in an instance of what the realists would term bandwagoning. A major concern for both countries is reported to have been the recognition of Palestine as a full member state and designation of certain sites as Palestinian heritage.

In 2018, the United States withdrew from the United Nations Human Rights Council and in 2020 from the World Health Organisation.

****

Post-COVID world order and international cooperation

Ten questions worth asking:

1. Who will be the winners and losers in international society?
2. Will a world order centred around one hegemonic power cease to exist?

[3] Meskell L (2013), UNESCO's World Heritage Convention at 40 Challenging the Economic and Political Order of International Heritage Conservation, Current Anthropology Volume 54, Number 4, p484

3. Will another hegemon emerge and engage in revisionism and what toll will such a transition exact?
4. Which aspects of history will be contested and resuscitated for forging of identities and articulation of political agendas?
5. How will powerful groups respond to challenges to their privilege?
6. How will the global economy adapt and will neoliberalism decline?
7. Will international organisations reform themselves or recede irredeemably?
8. Will conventional geostrategic rivalries be heightened or supressed by the impact of climate change?
9. What is the nature of preparedness required to cope with the psychosocial fallout of conflict and uncertain technological change?
10. Can we keep teaching globalisation and other foundational concepts in social science, law and international politics the way we have been? Have disciplinary silos been rendered completely irrelevant, even counterproductive?

****

Memory in Law

The concept of memory in law has mainly been interpreted as a psychosocial concept in the courtroom setting. Legal scholars, other than criminologists, have seldom found it necessary to unpack the phenomenon of memory. In the literature surveyed for this study, I was able to find one study which links memory and law towards analysing the impact of the latter on preventing mass atrocities. The authors Joachim J Savelsberg and Ryan D King propose two hypotheses in this context: first, "once established through trials and other mechanisms, collective memory may counteract violence directly, by

delegitimising grave human rights violations, or indirectly, by evoking new control responses" and second, "the narrative history produced by trials is unique in that it reflects the institutional logic of the legal sphere"[4]. This study rescues memory from cooption into this institutional logic of the legal sphere in two ways: first, through an exploration of the way in which memory is embodied and enacted in heritage we have a way to understand it anew; second, by observing how memory itself can fuel the conflict which law seeks to redress, particularly when it manifests itself as intergenerational trauma.

****

The Marble that saved the Mausoleum

The story of an attempted sale of the Taj Mahal by Governor General Lord Bentinck in the early 1830s has survived the inherited lore from British India. The demolition of several structures in Agra to repurpose their materials for construction of buildings of the imperial administration is well established. As to whether the Taj Mahal itself was under any serious threat of meeting a similar fate remains a matter of dispute[5]. Contemporary writings suggest that the demolition did not go through as the marble in which the Taj Mahal is constructed, failed to fetch an attractive price.

Today, the Taj is a World Heritage Site attracting millions of visitors each year and is also visited by controversy stemming from communalisation and politicisation of heritage

[4] Savelsberg JJ and King RD (2011), American Memories: Atrocities and the Law, Russell Sage Foundation, pp 8-9

[5] In Spear P. (1949), Bentinck and the Taj, The Journal of the Royal Asiatic Society of Great Britain and Ireland No. 2, pp. 180-187 evidence in support of both sides of the debate is examined.

from time to time. However, this saga contains key lessons. Firstly, it is difficult to define heritage because what is a masterpiece to someone is a mere hunk of marble to another.

Secondly, heritage is both unifying as a link to the past and polarising for its economic and identity-related aspects. And thirdly, studying heritage is an exercise in mindfulness and reflexivity because what we regard as cultural patrimony and how we approach it is a reflection of our history and how much power we are accustomed to wielding.

****

Other ways of knowing as heritage

In "Internationalising the University: A Spiritual Approach", I arrive at a conception of "other ways of knowing" by observing through time, the dance between religion, spirituality, science and knowledge creation. The separation of state and church was accompanied by secularisation of science and education which I argue led to a "double reductionism"[6]:

On the one hand, scientific modernity reduced the aim of salvation of the soul to constructs such as human rights and liberal democracy. On the other, for the religious domain too, a reductionist response was evoked, faced with a challenge to its universal applicability.

The concept of heritage is central to this study. As detailed later, the concept of heritage opens the door for a conversation with other ways of knowing besides positivist, Euro-centric, hegemonic science, chiefly by reminding us that "while it may be possible to explain the living human state entirely in scientific (biological) terms, it is our cultural

[6] Unkule K (2019), Internationalising the University: A Spiritual Approach, Palgrave Macmillan, p 101

inheritance that enables us to find meaning in our existence and not merely exist, but thrive"[7].

As a scholar situated in the global south, I consider other ways of knowing as part of my heritage. This perspective has helped me to be, as a person, in sync with my scholarship. With its growing influence on my teaching philosophy, this perspective has also enabled me to better connect with students and begin to reimagine my role in legal education as an outsider, a social scientist.

****

This doctoral study brings the disciplines of International Relations and International Law together. While referring to the disciplines I have used capital I-R and I-L, while referring to the real world phenomena, I have used small i-r and i-l. The main aim of this study is to discover how the two disciplines, in conjunction, extend each other's boundaries and open the way for a shift of focus from order to justice in international society. The case study I have used to delve into my research questions is that of protection of cultural heritage. Heritage is treated here as a site for interdisciplinary study and the central theme that draws in all the influences and strands of my research project. Accordingly, it is a site for meeting of interests and identities, of theory and practice, of International Law and International Relations, of empirical findings, conceptual redevelopment and theoretical innovation. Importantly for my situation and situatedness as a scholar in the global south Heritage is also a site that allows the clash between hegemonic/Eurocentric positivist science and other ways of knowing to play out. In the literature I have reviewed and cited in this study, I have not exclusively relied on the work of scholars from the

[7] Unkule p 102

global south or scholars pledging allegiance to non-western or post-colonial discourses. As reflected in my previous work, my attempt is not to replace one hegemony with another but to achieve harmony. The findings of this study are more relevant to tangible cultural heritage. However, a promising area of further research would be applying the analytical possibilities created by the study to investigate questions surrounding the protection of intangible cultural heritage.

The next chapter deals with the research methodology of the study somewhat unconventionally by thoroughly reviewing the epistemological traditions in International Relations and International Law and outlining what scholars on both sides have so far been able to achieve joining forces. Chapters three, four and five deal respectively with the game theory, human security and constructivist frameworks from International Relations, as applied to the case of heritage protection. The role that international law has played in heritage protection is critically assessed within each theoretical edifice. Chapter six turns to responses in international law and groups them as legalisation, criminalisation and regulation, again concentrating on wartime destruction of and illegal trade in cultural property. Together with the analysis presented in the foregoing chapters, findings on responses from international law lead us to conclude that approaches from International Relations and International Law working together present international cooperation in a particular domain in different light, as a step towards reconceptualising the role of law in international politics. Major conclusions of the study are listed in the final chapter.

Bibliography

De Sousa Santos B (2020), The Statues of our Discontent, Critical Legal Thinking website

Meskell L (2013), UNESCO's World Heritage Convention at 40 Challenging the Economic and Political Order of International Heritage Conservation, Current Anthropology Volume 54, Number 4

Savelsberg JJ and King RD (2011), American Memories: Atrocities and the Law, Russell Sage Foundation

Spear P. (1949), Bentinck and the Taj, The Journal of the Royal Asiatic Society of Great Britain and Ireland, No 2

Traverso E (2020), Bringing Down Statues Doesn't Erase History, It Makes Us See It More Clearly, THEWIRE.IN

Unkule K (2019), Internationalising the University: A Spiritual Approach, Palgrave Macmillan

Chapter 2

Seeking: Research Methodology

Chapter Highlights

- The disciplines of International Law and International Relations differ greatly in their methodological starting points
- The adversarial nature of legal practice exerts a marked influence on the traditions of legal research
- Method in International Relations has been shaped by the discipline's aspirations to be at once policy relevant and taken seriously as a science; for its conceptual building blocks, it has borrowed heavily from other social sciences; the discipline continues to be western-centric
- A common research agenda for both disciplines has been spoken of in recent decades but never engaging with their methodological orientations as this chapter attempts
- Heritage as a case study has rich potential for interdisciplinary collaboration between International Relations and International Law, especially if interpreted as a "site" for meeting of various influences, understandings and approaches
- Reflexivity and self-awareness need to be an explicit part of thinking about method in International Relations and International Law

Method in Legal Research and International Law

In legal science, according to Jaap Hage, "The adoption of a method is a choice for what counts as relevant ... (and) the kind of data that must be collected in order to argue for or against a potential piece of knowledge"[8]. This adversarial and interpretive approach marks off legal research from the understanding of method in the social sciences. Mathias Siems is critical of this traditional approach finding that it makes much of legal scholarship insular, self-referential and advocacy in disguise[9].

Lee Epstein and Gary King concede that "perfectionism in methods at the expense of other goals is both inappropriate and unnecessary"[10]. However, they do also lament the absence in legal scholarship of "the methods of statistics, interviewing, ethnographies, modelling, participant observation, experiments, network analysis, archival work, historical studies, and many other diverse approaches", as found in "political methodology, econometrics, psychometrics, or sociological methodology"[11]. Richard Revesz has argued, au contraire, that legal scholarship has become ever more interdisciplinary over the years and "social scientists would benefit from paying close

[8] Hage J. (2011), The Method of a truly normative legal science in Van Hoecke M. (ed.), Methodologies of Legal Research: Which Kind of Method for what kind of discipline?, Hart Publishing, p 22
[9] Siems, MM. (2011), A world without Law Professors in Van Hoecke M. (ed.), Methodologies of Legal Research: Which Kind of Method for what kind of discipline?, Hart Publishing, p 81
[10] In their reply to discussant submissions to their paper Epstein L and King G (2002), The Rules of Inference, University of Chicago Law Review 69 (1), p 207
[11] p 209

attention to the methodological innovations performed by legal scholars"[12]. Paul Roberts opts for a more pragmatic position in stating that "smart methodology means selecting 'horses for courses', the opposite of unthinking conformity to methodological dogma or transient intellectual fashions"[13].

According to Manderson and Mohr, "legal research means finding the law" and so far what is conventionally understood as legal research has "little to do with how things get to be called law, or how they are experienced as such, and with what effects"[14]. Manderson and Mohr further attribute these shortcomings of legal research to "a profoundly short-term and limited understanding of the actual nature and principles of 'law'"[15]. This study is undertaken based on the observation that these pieces are even more conspicuously missing in case of international law and adopts an interdisciplinary approach to address the gaps.

Paul Roberts attempts to outline the crux of legal research in these words[16]:

Legal research 'takes law seriously' in terms of its methodological presuppositions and engagement with primary institutional sources ... (which) include treaties, constitutions, legislation and precedent cases, but also procedural codes, 'hard-working soft law' norms and the informal operational routines that mediate between law in the books and law in action.

[12] Revesz RL. (2002), A Defense of Empirical Legal Scholarship, University of Chicago Law Review 69 (1), p 169
[13] Roberts P., Interdisciplinarity in Legal research, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press, p 100
[14] Manderson D and Mohr R. (2002), From Oxymoron to intersection: an epidemiology of legal research, Law Text Culture Vol 6, p160
[15] P 161
[16] Roberts P., Interdisciplinarity in Legal research, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press, p 95

Below, I have reviewed some of the nudges towards interdisciplinary research that have emerged from within the discipline of law.

Geoffrey Samuel attributes instances of isolation of law from social reality to the overwhelming emphasis on structure and coherence within the discipline and its aspiration to be regarded as a science. As a way out of this self-referential cycle, he reminds us that legal rules and institutions are meant to express a vision of justice, adding[17]:

...if justice is a phenomenon that exists independently of law one will need to turn to other social science disciplines...in order to give substance and definition to the phenomenon.

Manderson and Mohr similarly derive the possibility of scholarship in law with reference to considerations exogenous to law itself, stating that "law as a process of debating between outcomes offers thereby a language for articulating issues of morality and justice"[18]. More generally, they argue for the need to account for multiple reference groups as unifying law as technique, law as scholarship and legal ethics.

Ultimately, in answer to the question as to whether law is a social science, Samuel concludes that it has the ability to be so when it steps outside of the authority paradigm. The authority paradigm in law stems from the theological origins of law. Later in this chapter, I discuss how a conversation between positivist science on the one hand and theology and other ways of knowing on the other, opens the door for closer collaboration between international relations and international law.

[17] Samuel G. (2008), Is Law Really a Social Science? A View from Comparative Law, Cambridge Law Journal 67(2),p 295

[18] [18] Manderson D and Mohr R. (2002), From Oxymoron to intersection: an epidemiology of legal research, Law Text Culture Vol 6, p160

Commenting on the preponderance of doctrinal research in the discipline of law, Ian Dobinson and Francis Johns summarise the prevailing view as follows[19]:

The main arguments are that law is an authoritative, rules-based discipline where doctrinal observations are merely self-referential and do not reveal anything about the outside world. However such arguments also acknowledge that where law engages with society in a way revealed by legal realists or where a researcher reaches beyond jurisdictional authority to consider comparative law issues, then that doctrinal research may take on some of the elements of social science research.

Manderson and Mohr contend that it is due to the tradition of doctrinal scholarship compared to social sciences, law has more in common with theology "in terms of its exegetical cast, its faith in authority and its devotion to untangling the intricacies of canonical texts"[20]. The question of interest to them is not the intersection of law with other disciplines but the intersection of law with the idea of research itself.

Dobinson and Johns further document how the internal professional pull of legal reform and the external academic push of needing to align research methods with other disciplines, has brought research in law ever closer to social science research[21]. However, these authors do also add the caveat that "the social science model cannot be wholly applied to legal research because the source documents are derived in a different way", i.e. a more inductive and hierarchical approach than is practicable in the social sciences. Instead, they emphasize that what legal research can truly hope to gain from the social

[19] Dobinson I and Johns F, Legal Research as Qualitative Research, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press, p 21
[20] p 163
[21] Dobinson and Johns' main contention is that "law is not simply self referential but can teach us about the world". (p 35)

scientific approach is "the discipline of a thorough, unbiased and reproducible methodology"[22].

Paul Roberts alerts us to the inevitable friction that can result from the conjoint operation of two or more disciplines in a research study adding that "incompatible standpoints and perspectives can sometimes be more productive, energising or revealing that seamless coherence, harmony and integration"[23]. Indeed, such has been the case with the interactions between International Relations and International Law as we will see below.

The growing importance of socio-legal research has been proposed in the context of possibilities for interdisciplinary research in law. A growing body of scholars today accord great significance to context in legal research pointing out that "A precondition for legal research in any form has become that the researcher should not only have knowledge about the traditional elements of the law, but also about the quickly changing societal, political, economic and technological contexts and, possibly, other aspects of relevance"[24].

This study falls at the intersection of international relations theory and international law. Although influenced by exploratory, explanatory, historical and comparative studies, it primarily engages in critical, analytical research. For instance, in forthcoming chapters, the comparative merits and limitations of the rational choice, human security and constructivist frameworks are discussed in relation to protection of cultural heritage but

[22] p 35
[23] P 92
[24] Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, Wibo van Rossum (2017), Methodology of Legal Research: Challenges and Opportunities, Utrecht Law Review, Vol 13 (3), p1

going further, in each case, an analytical takeaway is arrived at which extends our conceptual understanding of the frameworks themselves. From a quality control standpoint, this study has found the following advice particularly instructive[25]:

The quality of legal research is gauged by the quality of the conceptual analysis, the quality of the reasoning and the rhetoric, and last, but not least, the quality of the references in the text.

Method in International Relations

Stanley Hoffman distils the philosophical preoccupations of the international relations scholar in these words[26]:

... they wrote about the difference between a domestic order stable enough to afford a search for the ideal state, and an international contest in which order has to be established first, and which often clashes with any aspiration to justice.

The first noteworthy point in these lines is that in International Relations analysis, international politics is not a mere extension of domestic politics just as the international system is not simply, a domestic polity writ large. Yet, certain assumptions about human behaviour, social control and the nature of power have been adopted from domestic politics. The second noteworthy point is that for generations of International Relations scholars the conception of order in the international system has not always been underpinned by an insistence on prioritising justice. Does this latter observation mean that International Relations has nothing to offer International Law in terms of

[25] Supra note 16, p 2
[26] Hoffman S. (1977), An American Social Science: International Relations, Daedalus, Vol. 106, No. 3, Discoveries and Interpretations: Studies in Contemporary Scholarship, Volume I (Summer), pp. 41-60

articulating a conception of justice, as many believe to be the promise of interdisciplinary engagement? It has been established in existing literature that theoretical perspectives developed by International Relations Scholars provide a variety of frameworks to articulate our vision of international society. Based on each vision, a different and well-specified approach to the relevance and form of international law emerges. In forthcoming chapters, conceptual lenses from International Relations – rational choice, human security and constructivism – are evaluated in relation to the concern of protecting cultural heritage. We find that:

1. Normative positions are written into the theoretical perspectives themselves
2. International Relations draws significantly from conceptual building blocks developed in other social sciences which originated from the quest for a just social order
3. When the operation in the real world of policies based on these paradigms is observed, it becomes evident who gains and does not from them
4. The role of epistemic and linguistic dominance in obstructing a genuine debate on "justice" is uncovered

Therefore, concludes the study, that although in their purest form International Relations theories may not serve as useful guides to outline a vision of international justice, their application in real world scenarios is highly instructive.

Drawing attention to the emphasis on empiricism in international relations, Hoffman further asks[27]: *Without a study of political relations, how could one understand the*

[27] p 42

fumblings and failures of international law, or the tormented debates on the foundation of obligation among sovereigns unconstrained by common values or superior power? It is interesting that Hoffman, among others in the discipline of International Relations, consider Hans Morgenthau, a teacher of international law, to be one of the founders of International Relations as a discipline. Morgenthau's approach of blending empiricism with normativism appears to have left a lasting legacy for International Relations. The wide scope and sweep of his work also laid the foundations for an analytical orientation focused on the system. Through an examination of the evolution of the realist school in international relations, Hoffman relates how the link which exists between scientific disciplines and State institutions and interests, usually uncomfortably, happens to be more robust in the case of International Relations. He lists an articulation of the concept of "system" as a web of interaction between states, the "rules of the game" that emerge from deterrence literature, and a specification of the role played by economic interdependence in interstate relations, as the three major contributions of disciplinary International Relations. Since the Cold War context in which the first two of these contributions were made no longer applies and the assumptions of a thriving liberal economic order on which the third contribution rests have been seriously undercut in the twenty first century, the continuing relevance of the discipline, lacking further innovation and advances, may be called into question. This study therefore advocates a two-way interdisciplinary dialogue in which the work of international legal scholars provides inspiration and impetus to the evolution of International Relations.

Reviewing the contribution of structural realist Kenneth Waltz to International Relations, Charlotte Epstein identifies two key dimensions: firstly, a move away from empiricism and an inductive approach to analysis and second, "the establishment of the

international as a discrete, constitutive, space; not simply as that indeterminate space beyond, in between or 'among nations'"[28]. From the perspective of international legal scholars, however, Waltz's strong emphasis on theorising underestimates how much international agreements factor into the decision-making calculus of policy-makers. The Liberal School of International Relations, by contrast, renders the international system as a reflection of the relationships that exist between state and civil society (strictly speaking interest groups) at the domestic level. They view foreign policy in the same way as they do the domestic variant – interests organising to achieve their goals through the system of governance. It is thus that they derive the Democratic Peace Thesis whereby liberal democracies shun war for being antithetical to the interests of the governed. With respect to international law, proponents of the liberal view would therefore contend "that liberal democracies are more likely than are other regime types to revere law, promote compromise, and respect processes of adjudication"[29]. Another hypothesis derived from the liberal view of the international system is that economic interdependence drives up the cost of conflict by linking the interests of domestic constituencies in various states, and is therefore desirable for systemic stability. While studying regime characteristics as a determinant of external policy, including compliance with international law, scholars have also investigated differences between federal and unitary states, parliamentary and presidential systems and common and civil law systems. Broadly speaking, while the realists are preoccupied with the system as a unit of

[28] Epstein C. (2013), Constructivism or the eternal return of universals in International Relations. Why returning to language is vital to prolonging the owl's flight, European Journal of International Relations, Vol 19, p 503
[29] Simmons BA (1998), Compliance with International Agreements, Annu. Rev. Polit. Sci. 1998. 1:75–93

analysis, the liberal international relations scholar's gaze is focused on the regime characteristics of the state.

Describing International Relations as a "not so international discipline", Ole Waever points out its major characteristics as follows[30]:

- The discipline's evolution has closely modelled the existence of American hegemony in the real world
- The discipline has borrowed heavily from other social sciences but simultaneously asserted its separate identity, in particular by embracing rational choice as the predominant analytical framework
- International Relations scholarship in the United States is oriented towards rational choice as the metatheoretical framework whereas European scholarship demonstrates a greater influence of constructivism and postmodernism

Even as International Relations has developed largely in the US and is heavily influenced by historical and institutional variables obtaining there, the contributions of scholars in other regions do help address important questions of our time[31]. Christer Jonsson describes International Relations scholarship emerging from Scandinavia as "prone to focus on subnational actors, ... more embedded in political science, ... generalist rather than specialist... (and) in a better position to escape from the entrapment of an ahistorical current-events approach"[32]. Jonsson points out that unlike their American

[30] Waever O. (2005), The Sociology of a not so international discipline: American and European Developments in International Relations, International Organisation Vol 52(4), pp 687-727
[31] In a footnote of a work cited in this chapter, Onuma Yasuyaki has linked a decline in academic interest in International law in Japan with progressive Americanisation of international studies since the 1970s
[32] Jonsson C. (1993), International Politics: Scandinavian Identity amidst American Hegemony?, Scandinavian Political Studies Vol 16(2), pp 149-165

counterparts, Scandinavian specialists of International Relations have maintained the research stance of an observer and not an advisor and as a result have had much success in explaining the nature of international cooperation. Jonsson concurs with the assessment above that the emphasis on grand theorising in International Relations, which has been a byproduct of the Cold War context, weakens its claims to continued relevance. Instead he argues[33]:

...the periphery – including Scandinavia – has been more involved in testing and refining middle-range theories [...] such as decision-making, conflict management, bargaining, and integration (which) have not been called into question by recent world events.

Jonsson further notes that while in the United States, International Relations has staked its claims as an independent discipline, in Scandinavia it has, au contraire, developed as a subfield of political science and in close connection with comparative politics. This has enabled Scandinavian International Relations scholarship to pay more attention to those questions which "involve a complex of domestic and international political processes"[34].

Asking whether "realism and liberalism (are) genuinely universal"[35], Amitav Acharya surveys the proposed influences that might shape a non-Western theory of International Relations. Some of the attempts that have so far been made in this direction take the approach of studying emerging powers or countries from the global south as outliers. However, it is increasingly clear that the assumptions undergirding realist stability or the

[33] p 152
[34] p 155
[35] Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3) 619–637

ethos of linear progression central to liberalism are today seriously challenged in the western world too.

Looking back on their approach to theory, International Relations scholars have found their historical aspiration to be policy relevant[36] to have had decisive implications for the evolution of the discipline in two ways: 1. The resemblance of theoretical frameworks to ground reality during important periods in history 2. The emphasis on producing middle-range theories which seek to establish the relationship between input and output variables in law-like fashion. Patrick Thaddeus Jackson and Daniel Nexon help us uncover the ideational assumptions underlying this general disciplinary approach as making "a number of commitments concerning the law-like character of good knowledge, the representational nature of empirical claims, and the 'Humean' account of causality. In other words, such middle-range theorizing generally depends on a neopositivist worldview, and on a wager that neopositivism — as distinct from other, equally 'scientific' methodological perspectives — provides a definitively superior grasp of the world"[37].

Tim Dunne, Lene Hansen and Colin Wright present a more comprehensive account of the various theoretical denominations in the discipline[38]: 1. Explanatory theory which prioritises utility and predictive capacity; 2. Critical theory which aims to bring about normative change; 3. Constitutive theory which investigates the influence of ideas on

[36] Frans Leeuw has identified a parallel in legal scholarship by discovering the influence of New Deal politics in the 1930s US on the research agenda of legal realism, F.L. Leeuw, 'American Legal Realism: Research Programme and Policy Impact', (2017) 13 Utrecht Law Review, no. 3, pp. 28-40.
[37] Jackson PT and Nexon DH (2013), International theory in a post-paradigmatic era: From substantive wagers to scientific ontologies, European Journal of International Relations, Vol 19, p 549
[38] Dunne t, Hansen L and Wright C (2013), The end of International Relations Theory?, European Journal of International Relations 19(3):405-425

observable facts. As a result, argues Arlene Tickner, this places International Relations in the same category of the rest of Western science which erects synthetic walls between modern/premodern, human/non-human, fact/value, nature/culture, and on which its hegemonic standing is premised. The core-periphery dynamic which characterises real world relations under pyramid globalisation, has very much been the operative scheme of the global spread of the International Relations discipline. Thus, the obsession with policy-relevance of metropolitan International Relations is mirrored in peripheral regions. Tickner observes, "research agendas in IR throughout the global South seem to parallel those of the foreign policy agendas of states, reinforcing the idea that theory should operate as a toolbox that derives from the realities that states must address in their international dealings"[39], making International Relations an extreme case of asymmetrical knowledge. Worse, since the of philosophical and ideational lineage of western theories is alien to other parts of the world, use of theory there is not methodologically rigorous, further hurting the prospects of localised development of theory.

Dovetails and Departures: the conversation between International Law and International Relations so far

In the mind of the International Relations scholar, the malleability of diplomacy lends itself much better to international life than the straitjacket of law. The conception of international law in the mind of the international legal scholar closely approximates an ingrained understanding of domestic law. As noted earlier, theorising in International

[39] Tickner AB. (2013), Core, periphery and (neo)imperialist International Relations, European Journal of International Relations, Vol 19, p 638

Relations is concerned primarily with order and justice has been a secondary concern if at all. Due to the influence of the parent discipline of Law, International Legal scholarship is much more interested in contending with the question of a just order. Expressing this dilemma, Onuma Yasuaki writes[40]:

If we understand the 'essence' of law as the realisation of justice, we may think that a major function of international law is to provide a tool for achieving international justice. If, on the other hand, we see the role of law as that of camouflaging the dominance and exploitation by the establishment of a society, then a major function of international law can be seen as that of justifying global dominance and exploitation by the powerful developed countries.

Yasuaki considers distinguishing law from the politics and ethics of international society as key to specifying its nature and promise. His analysis uncovers an important impetus for interdisciplinary work in International Law. He contends that the discipline has neglected investigating the drivers of status quo in the international system. In a similar vein, the common understanding of positive law has not been critically examined and further extended beyond "the category of Article 38 of the ICJ Statute[41], especially explicit provisions in existing treaties and norms of customary international law as

[40] Yasuaki O (2003), International Law in and with International Politics: the functions of international law in international society, EJIL Vol 14(1), p 107

[41] Article 38 of the Statute of the International Court of Justice falls under Chapter II: Competence of the Court. It states: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

exemplified by leading Western international lawyers"[42]. For scholarship in International Relations, the status quo or "systemic stability" has indeed been a key concern. Realists have elevated it as a prime variable for disciplinary investigation, liberals have closely observed interactions with and among its moving parts and constructivists have sought to discover its relationship with an extrinsic realm of ideas. Although positivist international lawyers do not consciously engage with these theoretical foundations, they nevertheless "invite international politics into their home through the back door", argues Yasuaki. This opens up the possibilities for scholarship in international law which knowingly engages with conceptions of international society reciprocally has the potential to influence disciplinary International Relations. Another noteworthy feature of International Legal analysis is that although exponents differ on whether international law is best viewed as an authoritative decision-making process or a framework facilitating cooperation, there is across the board a tendency to view soft law as "something minus legal commitment"[43]. This study highlights the rich spectrum of forms of international cooperation and their drivers that the discipline of International Relations has been able to observe and articulate. In the process, it should provide International Lawyers with a stronger case for seeing soft law in more promising light.

Exemplifying a common tendency among international lawyers, Philip Allott ascribes a social function to international law, claiming that all law "1. […] carries the structure and systems of society through time. 2. […] inserts the common interests of society into the behaviour of society-members. 3. […] establishes possible futures for society, in

[42] Ibid p 110
[43] Yasuaki p 111

accordance with society's theories, values and purposes"[44]. International Relations scholars, operating differently, are careful in distinguishing between a domestic polity and an international system. The centralising and unifying authority of law is not recognised in the International Relations scholar's imagination of the anarchic international system. The argument between the two disciplines comes down to specifying how law and power interact with each other. In this thesis I attempt to expand this understanding of law by teasing out the non-judicial functions of international law and exploring ways in which a dialogue between International Law and International Relations enables us to envision different possibilities for international law.

Elaborating further on the concept of International Law, Allott offers the following description that is amenable to the International Relations scholar's more expansive view of what makes international politicking[45]:

The legal self-constituting of society (the legal constitution) co-exists with other means of social self-constituting: self-constituting in the form of ideas (the ideal constitution) and self-constituting through the everyday willing and acting of society-members (the real constitution).

This description also corresponds to a broader understanding of sources of international law which includes customary law in addition to treaty law. When Allott further portrays law as conditioned by the ideal and real self-constituting, yet possessing its own distinctive social form, we see a striking parallel with the key theme in constructivist

[44] Allott P. (1999), The Concept of International Law, European Journal of International Law, Vol 10 pp 31-50
[45] p 32

International Relations that actors, rules and institutions are conditioned by socially constituted meanings.

To Manderson and Mohr[46]:

The socio-legal scholar operates in a distinct genre, committed to the sphere of human goods and contingent particulars, not eternal verities and universals.

International Legal scholars also suggest that the nature of research in international law is different from that in domestic law. Stephen Hall writes that the "decentralised, consensual and relatively primitive character[47]" of international law challenges us to seek new approaches to research rather than relying on off-the-shelf tools from largely domestically oriented legal research.

Describing the conception of the actorhood of states in International Law, Hall explains that "States are simultaneously the main subjects of international law and the entities whose choices and conduct generate positive international law"[48]. He adds that where the State is legal person, governing institutions which exercise power on behalf of the State are akin to the corresponding natural persons.

Anne Marie Slaughter advocates cross fertilisation between insights from International Relations and International Law through the cultivation of a "dual agenda"[49]. She

[46] p 170
[47] Hall S, Researching International Law, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press, p 254

[48] p 258
[49] Slaughter-Burley AM (1993), International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law* Vol. 87, No. 2 pp. 205-239

surveys the responses which International Relations scholars have offered to the realist contention that international law is at best an instrument of dominant states and finds:

- McDougal and Lasswell's formulation of law as derived from competitive political interaction and therefore a subset of the decision-making process in the international system
- Falk's vision of law as derived from a systemic logic that transcends national interest narrowly defined in pursuit of systemic stability
- Chayes, Henkin and others' concern with showing in what ways (rather than to what extent), international law proves to be a constraint on state behaviour and influences the course of international affairs
- Hoffman and Kaplan's understanding of "international law of a particular era as both a reflection of the reining political system and a repository of normative efforts to regulate and shape it"[50].

A wider menu of formats for inter-state cooperation is acknowledged within International Relations. Other than treaty law, this list includes unilateral/bilateral cooperation, formation of multilateral fora and soft law. Broadly speaking, the view in the International Relations community is that States align their behavior with international laws when they reflect the interests and values of states and when they are formulated through processes or by organisations that are perceived as legitimate.

However, it is only through a conversation with International legal scholars that International Relations theorists have had to rigorously examine regimes of interaction

[50] Slaughter Burley p 215

and cooperation. In "Why States Act through Formal International Organizations", Abbott and Snidal argue[51]:

Possible types of arrangement for inter-state cooperation are –

- Decentralized cooperation
- Informal consultation
- Treaty Rules

Despite the existence of such alternatives, states frequently resort to creation of International organizations to institutionalize cooperation. The two markers of IOs which, according to Snidal and Abbott, explain this preference of states are:

- Centralization
- Independence

Centralization refers to "a concrete and stable organizational structure and an administrative apparatus managing collective activities[52]". When the costs of decentralized action or unilateral intervention outweigh the costs of centralized organization, the creation of an IO becomes attractive to states.

IOs contribute the following through centralization:

[51] Abbott KW and Snidal D (1998), Why States Act Through Formal International Organisations, *The Journal of Conflict Resolution* Vol. 42, No. 1, pp. 3-32

[52] Snidal and Abbott p 9

- Neutral, depoliticized and specialized fora for dialogue
- Balance between states with different levels of power and varying interests through representation and voting rules
- Expertise in the form of background research and structured agendas
- Flows of information, institutional memory and documentation of state of play on a certain issue area

Thus pooling of resources, competencies and risks is what centralization is all about and wherefrom IOs have an edge over decentralized or bilateral cooperation or unilateral action.

Independence refers to "the authority to act with a degree of autonomy, and often with neutrality, in defined spheres". An independent International Organization has the potential to:

- Influence the terms of state interaction
- Elaborate norms
- Mediate or resolve member states' disputes
- Affect legitimacy of member states' actions

To sum up, actions taken on a state-to-state level, appear more legitimate when routed through an IO instead – a process that Snidal and Abbott term "laundering". Another advantage of IO independence lies in the fact that leaders are able to shield themselves from often overbearing assertion of interests from domestic constituencies. Lastly, even

if "IO autonomy remains bounded by state interests and power", strong states do also have a stake in not allowing their actions to completely undermine IO independence.

Snidal and Abbott also conceptualize IOs as Community Representatives. Here, the characterization of IOs departs from the rationalist discourse and crosses over into constructivist terrain. In particular, IOs perform two important functions:

- Creating a language based on norms and ensuring adherence to norms through "mobilization of shame" or reputational concerns among states
- Enforcement of commitments by making the threat of retaliation meaningful in cases of non-compliance

For the research agenda at the intersection of international relations and international law, Snidal and Abbott prescribe the study of International Organizations as a bridge between rationalism and constructivism.

By discussing compliance behavior in broader terms, international relations scholars have maintained its distinction from a strict technical understanding such as treaty implementation. A useful approach to unpacking the reasons behind States' compliance of international law is the one proposed by Robert Keohane. Keohane distinguishes between the instrumentalist optic where rules matter only if they affect calculations of interest and the normative optic where compliance is driven by reputational concerns[53]. Beth Simmons argues that real world compliance defies simplistic explanations since

[53] Keohane R. (1997), International Relations and International Law: Two Optics, Harv. Int'l. L. J, Vol 38(2), 487-502

"agreements among asymmetrically endowed actors are rarely perfectly voluntary, and the decision to "conform to prescribed behavior" might rest on an amalgam of obligation and felt coercion"[54].

Cali refers to the instrumental view on international law as the "cynic's view", describing it thus:

For the cynic, all international law does, is offer some intricate language which politicians use to get their own way[55].

She counters this cynicism by suggesting that "the survival of the idea and practice of international law after hundreds of years of manipulation shows us that there is something more to it than mere rhetoric".

In establishing the divergences and overlaps between the disciplines of International Relations and International Law, Cali holds:

There are two central independent variables that determine the nature of the relationship between International Relations and International Law.

1. Reasons motivating the asking of a question.

2. Reasons motivating the selection of procedures in order to answer a question.

The former indicates differences in terms of approaches. The latter indicates differences in methodology[56].

[54] Simmons BA (1998), Compliance with International Agreements, Annu. Rev. Polit. Sci. 1998. 1:75–93
[55] Çali, ed 'International Law for International Relations' (Oxford University Press, 2010) p.4
[56] p. 9

She goes on to explain that "the legal element has a more significant weight in International Law, while in International Relations it is the political element that takes center stage. International lawyers ask when we have international law. International relations scholars ask how international actors behave"[57].

"What are the rules and principles that govern international relations and how do we identify such rules?" and "what makes states support a particular norm in international relations and how do we know when support for that norm erodes or increases?[58]" are identified by Cali as key questions at the heart of International Law and International Relations respectively.

In Cooperation under Anarchy, Axelrod and Keohane state, "not only can actors in world politics pursue different strategies within an established context of interaction, they may also seek to alter that context through building institutions embodying particular principles, norms, rules, or procedures for the conduct of international relations"[59]. Applying the prisoner's dilemma game to interstate cooperation, these authors focus on three dimensions in particular:

- Mutuality of interest
- The shadow of the future
- The number of players

[57] p. 10
[58] p. 11
[59] Axelrod R and Keohane R (1985), Achieving Cooperation under Anarchy: Strategies and Institutions, World Politics, Vol. 38, No. 1, pp. 228

An attempt is made in a forthcoming chapter to apply principles of game theory to the cause of heritage protection.

Philip Allott discusses the social function of the law as signaling "presence of the social past, the organizing of the social present, and the conditioning of the social future"[60].

Allott likens an international public realm devoid of International Law with the Hobbesian state of nature, with "urbane diplomacy and mass murder" as the bases for survival. He characterizes the minimization of the role of law in mainstream International Relations Scholarship thus:

So-called international relations seemed to be the more or less random aggregating of the aggregate output of the systems of those societies, so that the absence of potential moral responsibility was even more evidently the case between the States than within those States. It seemed also to follow that international law, even more than national law, was morally immune, since it was itself seen as a secondary surplus social effect of the morally immune relations between States, the content of those relations—so-called foreign policy—being itself the morally immune systematic product of the internal national systems[61].

He explains this by problematizing morality at any aggregate social level. Since the outcome at any aggregate social level, or as Allott describes it, "the surplus social effect", is always greater than the sum of its parts, no single individual may be held accountable for it. This results in a situation where, since no human individual is responsible for the macro-product of social systems, there can be no moral responsibility

[60] Allott P. (2001), The Concept of International Law in Byers M. (ed), The Role of Law in International Politics: Essays in International Relations and International Law
[61] p. 5

for that product, including the macro-product known as law. Apparently, the social actual, and hence the legal actual, is necessarily right". Thus, to Allott, the problem of specifying the role of international law in international society is a more generic conundrum of attribution of moral responsibility at all macro levels.

In an attempt to theorize non-instrumental law in general and international law in particular, Terry Nardin writes[62]:

General international law is largely customary law, which obligates states as members of international society without their explicit consent. States can terminate their agreements but they cannot escape the jurisdiction of general international law, which, because it both constitutes and regulates the relationship of states as legal subjects, is the ultimate basis of their association. The rule of law demands that international law must not contravene certain basic rules of general international law. Agreement cannot legalise actions, like waging aggressive war, that are contrary to the non-instrumental rules of general international law. That law limits the policies that states can pursue collectively as well as unilaterally. The instrumental rules they adopt must conform to the non-instrumental rules of general international law and, at a deeper level, the principles of legality underlying those rules. The international rule of law exists to the extent that states conduct their relations on the basis of laws that limit and not simply enable policy.

This passage illustrates the contribution that international legal scholarship has made towards explaining the determinants of state behaviour in the international realm.

[62] Nardin T., Theorising the International Rule of Law, Review of International Studies, Volume 34 - Issue 3 - July 2008

As discussed above, there are two distinct conceptions of the payoff of interdisciplinary exposure for legal research. Dobinson and Johns anticipate gains in the form of a reproducible methodology. Roberts, on the other hand, emphasises greater analytical complexity and nuance as the main advantage. How do the conversations between International Law and International Relations fare in terms of meeting these expectations?

In this study I apply lenses from International Relations and International Law to demonstrate their contributions on such questions as:

What is heritage?

What contextual factors influence the definition of heritage?

Who owns it?

What is the proper way of protecting it and can it be applied universally?

What does studying transnational efforts to protect heritage tell us about the nature of international cooperation?

How does studying the case of heritage protection, in depth, contribute to our understanding of the potential for interdisciplinary dialogue between the fields of International Relations and International Law?

How might such an interdisciplinary dialogue transform our understanding of the nature, role and potential of international law?

It is relevant to clarify the way in which heritage is meant as a case study here. In general, a case study represents intensive analysis in contrast with a survey which represents

extensive analysis of a phenomenon. Thus, the approaches selected for critical analysis, both from International Relations and International Law, are not exhaustive. Instead, their choice is informed by the possibilities they afford to illuminate various facets of the case study. An attempt has been made to draw in some of the marginal and under-emphasized approaches in order to truly test and challenge the current state of the debate on the interplay between international relations and international law. The following lines of Peter Swanborn are resonant in this respect[63]:

As in all research, in doing a case study we focus on the problem we want to solve. Whatever research project one has in mind, the research question is the point of departure.

Heritage as site

With reference to themes such as "cities" or "drugs", Manderson and Mohr propose the following approach that may assist us in evading the downsides of disciplinary silos and over-specialisation[64]:

One approach might be to examine a particular site or sites of interest without a particular disciplinary strategy in mind. It is the site as observed and not the intellectual tradition of the observer which determines the approach.

Mandersohn and Mohr add that this framework taps into the relevant aspects of disciplines without allowing their role in research to become overbearing and hegemonic, thus making legal research "disciplinary-critical, site-specific, engaged and

[63] Swanborn P. (2010), Case Study Research: What, Why and How?, Sage Publishing p16

[64] p 173

constitutive"[65]. The concept of heritage richly lends itself to such an understanding of site.

Heritage as a site for meeting of past, present and future

Discovering heritage as the space where the past, present and future converge is presenting it in dynamic light, rather than as a culturally-specific relic stuck in time. It is also to acknowledge, that the past matters because it tangibly impinges on circumstances in the present and prospects for the future. Based on her study of the evolving meanings of Heritage in eastern Europe, Laura Demeter posits that "the use and abuse of heritage has reached a level of impact, intensity and differing complexities that has little in common with the realities of heritage in the Anglo-Saxon context"[66]. Heritage is subject to interpretive evolution. Illustrating this point with the example of the Palace of Versailles, Denise Maior-Barron writes that "the postmodern era witnesses a gradual transition in the interpretation of heritage from Tradition to Translation"[67]. Thus the same sites and objects contain different mnemonic associations for different groups and across time periods. Maior-Baron goes on to explain that political elite reinterpret history through heritage in service of their own legitimation and therefore often, the "version of history labelled 'inevitable progress' is preferred by victors rather than victims"[68]. In the age of nationalism, such reinterpretation to suit political interests has contributed to problematizing heritage conservation in source countries and complicated the debate over ownership and optimum methods of conservation in the

[65] p 174
[66] Demeter L. (2014), Value Creation Mechanisms and the Heritisation of the Communist Legacy in Romania in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg
[67] Maior-Barron D. (2014), Palace of Versailles UNESCO Heritage Site: Survivor of the French Revolution, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg
[68] Ibid p 98

international realm. Maior-Baron further notes that the rise in commemorative politics around the world in the recent past aims to "ritualise a society without rituals and to introduce fleeting moments of sacredness into a world otherwise bereft of a sacred dimension"[69]. Thus, as a by-product of fulfilling a psycho-social need for familiarity, distinctiveness and continuity, heritage contributes as a "freezing factor of the natural course of historical evolution"[70], in her estimate. This is an on-going process as seen through the instant memorialisation of sites of tragedy such as bombings in a bid to link present grief with future sanctity.

Having established the role of heritage in reinterpreting history and legitimising power rooted in construction of hegemonic identity, one must also give due regard to the positive implications of such potential. In her report to the UN Human Rights Council, the Special Rapporteur on Cultural Rights observes[71]:

By engaging people and encouraging their interaction through artistic and cultural expression, actions in the field of culture can open a space in which individuals and groups can reflect upon their society, confront and modify their perception of one another, express their fears and grievances in a non-violent manner, develop resilience after violent or traumatic experiences, including human rights violations, and imagine the future they want for themselves and how to better realize human rights in the society they live in.

Thus, the shape-shifting associations with heritage should be viewed against the ever evolving backdrop of a broader cultural landscape. In case of conflicts which coalesce

[69] Ibid p 105
[70] Ibid p 105
[71] Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 2018
https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/002/68/PDF/G1800268.pdf?OpenElement
Accessed May 13, 2020

around faultlines of identity, in particular, this potential for creative reconstitution could well translate into the power to assist social reconstruction. As the Special Rapporteur on Cultural Rights reminds us: "Humanity dignifies, restores and reimagines itself through creating, performing, preserving and revising its cultural and artistic life". In settings of violent ethnic conflict cultural activities involving celebration of common heritage have been vital for expressing common humanity or rehumanising the other, thereby contributing to trust building and reconstruction.

Heritage as a site for meeting of identities and interests

Interest and identity have both been polemical and polarising terms in discussions about international society, particularly under the influence of globalisation. Studying heritage protection in the context of both terms demonstrates what we lose when we attempt to parse phenomena in light of one, at the exclusion of the other. Heritage, as a site, enables us to liberate the two terms from narrow definitional strictures and create new possibilities for the study of International Relations and International Law at large.

Tracing back the ancient nexus between art, identity and heritage, Margaret Miles recalls that "much, if not all of what was highly valued in antiquity, and typically looted in wars, was originally created, dedicated or used within a religious context […] although art even in a religious context could also convey political values, including symbolic value as a trophy"[72]. Sara McDowell conceived the very essence of heritage in terms of its malleability and instrumental value defining it as "as an aggregation of myths, values and

[72] Miles MM (2017), War and Passion: Who keeps the Art?, Case Western Reserve Journal of International Law, Vol 49, p 8

inheritances determined and defined by the needs of societies in the present.[73]" Denise Maior-Baron posits a symbiotic relationship between heritage and power and illustrates it through the associations of successive rulers and governments in France with the Palais de Versailles despite its complicated past. Delving into this history she finds that heritage can be evocative of legitimate power and authority "within either the artificial remembering and commemorative process of nations, or the educational purposes of contemporary, globalised tourism"[74]. The fact that heritage can serve both purposes as outlined here by Maior-Baron contributes to the contested terrain that is the idea of "universal heritage". On the one hand, the nationalist view demands a set of context-dependent practices that tie heritage to origin stories and national identity while on the other, the cosmopolitan view is centred on logics of tourism, cultural consumption of market countries and the considerable commercial interest at stake. It is in the pre-meditated destruction of heritage during the course of war that we see its relationship with identity thrown in sharp relief, especially as the emerging complexities of warfare blur the battle lines between identities and interests. In recent memory we see such convergence of destructive factors of wartime collateral damage through shelling and occupation, deliberate erasure as a language of terrorism, genocide and civil war and varying scales of looting for financial gain in the damage that has been sustained to heritage in Syria.

Heritage as a site for meeting of International Relations and International Law

[73] McDowell S. (2008), Heritage, Memory and Identity from Graham B and Howard P. (eds.) The Ashgate Research Companion to Heritage and Identity, Routledge, Accessed online May 11, 2020

[74] Ibid p 111

The study of cultural heritage has thus far been undertaken within disciplinary silos as is the case with many multi-faceted concepts and phenomena. A consequent limitation at the epistemic level resulting from this is that "these disciplines bound conversations may talk about very similar issues in completely different languages, diminishing the opportunity to learn from, and communicate with, one another"[75].

Watfa Shadi and Mustafa Bashar poignantly capture the impact of heritage destruction and the illegal trade in cultural objects on the countries of origin and the world at large[76]:

We feel a tragic loss when our valuable cultural artifacts disappear. They become fuel for the black market, perpetuating the economic foundation of the plunder. Then they are lost to all, having value neither for their beauty nor for scientific research where much could be learned from them. Instead, they become hidden away in a collector's vault, reduced to a state of having no value for anyone, save for their illicit procurer.

The above articulation of the state of world heritage captures the possibility of convergence of the Game Theory, Human Security and Constructivist approaches to exploring possibilities of international cooperation, developed in forthcoming chapters. It opens the way for unapologetically recognising the dysfunctions and asymmetries of power in the international system which International Law either glosses over of helps sustain and strengthen.

Heritage as a site for meeting of empirical findings and conceptual re-development and theoretical innovation

[75] Anderson J and Geismar H (eds.) (2017), The Routledge Companion to Cultural Property, Abingdon, Oxon ; New York, NY : Routledge, p 13

[76] Shadi W and Bashar M. (2015), Syrian Archaeological Heritage: Past and Present, SCIENTIFIC CULTURE, Vol. 1, No. 3, pp. 1-14

The field of heritage studies has been characterised by a practice-driven orientation. Much of the existing literature is in the form of advocacy for competing approaches to conservation. An extremely promising ramification of such an emphasis has been the vast information base mapping where tangible and intangible heritage exists, detailing the causes of destruction or illicit transfer in the form of case studies and specifying the positions of relevant stakeholders. As noted above, the evidence of interdisciplinary dialogue in heritage literature is limited. Where the applicable body of international law is studied, the discussion focuses more on textual application of conventions and does not properly contextualise the emergence and operation of legal instruments in broader insights about operation of the international system.

However, according to Paul Roberts "simply highlighting significant gaps in the existing knowledge base might be sufficient to puncture the complacency of prevailing assumptions..."[77].

In the case of destruction and illegal trade of cultural heritage, much work of great value has documented the channels, operative methods, role of actors and extent of the phenomenon. It appears however, that this body of work does not point to a clear direction for legal reform and instead becomes clearly polarised along the lines of opposing causes or interested parties. It is thus, for instance, that the binaries of the nationalist and internationalist view or the source countries and market countries, have dominated much of the discourse directly influencing legal imagination on the question.

According to Denis Byrne, the sub-discipline of heritage management within archaeology has evolved based on Western experience and has since attempted to transplant its

[77] p 106

approaches to diverse contexts. Byrne also suggests that "imbued with the ideological colour of their own societies", archaeologists have reordered history to situate Europe at the pinnacle of the "hierarchy of progress" by ascribing to it such attributes as "technological pre-eminence" and "uni-linear cultural evolution"[78]. The fact that "heritage management seems simply to appear with the passing of the first protective legislation which itself occurs because an obvious 'need' is recognised", strikes Byrne as symptomatic of this one-size-fits-all approach. Further, he also recognises the continued imprint left by imperial legislation on the imagination of heritage management in the post-colonial world. "The legacy was not rejected; in fact there has been a widespread tendency for the new states to use and conserve precolonial and even colonial archaeological heritage in the name of national identity", writes Byrne. As we have established with the evolution of the discipline of International Relations, in the lines that follow, Byrne relates the influential position of western archaeology with strategies of dominance of powerful states[79]:

Their influence stemmed from the opportunities they had to work in other countries – archaeology following the flag either directly or through the favourable climate created by economic aid and military alliance – and from sponsoring the education of archaeologists from non-Western countries at 'home' universities, their ability to publish and disseminate research over large areas and from the intellectual thrall with which leading exponents at great universities could hold their less advantaged colleagues over large parts of the world.

[78] Byrne D (1991), Western Hegemony in Archaeological Heritage Management, History and Anthropology 5(2):269-276
[79] Ibid p 270

Byrne's analysis also shows us that lacking the social consensus or indeed the material resources to implement a western model of conservation, third world countries are often portrayed as uncaring of their heritage and their cultures as missing a sense of history. Sandra Bowdler has explained the same phenomenon in terms of an almost Pavlovian response of the "heritocracy" to any deviation from the hegemonic western discourse of archaeological research and heritage management[80].

Heritage as the site for clash of hegemonic/west-centric science and other ways of knowing

Supriya Chaudhuri recalls[81]:

The World Fairs and exhibitions of the nineteenth century were sites of display where colonial power offered itself for public admiration, and objects of material culture, denuded of social context and use-value, were accessible for consumption as spectacles.

Chaudhri paints a vivid picture of the growing fascination with displays of traditional Indian crafts (such crafts not to be confused with the more evolved European fine arts) in Europe during the late nineteenth and early twentieth centuries even as the policies of the imperial government[82] impoverished the artisan community in India and slowly eradicated this form of "industry". The fate of indigenous crafts was not simply linked to the economic processes unfolding in the hegemonic core but also to the apparatus of

[80] Bowdler S. (1988), Repainting Australian Rock Art, Antiquity, Vol 62, pp 517-523

[81] Chaudhuri S. (2018), Exhibiting India Colonial subjects, imperial objects, and the lives of commodities in Commodities and Culture in the Colonial World; edited by Supriya Chaudhuri, Josephine McDonagh, Brian H. Murray and Rajeswari Sunder Rajan, Routledge, p 57

[82] Policies geared increasingly to ensuring economies of scale for mass production of cloth in English mills through ready access to Indian consumers

knowledge creation which supported these developments. Capturing the epistemic dynamics, Chaudhuri writes[83]:

I*n important respects such collections of economic products and 'art-ware' bear witness to the taxonomic mode of colonial knowledge production. Listing by material, classifying by region, attempting to bring order into a botanic wilderness, they demonstrate the movement from the collection to the list, to the exhibition catalogue, to the guidebook or dictionary, and finally to the museum.*

Empire in the twenty-first century is characterised by the very same vision of consumption of other cultures through its obsession with the encyclopaedic or universal museum.

The hallmark of a critical researcher is that they are conscious both, of their own embeddedness of in a socio-historical milieu as well as the bases on which conventional ideas about scholarship rest. Margaret Davies views this as an enquiry into "what are the norms of 'good' scholarship, where do these derive from in cultural or political terms, on what basis can they be defended, and how should they be challenged or reformed?[84]" Being a researcher situated in the global south informs the vantage point from which I pose these questions. Being a researcher situated in a country which is rich in tangible and intangible cultural heritage has empowered me to grasp the complexities of issues but also challenged me to be more aware of my subjectivities.

[83] Ibid p 62
[84] Davies M. (2002), Ethics and Methodology in Legal Theory a (Personal) research Anti-manifesto, Law, text, Culture 6

Davies further elaborates that "Western knowledge has conventionally attributed 'objectivity' only to Western observers, who are typically also male – to highlight these associations and to ask whether there are knowledge practices other than those put forward by traditional 'objective' scholarship which might be more cognisant of the non-Western non-male other, poses a challenge to the myth that subject and object are separate"[85].

In the chapters that follow, the preponderance of Eurocentric episteme on the definition of heritage and formulation of strategies for its conservation is examined. William St. Clair has studied in depth the damage sustained by the Elgin Marbles[86] through the restorations efforts of the British museum in 1937 and 1938 – efforts which were inspired by "the aesthetic of white marble purity that is the idée fixe of neoclassicism"[87]. Similar case studies by scholars in museology, archaeology and law have documented the operation and impact of epistemic dominance in diverse contexts.

[85] p 2
[86] St. Clair W. (1999), The Elgin Marbles: questions of stewardship and accountability, International Journal of Cultural Property, Vol 8(2)
[87] Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century? p 18 https://www.academia.edu/20053839/The_Universal_Museum_A_Valid_Model_for_the_21st_Century Accessed may 29, 2020

Bibliography

Abbott KW and Snidal D (1998), Why States Act Through Formal International Organisations, *The Journal of Conflict Resolution* Vol. 42, No. 1

Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3)

Allott P. (2001), The Concept of International Law in Byers M. (ed), The Role of Law in International Politics: Essays in International Relations and International Law

Anderson J and Geismar H (eds.) (2017), The Routledge Companion to Cultural Property, Abingdon, Oxon ; New York, NY : Routledge

Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 2018

Axelrod R and Keohane R (1985), Achieving Cooperation under Anarchy: Strategies and Institutions, World Politics, Vol. 38, No. 1

Bowdler S. (1988), Repainting Australian Rock Art, Antiquity, Vol 62

Byrne D (1991), Western Hegemony in Archaeological Heritage Management, History and Anthropology 5(2)

Çali (2010), ed 'International Law for International Relations', Oxford University Press

Chaudhuri S. (2018), Exhibiting India Colonial subjects, imperial objects, and the lives of commodities in Commodities and Culture in the Colonial World; edited by Supriya Chaudhuri, Josephine McDonagh, Brian H. Murray and Rajeswari Sunder Rajan, Routledge

Davies M. (2002), Ethics and Methodology in Legal Theory a (Personal) research Anti-manifesto, Law, text, Culture 6

Demeter L. (2014), Value Creation Mechanisms and the Heritisation of the Communist Legacy in Romania in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg

Dobinson I and Johns F, Legal Research as Qualitative Research, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press

Dunne T, Hansen L and Wright C (2013), The end of International Relations Theory?, European Journal of International Relations 19(3)

Epstein C. (2013), Constructivism or the eternal return of universals in International Relations. Why returning to language is vital to prolonging the owl's flight, European Journal of International Relations, Vol 19

Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century?, Academia.edu

Hage J. (2011), The Method of a truly normative legal science in Van Hoecke M. (ed.), Methodologies of Legal Research: Which Kind of Method for what kind of discipline?, Hart Publishing

Hall S, Researching International Law, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press

Hoffman S. (1977), An American Social Science: International Relations, Daedalus, Vol. 106, No. 3, Discoveries and Interpretations: Studies in Contemporary Scholarship, Volume I (Summer)

Jonsson C. (1993), International Politics: Scandinavian Identity amidst American Hegemony?, Scandinavian Political Studies Vol 16(2),

Keohane R. (1997), International Relations and International Law: Two Optics, Harv. Int'l. L. J, Vol 38(2)

Maior-Barron D. (2014), Palace of Versailles UNESCO Heritage Site: Survivor of the French Revolution, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg

Manderson D and Mohr R. (2002), From Oxymoron to intersection: an epidemiology of legal research, Law Text Culture Vol 6

McDowell S. (2008), Heritage, Memory and Identity from Graham B and Howard P. (eds.) The Ashgate Research Companion to Heritage and Identity, Routledge

Miles MM (2017), War and Passion: Who keeps the Art?, Case Western Reserve Journal of International Law, Vol 49

Nardin T., Theorising the International Rule of Law, Review of International Studies, Volume 34 - Issue 3

Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, Wibo van Rossum (2017), Methodology of Legal Research: Challenges and Opportunities, Utrecht Law Review, Vol 13 (3)

Revesz RL. (2002), A Defense of Empirical Legal Scholarship, University of Chicago Law Review 69 (1)

Roberts P., Interdisciplinarity in Legal research, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press

Samuel G. (2008), Is Law Really a Social Science? A View from Comparative Law, Cambridge Law Journal 67(2),

Shadi W and Bashar M. (2015), Syrian Archaeological Heritage: Past and Present, SCIENTIFIC CULTURE, Vol. 1, No. 3

Siems, MM. (2011), A world without Law Professors in Van Hoecke M. (ed.), Methodologies of Legal Research: Which Kind of Method for what kind of discipline?, Hart Publishing

Simmons BA (1998), Compliance with International Agreements, Annu. Rev. Polit. Sci.

Slaughter-Burley AM (1993), International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law* Vol. 87, No. 2

St. Clair W. (1999), The Elgin Marbles: questions of stewardship and accountability, International Journal of Cultural Property, Vol 8(2)

Swanborn P. (2010), Case Study Research: What, Why and How?, Sage

Tickner AB. (2013), Core, periphery and (neo)imperialist International Relations, European Journal of International Relations, Vol 19

Waever O. (2005), The Sociology of a not so international discipline: American and European Developments in International Relations, International Organisation Vol 52(4

Yasuaki O (2003), International Law in and with International Politics: the functions of international law in international society, EJIL Vol 14(1)

Chapter 3

Protecting Cultural Heritage: Game Theory

Chapter Highlights

- Rational choice via game theory has been widely employed in International Relations research and has influenced both realists and liberal institutionalists
- Game theory is useful in understanding the illicit global trade in antiquities and explain the premises of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970
- The possibilities of regulation on the demand side (market countries) and supply side (source countries) can both be critically examined using rational choice
- Recognising the limits of the rational choice approach helps set the context for human security and constructivism (forthcoming chapters)
- A critique of rational choice analysis in International Relations helps ask how considerations of justice – rather than exclusively those of order – might have a place in systemic thinking

Protecting cultural heritage: Game Theory Approach in International Relations

At the outset, let us heed a note of caution sounded by Margaret Davies[88]:

Like the conventional view of method, theory is abstraction, an exercise of scholarly power over its objects -- objects which are tamed in the process of becoming understood.

This chapter delves into the global market for art and antiquities and applies the rational choice lens favoured by realists to sketch the possibilities for international cooperation. Such cooperation is already envisaged in international law, particularly by way of means to restrict illegal cross-border flows.

Article 2 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.

[88] Davies M. (2002), Ethics and Methodology in Legal Theory a (Personal) research Anti-manifesto, Law, text, Culture 6, p 10

2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

The next section reviews the insights that have emerged from the application of game theory in International Relations.

Game Theory in International Relations

Game theory, otherwise known as interactive decision theory, suggests that an actor's decisions are influenced by the decisions that other actors in the situation could possibly make. This catchy premise speaks to the quest of International Relations scholars for rigorous frameworks within which to make sense of the actions of states. In the words of Duncan Snidal, "conception of nation-states as interdependent, goal-seeking actors lies at the heart of strategic game analysis, it is applicable across different issue areas"[89]. In the prisoner's dilemma game, the greatest gain is made by an actor if they defect while the other actor cooperates. Thus game theory presupposes lack of harmony of interests and encapsulates the tendency of actors not to cooperate, aligning itself closely with the key assumptions of the realist International Relations view. In the structural realist paradigm developed by Kenneth Waltz, "a true systemic explanation […] assumes that structural elements dictate channels of actor interaction and ultimately determine the outcomes of that interaction. The components of that structure, in turn, are threefold: an ordering principle, the differentiation and functional specification of the units, and the

[89] Snidal D. (1985), The Game Theory of International Politics, *World Politics,* Vol. 38, No. 1, pp. 25-57

distribution of capabilities across units"[90]. In this chapter, the global system through which cultural objects are transacted will be analysed within this framework. The forces which have historically permitted and continue to assist their transfer from where they were originally found to where they came to be located will be reviewed. We will find that international law on cultural property – its ownership and protection – has been greatly concerned with the legitimacy of channels through which these objects move in the global system.

Like the realist school, the game theory approach has concentrated its attention on states as the important actor in the international system. And yet, Game Theory transcends the conflict-centred realist paradigm to explore the nature and causes of cooperation under anarchy. Snidal resolves this seeming contradiction thus: "No state can choose its best strategy or attain its best outcome independent of choices made by others. The related substantive implication is that national policy makers need to pursue opportunities for cooperative interactions even as they seek to protect against conflictual interactions"[91]. On the degrees of separation between Game Theory and Realism, Snidal concludes that "by assuming that power maximizing states are the principal actors, Game Theory subsumes the Realist position. But the game theoretic approach is not coincident with Realism"[92]. Game theory exponents agree with realists that structural factors constrain states but depart from them by making way for voluntary decision-making.

[90] Slaughter-Burley AM (1993), International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law* Vol. 87, No. 2 p 217

[91] P 39

[92] P 35

Benjamin Klasche and Peeter Selg identify key critiques of rational decision-making forwarded by other paradigms in social science and applied to international relations. According to them, approaches which privilege psychological analysis of international relations "assume imperfect rationality based on the fluidity of identities, past beliefs and groupthink"[93]. They also cite constructivists who view decision making as a product of modes of subjectivity and beliefs and expectations about other actors. In recognising the validity of these critiques as borne out by real world events, Klasche and Selg remind us that game theory does not work well when the rules of the game change or certain actors refuse to play by the rules and thereby they also embrace the sociological insight that rationality is context-dependent and bounded.

Axelrod and Keohane provide a useful framework for evaluating behaviour of relevant actors, including states, in an anarchic system. They focus on three variables – mutuality of interests, the shadow of the future and the number of players – as framing the context for cooperation or defection, in a classic prisoners' dilemma game[94]. Rational choice theorists have thus identified the compliance pull whereby, States concerned with their reputation in international society might see it in their interest to uphold international law rather than exercise hard power in contravention of it. According to Harlan Grant Cohen, "Building reputation into game-theoretic models of how states behave […] allows for the formulation of a comprehensive theory of international law that includes treaties, soft law, customary international law, and norms. Perhaps most

[93] Klasche B and Selg P. (2020), A pragmatist defence of rationalism: Towards a cognitive frames–based methodology in International Relations, March 2020 online issue
[94] Axelrod R. and Keohane R. (1985), Achieving Cooperation under Anarchy: Strategies and Institutions, Vol. 38 (1)

intriguingly, it helps explain opinio juris, the long-mysterious "psychological" element of customary international law"[95].

Staying true to the Rational Choice lineage of Game theory, the Demand and Supply sides of the trade in Antiquities will be sketched below. The section will be concluded by a set of questions and considerations, key to developing an approach to Heritage Protection grounded in Game Theory.

Antiquities Trade: The Demand Side

In this section I review the prevailing situation in those parts of the world where cultural goods are acquired, primarily by collectors and highly influential museums.

Describing trafficking in cultural goods as a "demand-driven crime", Leila Aminedolleh argues that "there is a well-documented link between the demand for looted items and museums"[96]. Further explaining the role of museums she adds that "purchasing illicit objects, museums fuel the market, thus motivating robbers to steal and destroy art objects".

The willingness of collectors and museums to expend significant sums of money on the acquisition of prized artefacts sets up the incentive structure for downstream participants in the trade. In his paper "The Fifth Column within the Archaeological Realm: The Great Divide", Oscar Muscarella places museums and collectors at the uppermost echelons of what he terms The Plunder Culture. Elaborating on the intervening systemic factors he says that "for museum curators, some are archaeologists, others art

[95] Cohen JG (2009), Can International Law Work?, Berkeley J. Int'l Law, Vol 27, p638
[96] Amineddoleh L. (2013), The Role of Museums in the Trade of Black Market cultural heritage property, Art Antiquity and Law, Vol 17(3) p 228

historians, the "acquisition" of antiquities is a major component of their job description, for which raises and promotions reward them"[97]. Acquisition of artworks and antiquities by museums from dealers and galleries of questionable repute is well-documented in the literature. Asif Efrat sums up this phenomenon as follows[98]:

Since the antiquities market has traditionally not required revealing a record of ownership history or original findspot of an object; and, furthermore, given the principle of vendor anonymity, looted antiquities may obtain a veneer of legitimacy when they are sold by dealers and auction houses. Illegally excavated and exported, antiquities often change hands several times before being purchased by institutional or private collectors, and any details of their *illegal origin are erased or lost in the process. Once published in a sales catalogue, an exhibition catalogue, or an academic paper, the antiquities acquire a new and respectable pedigree and are effectively laundered.*

Jessica Dietzler draws attention to two further important features of the antiquities trade: first, demand stems from a very limited, wealthy section of the population compared to other illicit trades such as drugs and weapons and second, the goods undergo a massive increase in value while making the transition from source to demand countries, estimated at as much as 100 fold by UNESCO[99]. On a related note, Erik Nemeth observes that "As a market dynamic, looting of cultural artefacts also inspires collecting of a disappearing commodity, which increases the profitability of trafficking in

[97] savingantiquities.org/wp-content/uploads/2015/01/OM5thcolumn.pdf Accessed April 16, 2018

[98] Efrat Asif (2009), "Protecting against Plunder: The United States and the International Efforts against Looting of Antiquities". Cornell Law Faculty Working Papers. Paper 47

[99] Dietzler J. (2013), On 'Organized Crime' in the illicit antiquities trade: moving beyond the definitional debate, Trends in Organised Crime, 16: 329–342

antiquities"[100]. The licit trade in cultural objects itself being clandestine in nature, allows for illegally acquired objects to be made to seem legally traded down the chain of transactions. In an abstract sense, trade in cultural objects converts them from heritage that is "given value" to commodities that "have value".

According to the non-profit Saving Antiquities for Everyone (SAFE), the United States is a major market for Chinese antiquities with the number of museums with collections numbering 47. Describing the toll taken by illegal excavations and the soaring international demand for finds, SAFE reports that "during most of the 20th century there was a real sense of duty to report finds to the authorities. The lucrative gains from supplying the demand of the international illicit antiquities trade in the last 20 years have eroded this sense of national responsibility. The forgery industry prospers as a result of the high demand for Chinese antiquities[101]."

Regulation on the demand side

Setting the context for the regulation of the antiquities trade in market countries, Simon Mackenzie writes[102]:

"Apart from a small and relatively localised cohort of archaeologists, the issue of looted antiquities has not fired the public imagination in the demand nations and accordingly there is little political value there in allocating resources to strategies of criminalisation.

[100] Nemeth E. (2008), Art-Intelligence Programs: The Relevance of the Clandestine Art World to Foreign Intelligence in Cultural Security: Evaluating the Power of Culture in International Affairs, Imperial College Press, p 2

[101] http://savingantiquities.org/a-global-concern/china/ Accesses April 16, 2018

[102] Simon Mackenzie (2011). Illicit deals in cultural objects as crimes of the powerful. Crime, Law and Social Change, Springer Verlag, 56 (2), pp.133-153

Public apathy in this case creates power in the trade by rendering it less visible on the political regulatory landscape."

It is therefore unsurprising that instances where regulation has taken place have been fraught with resistance and clash of interests. Mackenzie describes the pushback against regulation as a process of "mobilisation of the various other forms of capital mentioned (financial, social, legal, political) which bring the power to make influential representations in the regulatory debate to fend off or dilute any proposed intrusion when the light of law enforcement sweeps across transactions, revealing shady corners", once it is found that the sanctity attributed to the cultural sector has eroded amid revelations of wrongdoing.

"As institutions that receive tax benefits for their non-profit status, museums must be held to a heightened standard of due diligence", writes Aminedolleh, adding that failure to do so amounts indirectly to public funding of "illicit and terrorism-linked activities"[103].

The State of New York's 1973 Act to prohibit and prevent illicit import, export and/or transfer of ownership of cultural property within New York State finds that "interchange of cultural property among states and nations for scientific, cultural and educational purposes increases the knowledge of the civilization, enriches the cultural life of all peoples, and inspires mutual respect and appreciation among states and nations"[104]. The Act also recognizes the responsibility of all states to protect their own cultural heritage and respect that of all other states and nations.

[103] p 229
[104] State of New York, 5433, 1973-74 Regular Sessions In Senate, March 13, 1973

During Congressional hearings before the Subcommittee on Trade of the Committee on Ways and Means, House of Representatives, Ninety-fifth Congress, first session, on H.R. 5643, representatives presented the following recommendations on the bill on behalf of the State Department:

- The restriction of entering solely into bilateral agreements with other states for addressing illicit trade in cultural property be relaxed
- Instead of a statutory committee to advise the President on related matters, ad hoc committees be established as appropriate to the field of art and archaeological expertise in question
- Measures be taken to ensure that the provision to allow entry of an object in the US if it has been away from the source country for more than 10 years are not exploited, including notice to the country of origin in such cases to allow it to pursue legal remedies
- Once an object has been on display in a US museum for 10 years, such object be immune from seizure or forfeiture thereafter

These deliberations give a glimpse into the mind set which informs regulation in a market country where the goal is to balance the interests of domestic constituencies with the demands of international cooperation. The Museum community in the US has routinely voiced three main concerns in response to any attempts to regulate the illicit trade in antiquities by law:

- That the cultural and educational interests of the American public will suffer if acquisitions by museums are made more cumbersome
- That the US will be affected disproportionately if other market countries do not opt for similar regulatory practices
- That the burden of heritage protection should be equitably shared by source countries as well.

Miles suggests that "the record among American museums is mixed but improving: some such as the University of Pennsylvania Museum, stopped buying antiquities without extensive documentation in 1970, in accordance with the UNESCO agreement of that year; the Getty Museum declared its respect for the agreement in 2006.[105]" She finds that the New York Metropolitan Museum of Art has not amended its practices in this regard and the view that "the encyclopedic museums' needs should override the claims of nations to retain their heritage" continues to find regular expression from quarters within the community.

Self-imposed import restrictions are an important mechanism for market countries to help stem illegal flows. By way of example, Fincham describes the process following which source countries might seek cooperation from designated agencies in the United States. The Cultural Property Advisory Committee (CPAC)[106] advises the President on requests for bilateral agreements made by any State Party to the UNESCO 1970

[105] Miles M. M.(2017), War and Passion: Who Keeps the Art? In Case Western Reserve Journal of International Law, Vol 49 (1)

[106] The CPAC was created under the Convention on Cultural Property Implementation Act, 1983 and eight expert members from Archeology and Anthropology, Museums and the international art market combined as well as three members representing the general public.

Convention[107]. If the CPAC finds that cultural property located in the source country is at risk of looting; the source country has taken adequate measures to protect its own cultural property; if applied, the import restrictions will have a significant effect; and no other remedies are available to achieve the same effect, then, import restrictions may be enacted.

Section 303 3 D of the Act states that[108]

… the application of the import restrictions set forth in section 307 in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes

The Act also recognises imposition of similar restrictions by other importing countries as an important factor which is indicative of a quintessential prisoner's dilemma mindset where, decisions of other actors in the game matter.

Some have argued whether regulations on the supply side amount to taking on the responsibility of protecting their own heritage from source countries. In a way, this poses a dilemma similar to what plagues international negotiations on emissions reductions intended to mitigate climate change. The question in either case remains: Does more power and affluence entail greater responsibility?

[107] Fincham D (2012), Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes, Virginia Journal of Social Policy & the Law, Vol 20(1), p78

[108] CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT Partial text of Public Law 97-446 [H.R. 4566], 96 Stat. 2329, approved January 12, 1983; as amended by Public Law 100-204 [H.R. 1777], 101 Stat. 1331, approved December 22, 1987
https://eca.state.gov/files/bureau/97-446.pdf
Accessed June 11 2020

The notorious case of the collector and curator Marion True who worked at the J. Paul Getty Museum in the United States from 1986 until 2005 is worthy of mention here. As curator, True had a chequered record of acquiring unprovenanced material, identifying and refusing to acquire such material as well as demonstrating some readiness for repatriation in certain cases. In addition, she was reported to be involved in questionable personal financial dealings with antiquities collectors. Eventually, True was charged and prosecuted both in Italy and Greece as follows:

- In 2005 "True was charged in Italy with receiving stolen antiquities and conspiring with dealers Robert Hecht and Giacomo Medici to receive stolen antiquities, and she was ordered to stand trial in Rome [...]. The trial commenced on 16 November 2005, and was abandoned without verdict on 13 October 2010 as the limitation period on True's alleged offences expired"[109].

- In 2006 "Greek prosecutors charged True in connection with the fourth-century BC gold funerary wreath acquired in 1993, which was by then believed to have been taken out of Greece illegally [...]. In November 2007, her trial was ended without resolution after the expiry of the statute of limitations"[110].

Commenting on the real motivation behind the True trial, former Italian prosecutor Paolo Ferri is reported to have remarked: "To show an example of what Italy could do"[111].

[109] Brodie N (2012), Case Study: Marion True, for Trafficking Culture Website https://traffickingculture.org/encyclopedia/case-studies/marion-true/ Accessed June 15, 2020
[110] Ibid Brodie
[111] Edgers G (2015), One of the world's most respected curators vanished from the art world. Now she wants to tell her story, Washington Post https://www.washingtonpost.com/entertainment/museums/the-curator-who-vanished/2015/08/19/d32390f8-459e-11e5-846d-02792f854297_story.html Accessed June 15, 2020

Antiquities Looting: The Supply Side

In this section, illegal excavation and trade of antiquities is discussed in the context of war as well as in a peace-time scenario.

Below, a step-by-step account into how the trade begins in ISIS controlled regions and continues beyond is paraphrased:

Metal detectors are used to locate antiquities buried underground. Satellite imagery has allowed mapping of the extent of excavations. The Wall Street Journal estimates that the looting generates USD 88million in revenues annually for ISIS[112]. In addition, antiquities are used as bribes for facilitating cross border movement of individuals and as barter in exchange for weapons. The Antiquities division of ISIS has been issuing permits to locals to carry out excavations. Locals trying to earn a living dig up antiquities under ISIS supervision. Once obtained, ISIS engages a network of experts to verify authenticity of items and determine their value. They charge traders a 20 per cent tax on all items sold. At the next stage, the antiquities are sold to middle-men in countries like Turkey and Lebanon. These middle-men have the expertise to both channel the antiquities onto international markets as well as launder them through the system, until they arrive at their final destinations in Western Europe and the United States. Social media sites have

[112] Joe Parkinson, Ayla Albayrak and Duncan Mavin (2015), Syrian 'Monuments Men' Race to Protect Antiquities as Looting Bankrolls Terror, Wall Street Journal
https://www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241
Accessed June 15, 2019

been a useful tool for dealers to make the availability of antiquities known to prospective buyers.

Neil Brodie writes that neither the 1974 domestic law prohibiting export of archaeological material not the 1990 United nations Security Council Resolution 661, prevented large scale looting and export of cultural goods in Iraq during wars in the 1990s and 2000s[113]. Brodie's investigative and statistical work provides insight into certain key features of the supply side of the market:

- Auction houses such as Christie's and Sotheby's have profited immensely from the sale of antiquities. With reference to objects smuggled or legally exported from Iraq, we find their sales trends responsive to price fluctuations. Brodie writes that "the profits being made by Christie's from cylinder seal sales started increasing in the late 1980s, and stayed at a high level until 2002, when they declined sharply", somewhat contemporaneously with the United Nations Security Council Resolution 1483.
- While this decline in profits meant that objects from Iraq receded from the catalogue pages of the auction houses, the trade gradually moved online, leading to the emergence of a new supply-side entity. The internet market is characterised by fly-by-night operators unobstructed by reputational concerns, lower levels of scrutiny by experts compared to known auction houses and recent

[113] Brodie N., The Market in Iraqi Antiquities 1980–2009 and Academic Involvement in the Marketing ProcessS. Manacorda and D. Chappell (eds.), Crime in the Art and Antiquities World: 117 Illegal Trafficking in Cultural Property

attempts to engage the academic community to combat the proliferation of fakes.

- Another important supply side actor is the academic expert whose authentication and endorsement "support a credible pricing regime by establishing the quality, interest and rarity of pieces on offer, and maintain customer confidence by keeping the market free of fakes"[114].

Dietzler applies Marcus Felson's Routine Activity Theory to the illicit antiquities trade, whereby, the framing is in terms of a series of actions encompassing "the criminal elements and organizational structure and sequence of antiquities trafficking"[115], yielding "a broad chartable view of the entire process". This framework draws attention to "the settings on which actors converge, as opposed to focusing on the actors themselves", making it a useful way of conceptualising the supply side. Dietzler further argues that such framing allows us to discuss the illicit trade in cultural goods, as a form of trafficking, as both organised and criminal.

Part of the reason threats faced by heritage sites have intensified is the public policies of source countries themselves, most notably the pressure to expand physical infrastructure. For instance, Monalisa Maharjan has documented how lack of fulfilment of legitimate development needs of people in Nepal have led to perception of world heritage sites as a liability[116]. In his review of the Environmental (Protection) Act of India, 1986, Rana PB Singh recognises the tussle between a historically oriented approach –

[114] Ibid Brodie
[115] Dietzler J (2013), On 'Organized Crime' in the illicit antiquities trade: moving beyond the definitional debate, Trends in Organized Crime volume 16, pp329–342
[116] Marjan M (2014), Is World Heritage a Right of a Liability to People? A case study of Kathmanu Valley worold heritage site of Nepal, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg

espoused by the Archaeological Survey of India – and the broad, forward looking stance of the Town and Country Planning Organisation, exemplifying the complexity of goals and considerations characterising heritage conservation in urban and rapidly urbanising contexts[117]. In addition to the location of heritage sites in urban areas, Singh lists infrastructure development to support tourism and a lack of awareness about conservation needs as outstanding challenges.

In 2006 the New York Times reported Ma Weidu, founder of Guanfu private museum, as suggesting that the exclusive emphasis on developmental priorities had recently shifted to make room for measures to minimize harm caused to ancient sites[118]. The constructivist framework discussed in chapter five allows us to return to the question of a model of heritage conservation based on a tourism economy.

Regulation of the supply side

Source countries have been criticized by opponents of regulation of open market access to cultural items for:

- Failing to take adequate measures within their borders to safeguard cultural property and expecting market countries to shoulder the responsibility.
- Diverting cultural heritage towards pursuit of nationalistic agendas rather than allowing it to serve the cause of intercultural understanding as the common heritage of humanity.

[117] Singh, Rana P.B. 1997. Urban heritage in India; in, Contested Urban Heritage, eds. Shaw & Jones: 101-131
[118] New York Times (2006), Saving Chinese Artifacts: A Slow Fight
https://www.nytimes.com/2006/04/01/arts/design/saving-chinese-artifacts-a-slow-fight.html
Accessed June 15, 2020

One of the forms that looting prevention measures have taken in source countries is the creation of special security units such as the Italian Carabinieri. However, even with such commitment of resources, it has been found that the presence of archaeological sites being widespread, defies one hundred per cent security coverage. This is why supply side regulation has had to take the form of strict patrimony laws providing for post-looting sanctions and possibilities of restitution. And this also explains why Italy's "unique property laws entitle the government to assert ownership rights to any item dug up from a citizen's land" which "severely limit the permanent export of antiquities"[119]. Nicole Klug discusses the approach taken by Japan as less restrictive. The legal framework there is a combination of a limited register of objects under state protection, accompanied by "unregistered works of comparable age and quality" which may be exported or exchanged[120].

In recent years, source countries – Italy being a leading example – have stepped up demands for repatriation of objects holding great cultural and historical significance. Thanks to these efforts, their "position has won broad moral support and increasingly become the norm among academic archaeologists, who see ancient objects as historic artefacts inseparable from their place of discovery"[121]. While a shift in normative paradigm is not accounted for in the game theory/realist approach, the impact of such a change is felt on the demand side by putting museums and collectors under greater pressure to revisit their acquisition practices.

[119] Klug N (2010), Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise between the Conflicting Ideologies of Cultural Property, 42 Case W. Res. J. Int'l L. 711
[120] p 735
[121] Bennett D. (2008), Finders Keepers, Boston Globe
http://archive.boston.com/bostonglobe/ideas/articles/2008/02/10/finders_keepers/
Accessed April 21, 2020

Patrick Howlett-Martin expresses the core sentiment behind the calls for return and repatriation of stolen and illegally removed cultural objects in these words[122]:

The acquaintance with a culture, the achievement of a kind of relationship with a past civilization is obviously easier in situ. There is something inauthentic about a Westerner looking at an African sculpture or an Egyptian artwork in a Western museum that feels often compelled to build a fake scenery to display the pieces such as the Pergamonmuseum in Berlin with architectural structures from Greek and Roman Antiquity reconstructed. Showing objects in glass cases in museums is to denude them of their « sacred » meanings […]".

Evaluation

The game theory approach, which is founded in microeconomic fundamentals of firm and market behaviour, is useful towards grasping the trade in antiquities. Much of the flow of cultural goods globally, has been understood to take place between source countries who are richly endowed with these objects and market countries where wealthy collectors and the museums which eventually house the traded goods are situated. Treatment of the problem through a market-driven approach, however, is not independent of normative considerations. Au contraire, the case of cultural goods in particular, forces us to pay attention to the hierarchies and asymmetries that sustain the global trading system at large. According to Simon Mackenzie, "The moral argument laid out by archaeological commentators has become the object of much legal writing, and

[122] Howlett-Martin P. (2018), Art, Nationalism and Cultural Heritage: Artworks belong where they are found, Amazon, p 36

drafting, and the policy landscape at both the national level – in source and market countries – and the international level, is now characterised by many legal controls including notable international conventions (UNESCO 1970; UNIDROIT 1995), national generic criminal laws that have been applied to illicit dealing in antiquities (such as the National Stolen Property Act in the US) and criminal laws specific to dealing in looted antiquities such as the Dealing in Cultural Objects (Offences) Act 2003 in the UK.[123]" And yet, concentrating exclusively on the illegal antiquities trade between source and market countries, from a supply and demand standpoint, yields a framework with limited applicability and certain inherent limitations.

It is increasingly clear that the line between source and destination regions cannot be clearly delineated in present times. Due to the transnational nature of the trade in question, the network of suppliers, intermediaries and consumers is diffuse and cross-cutting. For instance, entities such as museums and auction houses, although based in market countries, operate, respectively, on the demand and supply sides of the market. Similarly, museums within universities are demand-side entities while academics working within those same institutions contribute to the supply side. Thus, the microeconomic analysis ingrained in game theory shows that there is no perfect overlap between the legal category of market country with the demand side and the legal category of source country with the supply side. Similarly, it is incorrect to say that source countries are necessarily "conflict-ridden", "war-torn" or "unstable" – the sort of language frequently used in internationalist arguments. Based on a survey of studies, Jessica Dietzler establishes that the "problem of looted or stolen antiquities is most damaging in

[123] Simon Mackenzie (2011). Illicit deals in cultural objects as crimes of the powerful. Crime, Law and Social Change, Springer Verlag, 56 (2), pp.133-153

politically conflicted and economically depressed regions but is not isolated to conflict regions alone; in fact, there are a number of politically and economically (relatively) stable countries that also experience theft of archaeological materials for profit; notably England, France, Italy, Germany, and Poland.[124]"

In practice, this delinking of categories gives rise to a sanctioning problem as defectors are not easily identifiable and it is difficult to ensure that sanctions are targeted. Similarly, the so-called "shadow of the future" is long since the effects of loss of cultural property only become evident over a longer time horizon. Alessandro Chechi points out a further important feature of the market whereby "objects of licit or illicit provenance pass through the same intermediaries – such as auction houses, antiques dealers and galleries – and that in the art market licit and illicit antiquities are mixed" and argues that such mixing results in an "opportunity to launder the proceeds of crimes and hence the cover for wrongdoers to evade criminal responsibility"[125].

For an effective conservation regime to be built around this approach, two key considerations matter:

- Current bifurcation in applicable body of laws and academic discourse between source countries and destination countries would have to be replaced by an alternative paradigm that more closely approximates the evolving landscape.
- The shadow of the future would need to be shortened by ensuring that the effects of loss of heritage are felt in the short-run. This is best achieved by tying

[124] Dietzler J. (2013), On 'Organized Crime' in the illicit antiquities trade: moving beyond the definitional debate, Trends in Organised Crime, 16: 329–342
[125] Chechi A., When Private International Law meets Cultural Heritage Law: Problems and Prospects, Yearbook of Private International Law, Volume 19 (2017/2018), pp. 269-293

heritage protection more rigorously with post-conflict reconstruction, which is where it becomes useful to apply the human security paradigm to this discussion.

International relations scholars like Kenneth Abbott, Duncan Snidal and Robert Keohane have drawn on game theory to define what purpose international organisations, viewed as "regimes", play in the international system. While structural realists like Kenneth Waltz write off international organisations as instruments of powerful states, the regime theorists set themselves the task of identifying how international organisations constitute inter-state interactions in specific ways. Observing that rational functionalism shares the emphasis on interests with realism, Beth Simmons underlines the absence of realist cynicism in the former's worldview[126]. Instead, rational functionalism posits that international law often stems from states rationally calculating the undesirable outcomes that might result from the absence of its constraints. In Slaughter Burley's assessment, regime theorists modify structural realism in contending that "institutions that provide valuable information must […] be factored into systemic explanations of state behaviour independently of structure"[127]. Regime theories exemplify the potential of interdisciplinary dialogue between International Relations and International Law. Slaughter Burley also notes that by recasting international law within the rational choice framework, regime theorists not only bridged the realist-idealist ends of the spectrum but also made an argument in favour of adoption of international law in domestic legal systems on grounds of efficiency and transparency.

[126] Simmons BA (1998), Compliance with International Agreements, Annu. Rev. Polit. Sci. 1998. 1:75–93
[127] Slaughter-Burley AM (1993), International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law* Vol. 87, No. 2 p 219

Amitav Acharya has identified three prominent characteristics of the system in the realists' systemic thinking:

- Pre-Westphalian international systems are largely ignored
- The dominant template is the classical Mediterranean of Greek and Roman times
- The history of war and conquest is well documented while "Interactions anchored on trade, ideas (including political ideas) and culture, where empire, hegemony or explicit and continuous power balancing is absent, have been ignored"[128]

Analysing the movement of cultural goods and the consumption and exchange of heritage through the international system helps partly address these imbalances. As a case, it is possible to examine heritage destruction both in conflict and in peace, as I do in this study.

In forthcoming chapters, analysis from the lenses of human security and constructivism reveals the far reaching effects of the dominance of military affairs and Eurocentric thinking in the evolution of international law.

As explained in chapter two, realism greatly emphasizes the distribution of power in the system and this is why, moments of power redistribution or the emergence and decline of powers are of great import. According to a McKinsey report, "the Art Basel and UBS global *Art Market Report 2018* found that in 2017, China accounted for 21 percent of the

[128] Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3) p 628

$63 billion global art market, second only to the United States"[129]. Recent participation of China and emerging markets in general in the international heritage trade could give us a glimpse into how ascendency to great power and hegemonic status influences actor behaviour.

Derek Fincham suggests that the merits of nationalist and internationalist views on ownership, location and protection of cultural property should be debated from the standpoint of distributive justice. He writes[130]:

In applying ideas of distributive justice to cultural heritage, we can arrive at a mutually beneficial set of principles and ideas which can, ideally, balance the concerns of cultural internationalists, who value the idea of universal museums and the dissemination of works of art, with the enforcement of legitimate legal restrictions on the theft of heritage, the looting of archaeological sites, and the destruction of knowledge. Even groups wanting the return of their heritage only want to achieve justice.

Travelling exhibitions and international loan agreements have been suggested as ways to balance the interests of countries of origin and a global audience. Elsewhere, I have argued in favour of a travelling exhibition as a satisfactory resolution to recurring public debate in India about the repatriation of the Kohinoor diamond[131]. Such a step, I find, will:

[129] McKinsey & Company (2019), Navigating Asia's booming art market: An interview with Rebecca Wei, chairman of Christie's Asia
https://www.mckinsey.com/featured-insights/china/navigating-asias-booming-art-market-an-interview-with-rebecca-wei-chairman-of-christies-asia#
[130] Fincham D (2012), Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes, Virginia Journal of Social Policy & the Law, Vol 20(1), p69
[131] Unkule K. (2016), A Diamond with many facets, Nickled and Dimed
https://nickledanddimed.com/2016/05/11/a-diamond-with-many-facets/
Accessed June 11, 2020

Keep alive the memory of empire and its ravages to serve as learning for future generations

Address the challenge of resource allocation for the upkeep of the diamond in India, amid competing priorities

Sidestep what some would argue to be the controversial claim of a nation-state to an object which has changed hands a number of times before the State came into existence.

Serve the interest of the global community in enjoying access to a precious stone and a contested fragment of history

Derek Fincham writes that even in the absence of laws addressing illegal trade in source countries, "native cultures have successfully used ethical claims, using social justice to successfully repatriate objects wrongfully removed from their context". Native cultures often in conflict with domestic laws anyway and this phenomenon observed by Fincham allows us to:

Study international cooperation in the absence of law but with reference to a claim for justice

Usefully problematize the realist claims that States are the only important actors in the international system and as an actor, the State is a monolith without any contradictory internal pulls

Begin to imagine how considerations of justice – rather than exclusively those of order – might have a place in systemic thinking

As noted above, reputational concerns contribute towards making compliance with international law a rational choice for States. However, in the case of the global market

of cultural goods, until recently, there was a lot of reputational gain to be made by disregarding the law and become a major market country. As we saw above in case of the True trial, the recourse to prosecution was a step taken by a source nation (Italy) for the demonstrative effect it would have on targeted adversaries in market countries. Also, the game theory model does not account for the disparities in the capacity of States to comply with international law. Therefore, the rational choice framework and lessons drawn when it is applied to the international system, alone are insufficient to illuminate the many threats to cultural heritage and the range of efforts directed at its conservation. The forthcoming chapters attempt to present a more complete picture by drawing on the paradigms of human security and constructivism from International Relations[132].

Bibliography

Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3)

Amineddoleh L. (2013), The Role of Museums in the Trade of Black Market cultural heritage property, Art Antiquity and Law, Vol 17(3)

Axelrod R. and Keohane R. (1985), Achieving Cooperation under Anarchy: Strategies and Institutions, Vol. 38 (1)

[132] The premise behind this line of further exploration is, as Cohen puts it, the fact that liberal and constructivist schools are better equipped to "to explain the flow of ideas through the international system or the relationship between international actors and domestic constituencies".

Brodie N., The Market in Iraqi Antiquities 1980–2009 and Academic Involvement in the Marketing ProcessS. Manacorda and D. Chappell (eds.), Crime in the Art and Antiquities World: 117 Illegal Trafficking in Cultural Property

Brodie N (2012), Case Study: Marion True, for Trafficking Culture Website

Chechi A., When Private International Law meets Cultural Heritage Law: Problems and Prospects, Yearbook of Private International Law, Volume 19 (2017/2018),

Cohen JG (2009), Can International Law Work?, Berkeley J. Int'l Law, Vol 27

Davies M. (2002), Ethics and Methodology in Legal Theory a (Personal) research Anti-manifesto, Law, text, Culture 6

Dietzler J. (2013), On 'Organized Crime' in the illicit antiquities trade: moving beyond the definitional debate, Trends in Organised Crime, 16

Efrat Asif (2009), "Protecting against Plunder: The United States and the International Efforts against Looting of Antiquities". Cornell Law Faculty Working Papers. Paper 47

Fincham D (2012), Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes, Virginia Journal of Social Policy & the Law, Vol 20(1)

Howlett-Martin P. (2018), Art, Nationalism and Cultural Heritage: Artworks belong where they are found, Amazon

Klasche B and Selg P. (2020), A pragmatist defence of rationalism: Towards a cognitive frames–based methodology in International Relations, March 2020 online issue

Klug N (2010), Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise between the Conflicting Ideologies of Cultural Property, 42 Case W. Res. J. Int'l L

Mackenzie S (2011). Illicit deals in cultural objects as crimes of the powerful. Crime, Law and Social Change, Springer Verlag, 56 (2)

Marjan M (2014), Is World Heritage a Right of a Liability to People? A case study of Kathmanu Valley worold heritage site of Nepal, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg

Miles M. M.(2017), War and Passion: Who Keeps the Art? In Case Western Reserve Journal of International Law, Vol 49 (1)

Nemeth E. (2008), Art-Intelligence Programs: The Relevance of the Clandestine Art World to Foreign Intelligence in Cultural Security: Evaluating the Power of Culture in International Affairs, Imperial College Press

Singh, Rana P.B. 1997. Urban heritage in India; in, Contested Urban Heritage, eds. Shaw & Jones

Slaughter-Burley AM (1993), International Law and International Relations Theory: A Dual Agenda, *The American Journal of International Law* Vol. 87, No. 2

Snidal D. (1985), The Game Theory of International Politics, *World Politics,* Vol. 38, No. 1

Unkule K. (2016), A Diamond with many facets, Nickled and Dimed

Chapter 4

Protecting Cultural Heritage: The Human Security Paradigm

Chapter Highlights

- The human security paradigm rose to prominence in the post-Cold War period as interstate warfare receded and concerns over non-conventional threats to security grew
- Whether human security is useful and actionable in it thick or thin conception has been a matter of debate
- Broadly it has been discussed with reference to aspirations of freedom from fear and freedom from want
- Applying the human security framework to understand the toll taken by destruction of heritage reveals that future prospects are an important element of our sense of security
- It is observed that those military interventions which have deployed the rhetoric of human security in the past couple of decades have neglected and failed to protect heritage sites
- It is argued based on the analysis that freedom from trauma is an important facet which should be added to the definition of human security so as to more fully address the causes and impact of conflict

"There is no small irony in hearing that American museums became havens of spiritual nourishment following the attacks of September 11th 2001. By way of contrast, one of the most immediate consequences of the invasion of Iraq was the transformation of its national museum from peaceful oasis into desecrated battleground as American forces sought to spread the "ideals of democracy""[133], writes Tom Flynn, plainly setting out the complex and variegated repercussions that war, insecurity and conflict have for heritage and cultural practice. According to Chinkin and Kaldor the element of use of force inherent in guaranteeing human security was an outgrowth of European wars of the nineteenth and twentieth centuries and is inapplicable to the New Wars of today. However, the influence of said European wars over international law endures. Substantiating this influence, Craig Forrest goes as far as to argue that "the need for a balance between the considerations of humanity and the military actions necessary to win a war is regarded as defining the very nature of international humanitarian law"[134].

The notion of human security itself is premised on the immediate post-Cold War optimism about the universality of liberal democratic ideals which has proven to be misplaced[135]. Chinkin and Kaldor argue that International law was aimed at mitigating suffering in war but in doing so, has legitimized war. They call for a reconceptualization

[133] [133] Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century? P 7 https://www.academia.edu/20053839/The_Universal_Museum_A_Valid_Model_for_the_21st_Century Accessed may 29, 2020

[134] Forrest C.J.S (2006), The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts, California Western International Law Journal, Vol. 37, No. 2, Art. 2, p 183

[135] The crisis of the liberal world order has been widely debated in International Relations. But a very striking example is the work of Francis Fukuyama who authored the book "The End of History and the Last Man" in 1992 and by 2018 was forced to thoroughly revisit his position in the work "Identity: The Demand for Dignity and the Politics of Resentment"

of human security that brings prohibition of war back in focus. This also means extending the concept of crimes against humanity to include attacks on States even if they are conducted by other States. These authors also recap the on-going debate on the relative merits of broad and narrow conceptions of human security, with the former encompassing material security while the latter is limited to physical security. Summed up in their words, the main critique levelled against the two approaches is as follows[136]:

Those who favour the broad version have argued that the narrow version is too concentrated on military intervention, while those who favour the narrow version have argued that the broad version is indistinguishable from development and covers too much ground to be analytically useful.

A typical conceptualisation of a broad understanding of human security is seen first in the 1994 Human Development Report which added the paradigm of security into its study of development. The report reads: "The concept of security has for too long been interpreted narrowly: as security of territory from external aggression, or as protection of national interests in foreign policy or as global security from the threat of a nuclear holocaust. It has been related more to nation-states than to people. The superpowers were locked in an ideological struggle-fighting a cold war all over the world. "[137] The UNDP defined human security as "safety from such chronic threats as hunger, disease and repression" and "protection from sudden and hurtful disruptions in the patterns of daily life," thus broadening the conceptualisation of security. Defining human security as "safety from such chronic threats as hunger, disease and repression" and "protection

[136] Pp487
[137] Human Development Report 1994, (1994), UNDP, Oxford University Press 1994 http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf

from sudden and hurtful disruptions in the patterns of daily life," the UNDP broadened the conceptualisation of security. [138]

The justification of a broad definition is best provided for in the foreword in "Human Security and the New Diplomacy: Protecting People, Promoting Peace" written by former Secretary General of the UN, Kofi Anan - "During the cold war, security tended to be defined almost entirely in terms of military might and the balance of terror. Today, we know that 'security' means far more than the absence of conflict. We also have a greater appreciation for nonmilitary sources of conflict. We know that lasting peace requires a broader vision encompassing areas such as education and health, democracy and human rights, protection against environmental degradation, and the proliferation of deadly weapons. We know that we cannot be secure amidst starvation, that we cannot build peace without alleviating poverty, and that we cannot build freedom on foundations of injustice. These pillars of what we now understand as the people-centered concept of 'human security' are interrelated and mutually reinforcing."

Tatah Mentan offers the following definition of human security which represents it as a peace-time project designed to mitigate the very causes of conflict[139]:

…human security advocates for inclusive policies that strengthen social cohesion and rejects exclusionary policies and practices that result in an unequal allocation of economic, political, and cultural rights among identity groups and that also, if left unattended, can

[138] Luke Johns, (2014), "A critical evaluation of the concept of Human Security" http://www.e-ir.info/2014/07/05/a-critical-evaluation-of-the-concept-of-human-security/

[139] Mentan T (2014), Africa facing Human security challenges in the 21st century, African Books Collective, p 1

lead to social exclusion, proliferation of networks of discontent, and possibly higher incidence of conflict.

Addressing the lack of consensus on a definition of human security, David Roberts proposes specifying what constitutes human insecurity, "to represent avoidable civilian deaths, global in reach, that are caused by changeable human-built social, political, economic, cultural or belief structures, created, inhabited and operated by other civilians whose work or conduct, indirectly and/or directly, unintentionally, unnecessarily and avoidably causes needless mortality around the world"[140].

To sum up, human security paradigm is centered on the individual, is cosmopolitan to the extent that it critiques the insecurity fostered by forces of globalization and is built around the pillars of freedom from fear and freedom from want.

Evolution

Human security came into being as a concept only after the close of the cold war.[141] With the end of the cold war came a general acknowledgement that the traditional modes of understanding security through a "realist, state centric paradigm"[142] were inadequate. Mary Kaldor traces the origins of the idea to Conference on Security Cooperation in Europe's 1975 Helsinki Agreement. According to her, "by emphasising the security of individuals rather than states, human security implies a commitment to human rights but it does not deny the importance of the more traditional state centre"[143].

[140] Roberts D., (2006), Review Essay: Human Security or Human Insecurity? Moving the Debate Forward, Security Dialogue Vol 37 (2), pp 249-261
[141] Luke Johns
[142] Luke Johns
[143] Kaldor M (2011), Human Security, Society and Economy, Vol. 33, No.3, pp. 441-448

The concept of human security came into focus once again with the Human Development Report of 1994. The Human Development Report of 2001 furthered this concept which called for the formation of the Commission for human Security (CHS).[144] The formation of the commission was chiefly on the lines of UN Secretary-General's call at the 2000 Millennium Summit for a world "free of want" and "free of fear".

The purpose of the said commission was to

(i) mobilize support and promote greater understanding of human security,

(ii) develop further the concept as an operational tool, and

(iii) outline a concrete action plan for its implementation.[145]

When the 2004 Barcelona report, we see a new way of looking at human security given that it suggests that in the modern world, individuals from across the world face significant threat of violence. Much of this violence, however, is not resultant of state or military action. A prime threat in the modern world are terrorist organizations which are not representative of state or military interests. Moreover, military action cannot conveniently suppress such acts of violence for

(1) Military cannot be expediently deployed to insecure areas.[146]

(2) Military action is meant for usage in battlefields and not over areas inhabited by civilians. Military action used to suppress such local security issues can in turn cause

[144] UNDP, Human Development Report (2001)
[145] ibid
[146] Albrecht, Ulrich, Chinkin, Christine, Dervis, Kemal, Dwan, Renata, Giddens, Anthony, Gnesotto, Nicole, Kaldor, Mary, Licht, Sonia, Pronk, Jan, Reinhardt, Klaus, Schmeder, Genevieve, Seifter, Pavel and Serra, Narcis (2004) *A human security doctrine for Europe: the Barcelona Report of the Study Group on Europe's Security Capabilities.* . Study Group on Europe's Security Capabilities, Barcelona, Spain.

further insecurity (as in the case of Syria where American bombs targeting enemies affect civilian populations)

On 10 September, 2012, the United Nations General Assembly adopted General Assembly Resolution 66/290 entitled "Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome" in which Member States agreed on a common understanding on human security[147].The UN Human Security Unit's 2014-17 Strategic Plan identifies as its basis, two key building blocks of the concept[148]:

1. *The application of human security derives much of its strength from a dual policy framework based on the mutually reinforcing pillars of protection and empowerment. Application of this framework offers a comprehensive approach that combines top-down norms, processes and institutions with a bottom-up focus in which participatory processes support the important role of people as actors in defining and implementing their essential freedoms.*

2. *Human security is best safeguarded through proactive and preventive actions to current and emerging threats. By examining how the particular constellations of threats to individuals and communities can translate into broader insecurities, human security promotes the development of early warning mechanisms that help to mitigate the impact of current threats and, where possible, prevent the occurrence of future threats.*

Scholarship emerging from a non-western lens has tended to mobilise the human security framework to draw attention to the linkages between neoliberal globalization

[147] Human Security Unit Strategic Plan 2014-17, United Nations 2014, p 8
[148] http://www.un.org/humansecurity/human-security-unit/human-security-approach Accessed January 22, 2018

and non-conventional security challenges, particularly in resource-rich parts of the world. According to Mentan, "Global demand for particular commodities, such as timber, diamonds and drugs, has provided the funds that have allowed warring factions to sustain fighting over many years. The cases of Angola, Sierra Leone, etc. are eloquent examples.[149]" Mary Kaldor has similarly drawn parallels between the erosion of decision making at the national level caused by the market fundamentalist structural adjustment paradigm and heightened global levels of insecurity[150]. Such insecurity is at times reminiscent of Cold War dynamics while also defying simplistic rendering in conventional geostrategic rivalries.

Debates and criticisms

The key debate that emerged post the Human Development Report of 1994, was regarding whether Security was to be viewed narrowly (in terms of solely physical security) or whether the definition of the same should be broadened (to other elements of human development).

King and Murray have described the birth of the concept of human security as a "unifying event" – it works as an "organizing concept" that enables the development of broad coalitions around specific 'security' issues without the traditional strains of narrowed, state-centric definitions of security that have previously hindered multi-party cooperation.[151] In a similar vein, both Jolly and Ray [152](2006: 13-14) and Tadjbakhsh and

[149] Mentan T (2014), Africa facing Human security challenges in the 21st century, African Books Collective, p 19
[150] Kaldor M (2011), Human Security, Society and Economy, Vol. 33, No.3, pp. 441-448
[151] King, Gary and Christopher Murray (2001-02) 'Rethinking Human Security', *Political Science Quarterly*, 116(4), pp. 585-610.
[152] Jolly, Richard and Deepayan Basu Ray (2006) *National Human Development Reports and the Human Security Framework: A Review of Analysis and Experience*, Brighton: Institute of Development Studies.

Chenoy [153](2007: 10) advocate a holistic approach to human security definition, arguing that the post-Cold War world presents such a plethora of security problems, where the sources of threat vary widely both within and across states, that a flexible, broad definition of human security is the only viable option. "Not only does a holistic approach draw different specialisms together in the quest to understand better the interconnections between diverse aspects of human insecurity," writes Ewan, "it may also bolster co-operation between international agencies in the fields of security, development and human rights."[154]

One of the key criticisms levelled against the concept of human security is its lack of clear, universal definition.[155] Roland Paris argues that the concept of human security can be closely likened to the concept of sustainable development. Similarly, Edward Newman calls it "normatively attractive but analytically weak."[156]

Consequently, the proponents of a narrow definition argue that a broad definition would take away from the focus of physical security. For instance, according to Khong, by broadening the concept of security to encompass anything from environmental degradation and pollution to homelessness and unemployment, we would be prioritizing everything.[157]

[153] Tadjbakhsh, Shahrbanou and Anuradha M. Chenoy (2007) *Human Security: Concepts and Implications*,London & New York: Routledge.
[154] Ewan, Pauline (2007) 'Deepening the Human Security Debate: Beyond the Politics of Conceptual Clarification', *Politics*,27(3), pp. 182-189.
[155] Paris, Roland (2001) 'Human Security: Paradigm Shift or Hot Air?', *International Security*,26(2), pp. 87-102.
[156] Newman, Edward (2010) 'Critical Human Security Studies', *Review of International Studies*, 36(S1), pp. 77–94.
[157] Khong, Y. F. (2001) 'Human Security: A Shotgun Approach to Alleviating Human Misery?', *Global Governance*, 7(3), pp. 231-236.

A different line of criticism comes from those who contend that states have been able to co-opt the human security narrative to further their own ends, augmenting hegemonic interests and narratives rather than challenging or transforming them.[158] Instead of having genuine commitment to the emancipation of the most vulnerable and impoverished, Suhrke has argued that non-military "middle powers" such as Norway, Japan, and Canada have used the promulgation of the human security agenda to cement their own places in the international state system.[159] Taking a critical perspective on the development of the concept, Booth argues that human security has taken the image of "the velvet glove on the iron hand of power," criticising how "the cold monster of the sovereign state has appropriated human security in order to help entrench its own."[160] It doesn't give a voice to the previously 'marginalized', as scholars such as Conteh-Morgan have suggested.[161] Instead, Western powers have privatised aid and development agencies and a particularly troubling issue has arisen where the security and development of "those over there" is seen as only a means towards the security of "us over here".[162]

Tara McCormack argues that:

"[The human security discourse]… potentially allows powerful states or international institutions greater freedom to intervene in and regulate weaker states in a number of different ways. This serves to disempower the citizens of weak or impoverished states. Whilst their own state is held up to greater scrutiny and regulation by the international

[158] Black, David R. (2006) 'Mapping the Interplay of Human Security Practice and Debates: The Canadian Experience', in Sandra J. MacLean, David R. Black & Timothy M. Shaw (eds.), *A Decade of Human*
[159] Suhrke, Astri (1999) 'Human Security and the Interests of States', *Security Dialogue*,30, pp. 265-276.
[160] Booth, Ken (2007) *Theory of World Security*, Cambridge: Cambridge University Press.
[161] Conteh-Morgan, Earl (2005) 'Peacebuilding and Human Security: A Constructivist Perspective', *International Journal of Peace Studies*,10(1), pp. 69-86.
[162] Booth, Ken (2007) *Theory of World Security*, Cambridge: Cambridge University Press.

community – purportedly on their behalf – the citizens of those states do not have the means by which to control or hold to account major international institutions or powerful states."[163]

Thus human security can also be seen as a tool in the hands of the developed states to influence the sovereign functions of the weaker states. Moreover, with the new paradigm of human security, often, weaker states are presented as existential threats to the most powerful states.[164]

McCormack suggests that the concept of human security evolved during the post-Cold War period of disengagement from developing countries by great powers and this is why it delinks development from security[165]. Recounting some prominent critiques of human security, she further notes:

"For Duffield and other authors, human security can be understood as a regulatory power that seeks to support life through intervening in the biological, social and economic processes that constitute a human population. […] In this reading the West seeks to assert control over the developing world in order to protect itself from disorder emanating from the South.[166]"

Human Security and Cultural Heritage

Applying the concept of human security to cultural property conservation in conflict zones, one is operating in a context of people-to-people war and isolating as its enduring

[163] McCormack, Tara (2008) 'Power and Agency in the Human Security Framework', *Cambridge Review of International Affairs*,21(1), pp. 113-128.
[164] McCormack, Tara (2008) 'Power and Agency in the Human Security Framework', *Cambridge Review of International Affairs*,21(1), pp. 113-128.
[165] McCormack, Tara (2011), Human security and the separation of security and development, Conflict, Security & Development 11:2
[166] P 243

feature, the targeting of civilians. Referring to heritage as "the ultimate expression and footprint of a society", Watfa Shadi and Mustafa Bashar argue that "to inflict damage to the heritage of a country is to damage the soul and identity of the people themselves"[167].

Bearing in mind that "an individual's current security is a function of her or his future prospects"[168], allows us to fully capture the psychological impact that the social dislocation caused by destruction of heritage can have. This is also to say that heritage and cultural practices are not only significant in terms of preserving the past but also must be valued as contributing factors to future well-being. For its success, the human security approach relies on coordinated action of state and non-state entities at the local, national and international level, enabling an interplay of the varied associations with the idea of heritage. This approach also takes due cognizance of the fact that more often than not, actors trained in combat and other conventional dimensions of security are ill-equipped to shoulder the responsibility of protecting heritage.

At present, most discussion on "protection of civilians" is based on a narrow definition of civilian and a thin conception of protection. The definition of civilian can be seen as narrow for the following reason: It is hard to distinguish between combatants/aggressors, many of whom may be in and out of civilian life over the span of conflict and the civilian population, which is purportedly at risk from them. Destruction of heritage sites in Syria shows that it is far from easy to separate parties to the conflict into

[167] Shadi W and Bashar M. (2015), Syrian Archaeological Heritage: Past and Present, SCIENTIFIC CULTURE, Vol. 1, No. 3, pp. 1-14

[168] King G and Murray CJL. (2001), Rethinking Human Security, Political Science Quarterly Vol 116(4) pp 585-610

watertight categories of those who are attacking and those who are protecting heritage. Reporting on the situation in Syria, Michael D. Danti writes[169]:

Combat damage and looting are widespread in Syria, and all major combatants (state, quasi-state, and non-state) are responsible for acts of theft and destruction to varying degrees. Intentional destructions of heritage places by ISIL and other Jihadi-Salafi organizations (Meijer 2013: 24–29; Steinburg 2013) – mainly tombs, cemeteries, mosques, churches, temples, and shrines sacred to Shia, Christians, Sufis, Jews, Druse, Alawi, Yezidis, and Mandaeans – across northern Iraq and Syria are perhaps the highest impact cultural property crimes given their explicit purposes of eradicating cultural diversity, inspiring terror, fuelling sectarian tensions, and fomenting further violence.

The conception of protection can be adjudged as thin concerned almost exclusively with keeping people alive. This may be viewed in contrast to a thick conception of protection in the sense of minimizing the impact of the conflict on civilian life. The more broad-based conception of protection has a short-term and a long term advantage. In the short-run it reduces the incentives for individuals to take up combat as an occupation or to perform other services for conflict entrepreneurs. In the long-run it makes for a smoother road to peace-building and transition to stability. The widening of social cleavages due to cultural crimes would be avoided, making post-conflict restoration of social trust less fraught. Disruption and internal displacement would be minimized and individuals and communities would be optimistic of having a real chance of rebuilding where they are rather than be forced to flee. This would minimize regional contagion of

[169] Danti MD. (2015), Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq, Near Eastern Archaeology, Vol. 78, No. 3, Special Issue: The Cultural Heritage Crisis in the Middle East, pp. 132-141

instability and other knock-on effects of refugee outflows from conflict zones that are being experienced globally.

Kaldor describes the operative implications of a human security based national and transnational governance paradigm in these words[170]:

We are used to thinking of internal security as the domain of law and policing and external security as war and diplomacy. A human security approach implies that something like what we take for granted internally has to apply externally as well.

Resituated within this framework, the concern with destruction of cultural heritage becomes a problem not of specifying what protections are to be extended to heritage in war-time but of finding mechanisms to resolve conflict without recourse to war.

A human security approach to conflict resolution needs also take into account those global private economic interests which profit from weakening of state capacity or state failure in resource rich parts of the world. Insights into the dynamics of the market for cultural goods yielded by the game theory approach are thus placed within a broader context of the systemic inequality and insecurity.

As we have seen, the human security approach lends itself well to understanding the intricacies of destruction of heritage in conflict zones. Such an applied approach also reveals an inherent contradiction in the conceptual framework of human security. Freedom from fear and freedom from want have been recognized as key pillars of human security. In conflict zones, however, these two motivations may be at cross purposes with each other. Confronted by economic disruption and extreme deprivation, host

[170] Kaldor M (2011), Human Security, Society and Economy, Vol. 33, No.3, pp. 441-448

communities turn to looting and pillaging of heritage in order to earn a living. "Given the sometimes life-or-death situation for themselves and their families, the financial gains achieved by stealing and smuggling their own cultural heritage creates an overwhelming option"[171], write Watfa and Mustafa, lucidly portraying the grim reality of conflict zones. Fear of long term social consequences is a small consideration for them but is nothing short of terrorizing to a worldwide cosmopolitan sensibility, in large part inspiring the high profile, well publicized strikes on museums and ancient sites in Afghanistan and Iraq in the first decade of the twenty first century. In this way, the human security framework vests more responsibility in the international community to take a long term view on heritage protection and interpret the conservation capacities of countries of origin in a dynamic sense, rather than as a given. Despite being normative in nature, the human security approach hinges on the economic value of cultural objects but in a different way than the game theoretical approach. Where the analyses of both approaches converge is in ascribing to international law the responsibility of pursuing equitable global development rather that sustain the widening of inequalities in a bid to uphold the edifice of neoliberal globalization at all costs. Powerful states have also deployed the rhetoric of human security to conduct military operations in other parts of the world, particularly emphasizing freedom from fear. Such military operations have in recent history dealt significant damage to heritage sites and cultural objects.

At the epistemic level, Amitav Acharya traces the origins of "human-centric" approaches to the Global South, making them a significant step forward in the direction of non-western International Relations scholarship. He is however critical of their appropriation

[171] Ibid p 6

by "western governments such as Canada and Norway" and expresses disappointment with their inability to "challenge the centrality of the state"[172].

Freedom from Trauma: Towards redefining human security

A conception of protecting cultural heritage based on human security is likely to suffer from two of Philip Allott's five main challenges to the future evolution of international law[173].

1. The Hegemony of the Economic
2. The Tyranny of the Actual

While explaining what he means by the "hegemony of the economic", Allott questions the assumed positive correlation between economic development and social development and is critical of the association of public interest with capitalist, private-interest driven economic activity. The human security paradigm seems to have coopted Freedom from Want without addressing the basic underlying limitation that capitalism and globalization exacerbate inequalities.

Allott also argues that "to rationalize or naturalise the human actual is to empty it of its moral content, to neutarlise it"[174]. We see this done to a great degree when the human security paradigm evaluates the harm caused to heritage against a static background of conflict or in the contingency of war and its immediate aftermath. Here the opportunity to think about conflict and reconstruction as long term processes is missed with the end result that heritage is the loser since by definition it accrues more value over the longer

[172] Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3), p 630
[173] Allott P. (1999), The Concept of International Law, European Journal of International Law, Vol 10 pp 31-50
[174] Ibid p 49

horizon of time. Keeping these limitations in mind, I propose a revised understanding or human security below which would elevate the potential of the framework to safeguard cultural heritage.

In The Body in Pain, Elaine Scurry writes, referring to the phenomenon of torture[175]:

But this reluctance, and the deep sense of tact in which it originates, increase our vulnerability to power by ensuring that our moral intuitions and impulses, which come forward so readily on behalf of human sentience, do not come forward far enough to be of any help: we are most backward on behalf of things we believe in most in part because our instincts salute the incommensurability of pain by preventing its entry into worldly discourse.

In the concluding part of this chapter, I will discuss loss of heritage and one's cultural grounding as a form of trauma and propose that Freedom from Trauma should be given place alongside Freedom from Fear and Freedom from Want if the conception of Human Security is to be responsive to our time.

Present day global conflicts need much more nuanced interpretation than the limited categories of inter or intra state war might allow for. The individualisation brought about by technologies of globalisation has also made it easier for those same individuals to rally around causes, culminating in the ongoing instability that has been the saga of the twenty first century thus far[176]. One less talked about feature of these conflicts is the aggregation of intergenerational trauma which almost inexplicably erupts as if a dormant volcano come alive. The Black Lives Matter Movement in the United States, the Me Too

[175] Scarry E. (1985), The Body in Pain: The Making and Unmaking of the World, OUP, p 60

[176] "…injury must at some point be understood individually, because pain, like all forms of sentience, is experienced within, happens within, the body of the individual", writes Scarry.

and Rhodes must fall movements globally share in common a painful reckoning with a loss of agency and narrative control which until recently seemed to have been perfectly normalised. Many have expressed bafflement at the polarisation that has ensued in the wake of these movements. As Scurry explains, pain makes an "absolute claim for acknowledgement" and because society is unused to the expression of pain, such a claim tends to remain unacknowledged.

Scurry describes the trauma inflicted by the fallout of war poignantly:

"When Berlin is bombed, when Dresden is burned, there is a deconstruction not only of a particular ideology but of the primary evidence of the capacity for self-extension itself: one does not in bombing Berlin destroy only objects, gestures, and thoughts that are culturally stipulates, but objects, gestures, and thoughts that are human"[177].

What these lines powerfully convey is that any attempt to subjugate the alien and stamp out the particular through conquest, although seemingly contributing to the homogenising onslaught of globalisation, is actually a great disservice to humanity and a moral conception of the "universal". Fortunately, history has examples of societies digging deep in their cultural values to deal with loss of the "tangible". Where trauma really runs deep and inflicts the most damage is when "the legitimacy of the outcome (whether of war or ideational and epistemic dominance) outlives the end of the contest because […] the winning issue or ideology achieves for a time the force and status of material "fact" by the sheer material weight of the magnitudes of damaged and opened human bodies"[178].

[177] Scarry p 61
[178] Ibid p 62

Much of the existing literature studies the toll taken by war in the form of trauma caused to heritage. Little thought has been invested in considering the trauma inflicted on societies who witness their heritage being destroyed or taken away. Beth Stamm et al attempt to address this question through a Cultural Clash Theory which "posits that original cultures have identifiable and sustainable economic, social, political, and spiritual systems in the pre-contact era" and these are vulnerable to dissolution when challenged by another culture. In response, claim these authors, the "injured culture lays claim to economic and social resources, preferably with the support and encouragement of the hegemonic culture"[179]. This formulation helps us understand why demands for repatriation and restitution are such an important piece of the puzzle of reclaiming cultural agency. Usefully for international law, it also acknowledges the crucial role that powerful actors who benefit from such a system of dispossession need to play in rebalancing it. Therefore, for the human security paradigm to form a useful bridge between International Relations and International Law, the goal of achieving Freedom from Trauma should be recognised an integral part a long term intergenerational understanding of "Security".

Envisioning long-term security in this broader sense, swings the pendulum back towards a thicker conception of human security but, I would argue, without necessarily diluting its actionability and operative impact. It also embodies the spirit of the United Nations General Assembly Resolution 66/290 mentioned above. Firstly, it is a conceptualisation that not only protects cultural heritage but recognises the potential of and invests in empowering host communities to do so in their own way. Secondly, it treats cultural

[179] Stamm, B.H., Stamm, H.E., Hudnall, A.C. & Higson-Smith, C. (2004). Considering A Theory of Cultural Trauma and Loss, Journal of Trauma & Loss, Vol 9(1), pp 89-111

trauma as that "early warning mechanism", paying heed to which "help to mitigate the impact of current threats and, where possible, prevent the occurrence of future threats", as stated in the resolution. But this does not mean that this expanded idea holds no promise for the near term, for, as we have noted above, future prospects are an important determinant of security in the present.

However, such redefinition of human security also requires us to contend with the norm of military necessity. The balance between risking the lives of combatants and the obligation to protect heritage and cultural property is a difficult one to strike. Describing attaining military objectives whilst preserving cultural property as goals mutually in conflict, Forrest argues that "the key to resolving this conflict may be found in the humanitarian legal doctrine of military necessity"[180]. He goes on to state that "necessity has been viewed as a limitation to unbridled barbarity" and finds expression in the principle of proportionality. It is important to consider the range of threats faced by heritage in the course of warfare and military occupation.

Since antiquity, heritage has been targeted to signify an attack on the most obvious symbols of a ruling power or community. Often the intent behind destruction of heritage sites has also been to erase local identity. In recent decades, much publicised attacks on heritage sites have been seen as an instrument of propaganda and terror.

The first question relevant to this discussion would be asking why heritage is vulnerable to destruction during wars.

[180] Forrest C.J.S, The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts, California Western International Law Journal, Vol. 37 [2006], No. 2, Art. 2

Gegner and Ziino frame the issue thus[181]:

"If heritage can be understood as the selective use of the past as cultural and political resources in the present, then there are few fields more productive for understanding the process than the heritage of war."

This conclusion is based on their perception of heritage as "constituted in the act of identifying what is appropriate to remember and preserve in light of experience".

Zainab Bahrani claims that "cultural destruction in war is not always a result of accidental or "collateral" damage". Instead, she characterizes the plundering of museums and libraries in Iraq as "destruction of history in a country under occupation"[182]. Bahrani underscores the rhetorical strategies that emphasize rescue and reconstruction and minimize annihilation, further making heritage "a pawn in this game of war". She reviews a host of well-funded programs aimed at whitewashing the image of what she terms the occupation of Iraq, concluding that activities aimed at heritage restoration fall within this category and continue to be designed to benefit interested constituencies in the West.

According to Bahrani:

The loss or destruction of historical monuments can and does have a devastating effect on people. That is why throughout history such destruction has been calculated into the strategies of war. This is the reason why iconoclasm and destruction or the relocation of monuments have occurred as a deliberate act of war throughout recorded world history,

[181] Gegner M, Ziino B (eds), The Heritage of War, Routledge 2012
[182] Bahrani Z, Iraq's Cultural Heritage: Monuments, History, and Loss, Art Journal, Volume 62 (4), 2003

and why ethnic cleansing works through the annihilation of people by means of eradicating any trace of their past.

Echoing this hypothesis, David Roberts explains destruction of ancient Iraqi and Syrian sites by ISIS thus:

Destroying such heritage is thus a part of their duty, as they see it, to reject such a "nationalist agenda" that the statues, temples, and indeed, cities represent[183]*.*

Hardy argues that throughout history, "'punitive expeditions' to vulnerable States by powerful States persisted as standard practices" and that plunder of cultural artefacts during these expeditions was motivated sometimes by strategic and at other times by material considerations. Practices of preservation, destruction and reservation also varied through time and space. "Preservation and destruction were matters of religious duty (or its absence) and economic benefit, rather than matters of historical understanding and cultural respect. Restitution was still ultimately performed as an act of realpolitik and strategy, rather than a recognition of property rights or cultural belonging"[184], says Hardy.

A further distinction to be drawn here is that of destruction during combat and destruction inflicted after a territory has fallen into the hands of enemy combatants.

Nabil al-Tikriti alleges wilful neglect on part of US military and government officials when it came to protecting cultural heritage in occupied Iraq, something he terms "not a policy

[183] Roberts D, Why IS militants destroy ancient sites, BBC News website, September 2015 (http://www.bbc.com/news/world-middle-east-34112593 accessed on April 26, 2016)
[184] Pg. 22

failure but a policy of failure". He deems it "reasonable to suggest that a lack of cultural sympathy was at play".

William Schabas notes that this distinction is in fact mirrored in some of the relevant international legal instruments. Referring to the Rome Conference (1998) Schabas recalls:

The travaux preparatoires indicate that the drafters were familiar with two models or types of provision governing cultural property, one applicable to the conduct of hostilities and the other to persons and property that have fallen under the control of one of the parties[185].

In his analysis, it is crucial to draw this distinction when unpacking the terminology of "attacks" on cultural property, particularly in the context of international criminal law.

The above overview of the various threats to heritage in the throes of conflict demonstrates that the doctrine of military necessity is complex and can seem insurmountable especially when the endangerment of human life is factored in. Military necessity is on its own a complex construct due to different capabilities of the parties to a conflict, the ever-evolving technologies of warfare and the difficulty of achieving normative consensus across the board around such an idea. The proscriptions of military necessity in practice must be weighed against considerations of strategic and tactical advantage in the battlefield. To determine where the line between preventing human suffering in the immediacy of conflict and protecting cultural heritage for the long run falls, is beyond the scope of this study. It is at this juncture however, that Chinkin and Kaldor's observation that in the process of alleviating human suffering, international law

[185] Schabas W. (2017), Al Mahdi has been convicted of a crime he did not commit, CWR Journal of International Law 49

has legitimised war, is resonant. In the next chapter we deploy the conceptual possibilities of Constructivism to investigate this point further and understand how, both in conditions of war and peace, when it comes to International Law too, the adage "Words make Worlds" holds true.

Bibliography

Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3)

Albrecht, Ulrich, Chinkin, Christine, Dervis, Kemal, Dwan, Renata, Giddens, Anthony, Gnesotto, Nicole, Kaldor, Mary, Licht, Sonia, Pronk, Jan, Reinhardt, Klaus, Schmeder, Genevieve, Seifter, Pavel and Serra, Narcis (2004) *A human security doctrine for Europe: the Barcelona Report of the Study Group on Europe's Security Capabilities.* . Study Group on Europe's Security Capabilities, Barcelona, Spain

Allott P. (1999), The Concept of International Law, European Journal of International Law, Vol 10

Bahrani Z, Iraq's Cultural Heritage: Monuments, History, and Loss, Art Journal, Volume 62 (4)

Booth, Ken (2007) *Theory of World Security*, Cambridge: Cambridge University Press

Conteh-Morgan, Earl (2005) 'Peacebuilding and Human Security: A Constructivist Perspective', *International Journal of Peace Studies*,10(1)

Danti MD. (2015), Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq, Near Eastern Archaeology, Vol. 78, No. 3, Special Issue: The Cultural Heritage Crisis in the Middle East

Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century?, academia.edu

Forrest C.J.S (2006), The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts, California Western International Law Journal, Vol. 37, No. 2

Gegner M, Ziino B (eds), The Heritage of War, Routledge 2012

Jolly, Richard and Deepayan Basu Ray (2006) *National Human Development Reports and the Human Security Framework: A Review of Analysis and Experience*, Brighton: Institute of Development Studies

Kaldor M (2011), Human Security, Society and Economy, Vol. 33, No.3

King, Gary and Christopher Murray (2001-02) 'Rethinking Human Security', *Political Science Quarterly*, 116(4)

McCormack, Tara (2008) 'Power and Agency in the Human Security Framework', *Cambridge Review of International Affair*s,21(1)

Mentan T (2014), Africa facing Human security challenges in the 21st century, African Books Collective

Roberts D., (2006), Review Essay: Human Security or Human Insecurity? Moving the Debate Forward, Security Dialogue Vol 37 (2)

Schabas W. (2017), Al Mahdi has been convicted of a crime he did not commit, CWR Journal of International Law 49

Scarry E. (1985), The Body in Pain: The Making and Unmaking of the World, OUP

Shadi W and Bashar M. (2015), Syrian Archaeological Heritage: Past and Present, SCIENTIFIC CULTURE, Vol. 1, No. 3

Stamm, B.H., Stamm, H.E., Hudnall, A.C. & Higson-Smith, C. (2004). Considering A Theory of Cultural Trauma and Loss, Journal of Trauma & Loss, Vol 9(1)

Suhrke, Astri (1999) 'Human Security and the Interests of States', *Security Dialogue*,30

Tadjbakhsh, Shahrbanou and Anuradha M. Chenoy (2007) *Human Security: Concepts and Implications*,London & New York: Routledge

Chapter 5

Protecting Cultural Heritage: Constructivism

Chapter Highlights

- Constructivism is a useful framework for engaging with concepts such as rules, norms and institutions and their relationship with each other
- Constructivist analysis allows us to step back from certain constructs and formulations to examine the way in which they are constituted
- The attention that constructivists pay to the use of language enables us to unpack the normative positions embodied by international law on the protection of cultural heritage
- This paradigm is also used to turn a critical gaze on international law from the outside in by evaluating it as a product of hegemonic discourse and practices of knowledge creation that lead to it

Countering the methodological individualism of rational choice approaches, Constructivists argue that individuals cannot be understood stripped from their social context. In practice their approach generates the hypothesis that if institutions embody the rules of the game, then they can be powerful determinants of identities and preferences and influence behaviour. As a framework of searching for meaning, constructivism is consistent with the view that theory is "indispensable, at times, to make progress, but alone, it is false"[186].

Constructivist theory assumes that learning is a process in which people construct new ideas or concepts based upon their knowledge. Each and every person selects and processes information, constructs hypotheses and makes decisions, relying on a particular structure. This cognitive structure (also called schema or mental model) provides meaning and organization to experiences and allows the individual to go beyond the information given. Richard Price credits constructivism with "demonstrating that moral norms can matter in world politics" before taking on the challenge of answering "how and why some norms mattered in some places or sometimes, but not in others"[187]. For Price, the emerging concern for the constructivist research agenda is to provide robust ethical defences of all norms advocated or interventions prescribed. Addressing the criticism that constructivists draw from both, the sceptical and utopian, ends of the theoretical spectrum, Price says[188]:

[186] Cixous H and Calle-Gruber M (1997), Helene Cixous Rootprints: Memory and Life Writing, Routledge, p 4
[187] Price R. (2008), The Ethics of Constructivism in Reus-Smith and Snidal (eds.) The Oxford Handbook of International Relations, p.318
[188] P. 323

Implicitly or explicitly endorsing developments such as the generation of an international norm prohibiting the use of antipersonnel landmines or the creation of an ICC need not preclude what some might champion as more fundamental progressive changes such as the ending of war altogether. Indeed, until such larger international structures are in fact favourably altered, constructivists can point the way to forms of action that could claim to make a progressive difference, as opposed to falling short of much more ambitious comparisons to the ideal that, until their realization, do amount to failure.

Nicolas Onuf's point of departure is the idea of agency which he believes to be a product of social conditioning[189]. In his analysis, agents are those individuals or groups who play an active part in society based on certain rules. The way rules are either obeyed or flouted constitutes social practice and a stable pattern of such practices is what Onuf designates as an "institution". Because agents derive their ability to act under "rules", having rules creates a condition of being "ruled", in this framework. Those actions of agents are considered "rational" which are directed at achieving a set of socially determined goals. Thus unlike in the realist conception, constructivist rationality is not set in stone but is context dependent and the variables influencing it may be exogenously determined rather than simply a function of the internal structure of the international system. To sum up, constructivist agency is institutionally constituted but has an element of choice built into it. Exercise of this choice is what brings about institutional evolution. Charlotte Epstein expands our understanding of Onuf by suggesting that agents derive the range of possibilities within which they may act from

[189] Onuf N (1998), Constructivism: A User's Manual in Vendulka K, Onuf NG and Kowert P., International Relations in a Constructed World, Routledge, pp 58-78

the inherent structures of language[190]. Epstein adds that the influence of constructivism has polarised International Relations between the causality and rationality of Realism at one end and the constitutivity and reflexivity of constructivism on the other. As we have seen so far, realists attribute compliance with international law to perception of interests and reputational concerns while liberals are more concerned with legitimacy of the process by which it comes into being. Constructivists believe "that international law is most effective when it ceases to be part of the calculation at all, when the rules of international law become so deeply internalized that they are followed simply as a matter of course, as little reflected-upon state self-interest.[191]"

Persuasion, Issue-framing and Socialization

According to Payne, "Constructivists commonly explain persuasion by pointing to the substantive content, or intrinsic characteristic, of particular ideas or claims"[192]. It has further been argued by constructivists that messages tend to be more persuasive when linked with already well-established norms, making this a key strategy for norm entrepreneurs when they frame an issue. Payne explains that "frames" perform the dual function of offering "a singular interpretation of a particular situation" and prescribing "appropriate behavior for that context"[193]. Thus the constructivist position on issue framing and persuasion may be summed up as follows: Frames draw on building blocks from existing normative orders, broadly perceived as legitimate. They then structure

[190] Epstein C. (2013), Constructivism or the eternal return of universals in International Relations. Why returning to language is vital to prolonging the owl's flight, European Journal of International Relations, Vol 19, pp 499-519
[191] Cohen JG (2009), Can International Law Work?, Berkeley J. Int'l Law, Vol 27, p639
[192] Payne R A, Persuasion, Frames and Norm Construction, European Journal of International Relations, 2001 Vol. 7(1): 37–61
[193] Payne pg. 39

messages with specific audiences in mind, outlining the nature of the issue and advocating change.

Finnemore and Sikkink offer the following characterization of Norms[194]:

- Norms and rationality are intimately connected (although for the most part the one is discussed in scholarship at the exclusion of the other)
- It is the prescriptive quality of "oughtness" that sets norms apart from other kinds of rules
- There are no bad norms from the perspective of those who promote the norm
- A norm is an appropriate standard of behavior with reference to a given identity and hence norms need not always be global
- Adherence to norms has been linked to the "logic of appropriateness" but what causes standards of appropriateness to evolve, be recognized and change over time still needs explaining
- International norms often begin as domestic norms and the domestic influence is particularly strong early in the norm's life cycle
- For a certain norm to gain international acceptance, key states (and this will vary as per issue area) adopt and implement them

The last two points of this characterization of norms described what is termed "socialization". Finnemore acknowledges the emphasis of constructivists on soft law in

[194] Finnemore M. and Sikkink K., International Norm Dynamics and Political Change, International Organization Vol. 52 (4), 1998

adding, "much of the macrotheoretical equipment of constructivism is better at explaining stability than change"[195]. Jutta Brunnée and Stephen J. Toope have observed in a similar vein that the "fascination with norm creation, evolution, and destruction" drives the conversation between Constructivists in International Relations and International Legal theorists, in particular legal pluralists[196]. The constructivist support for international law rests heavily on the legitimacy of the legal rule as well as the legitimacy of the process through which it came into being. As Beth Simmons puts it, contrary to realists and rational functionalists, constructivists argue that "international institutions and organizations legitimate particular rules, enhancing their effectiveness through a heightened sense of obligation rather than through their mere instrumental value as a convenient point of convergence"[197].

Constructivist Approach to Cultural Heritage Protection

Laura Demeter explains that identification of certain sites and objects as heritage is itself a process of defining criteria and ascribing meaning. Specifically, she notes that "when a consensus is achieved around certain 'relevant' values, categories and meanings, the institutionalisation and classification as heritage takes place"[198].

[195] Finnemore M. (2000), Are Legal Norms Distinctive? NYU Journal of International Law and Politics, Vol 32, p 699

[196] Brunee J and Toope SJ (2012), Constructivism and International Law in Jeffrey L. Dunoff and Mark A. Pollack (eds), Interdisciplinary Perspectives on International Law and International Relations: The State of the Art, CUP, pp 119-145

[197] Simmons BA (1998), Compliance with International Agreements, Annu. Rev. Polit. Sci. 1998. 1:75–93

[198] Demeter L. (2014), Value Creation Mechanisms and the Heritisation of the Communist Legacy in Romania in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg

An important definitional question relevant to the constructivist paradigm is that over the distinction between the nomenclatures "cultural property" and "cultural heritage". Xanthaki sums up the adoption of both terms in international legal instruments thus:

The (1954) UNESCO Convention for Protection of Cultural Property in the event of Armed Conflict defines cultural property as: 'irrespective of origin or ownership… movable or immovable property of great importance to the cultural heritage of every people'. The restrictiveness of this definition is maintained in the (1999) Second Protocol to the Convention, even though the Preamble emphasizes that rules in this area should reflect developments in international law. The (1970) UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property is more detailed: cultural property is defined as 'property which, on religious or secular grounds, is specifically designated by each State as being of importance to archaeology, prehistory, history, literature, art or science'. The Convention also includes a very detailed account of objects of cultural property. The (1972) UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage is an exception to these early instruments, as it refers to cultural heritage, instead of cultural property[199].

As concerns with protecting natural and intangible cultural heritage became more widely recognised towards the latter half of the twentieth century, we find international conventions (eg. UNESCO 1972 and UNIDROIT 1995) increasingly replace the term cultural property with the term cultural heritage, which is broader in scope.

[199] Xanthaki A. (2017), International Instruments on Cultural Heritage: Tales of Fragmentation, in Xanthaki et. al. (eds.) Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges, Brill-Nijhoff

According to Elizabeth Crooke, "the ideas of community and heritage share vital characteristics: both have multiple definitions; are constructed for contemporary needs; and will selectively draw on narratives of place, history and belonging"[200]. The second most important point to consider within a constructivist paradigm on Heritage is whether cultural property draws its meaning from and therefore belongs to a particular culture or, as is the dominant perception, to humanity as a whole. To set the context for this discussion, Benjamin Porter offers a useful explanation about the relationship between heritage and identity[201]:

Heritage is an intentional phenomenon, a sense of the self in the past where the subjective component of 'self' is ascribed at increasingly broad scales of the individual, community, nation, and globe, and the temporal links between the subject and the past are based on perceived genealogical, biological, or community connections. But heritage also possesses an extensional component, where these subjective meanings are externalized in language, practice, and objects that are concrete and publicly accessible.

In other words, the intrinsic abstract value of heritage as a link between the past, present and future is just as important as the tangible, material worth of its embodied or performative manifestation.

Discussing the evolution of international law on protection of cultural property Merryman writes:

[200] Crooke E (2008), An Exploration of the Connections among Museums, Community and Heritage, in The Ashgate Research Companion to Heritage and Identity, edited by Brian Graham, Taylor & Francis Group, pp 415-424

[201] Porter BW (2008), Heritage Tourism: Conflicting Identities in the Modern World in The Ashgate Research Companion to Heritage and Identity, edited by Brian Graham, Taylor & Francis Group, pp 267-282.

The Lieber Code and its progeny all dealt comprehensively with the obligations of belligerents; the protection of cultural property was merely one among many topics. In the 1930s, however, international interest turned to the preparation of a convention dealing solely with the protection of cultural property in time of war. In 1935 the 21 American nations promulgated a Treaty on the Protection of Artistic and Scientific Institutions and Monuments, now generally referred to as the Roerich Pact[202].

To this, Merryman further says, the Nuremberg Trials added the innovation of holding individual officials responsible for unlawful destruction of cultural property in the name of a belligerent nation. The Preamble to The Hague Convention of 1954 justifies the protection of cultural property by conferring on it the attribute of belonging to the common cultural heritage of mankind. According to Merryman, reference to common cultural heritage of mankind, "which has been echoed in later international instruments, is a charter for cultural internationalism, with profound implications for law and policy concerning the international trade in and repatriation of cultural property". He labels this important and influential approach of thinking about cultural property as cultural internationalism.

The constructivist lens also enables us to think of conservation with reference to multiple approaches conditioned by a diversity of values, beliefs and historical experience. The practice of heritage tourism has resulted from a normative paradigm which prioritises economic resource generation to achieve the aims of conservation. It has proven a highly influential approach to the extent of motivating greater engagement with instruments

[202] Merryman J.H. (1986), Two Ways of Thinking about Cultural Property, The American Journal of International Law, Vol. 80, No. 4., pp. 831-853

put in place by international conventions such as The World Heritage List discussed below. Multiplicity of interests in heritage further complicate the pre-existing culturally derived ideas about its significance and proper conservation. Irrespective of the context-specific model of conservation, by and large, "we find ourselves on the verge of conflict when the value groups place on heritage is inversely proportional to their role as stewards"[203]. Constructivism addresses the identity driven norm preferences that shape perceptions of interest. In doing so, this theoretical apparatus helps grasp the impact of cosmopolitan identity on the global consumption of cultural goods and view the application of the rational choice and human security lenses from the outside in.

As noted above, constructivists believe that agents take their cue about the range of possible actions available to them from the structure of language. Based on this premise, Constructivism also helps us delve into the role played by communities of experts in building a world around words. According to Derek Fincham[204]:

The cultural heritage movement emerged in the twentieth century as groups used law, policy, and advocacy to undo these contemporary and historical takings (of art from various cultures). But the movement has too often been reactive.

Fincham describes placing the onus of proving ownership of a cultural object on the country of origin, while the collectors, auction houses and museums claim good faith acquisitions by maintaining a culture of secrecy around the history of objects. Comparing cultural exploitation of less affluent communities with the imposition of environmental costs on less affluent parts of the world, Fincham argues that global flows of art and

[203] Porter p 275

[204] Fincham D (2012), Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes, Virginia Journal of Social Policy & the Law, Vol 20(1), p44

heritage objects mean access and enjoyment at one end and "cultural pollution" at the other. He further asserts that the ramifications of these flows throw up questions relevant to intergenerational justice. To address these concerns Fincham proposes an analysis of "current local, national, and international cultural heritage discourse"[205], to identify sources of injustice. All said and done, he concludes, "the (cultural heritage) movement needs an animating philosophy beyond "this used to be here and looters and smugglers skirted the law"". The constructivist framework usefully serves just such a cause by focusing its analysis on the role of norms and rhetorical strategies over actor behaviour.

The language of cultural property

The Hague Convention, 1954, defines cultural property as below:

Article 1. Definition of cultural property For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are
of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed

[205] Ibid p48

conflict, the movable cultural property defined in sub-para-graph (a);(c) centers containing a large amount of cultural property as defined in sub-para-graphs (a) and (b), to be known as 'centers containing monuments'.

Jane Anderson and Haidy Geismar write that "the language of cultural property […] emerged predominantly in the nineteenth century as a means to position the nation-state as the owner of particular kinds of artefacts and institutions. Breaking open a space between traditional ideas of private property and of public property, this category of national property produced a new understanding of the inalienable relationship between the state and its possessions.[206]"

Their expression of the term cultural property in the following terms is conceptually significant[207]:

A curious hybrid of culture (the evanescent and immaterial systems and structures of knowledge that bind human beings together) and property (the ideologies, political regulations, customs and popular consensus that establish entitlement and sovereignty, and determine claims and power over a range of tangible and intangible resources), cultural property is an evolving category used to describe ways of talking about collective entitlement, shared inheritance, the material nature of identity, and in more recent years, to debate the ethics of the commoditization of culture.

Further they add that "to understand that the phrase ' cultural property ' does not simply reference an international category and bureaucratic order, but is itself an active site of

[206] Anderson J and Geismar H (eds.) (2017), The Routledge Companion to Cultural Property, Abingdon, Oxon ; New York, NY : Routledge, p 2
[207] p 1

claim making that is about political recognition, cultural memory, and identity formation.[208]"

Significantly, Anderson and Geismar note the relationship between cultural property and national identity formation, arguing that "Cultural property became one way to articulate a political theory of society that was constituted not simply by the recognition of individual rights, but by the recognition of collective entitlements triangulated through ethnicity, territory, and citizenship in the context of the modern nation-state.[209]" It is thanks to this close relationship between heritage and national identity that cultural property became a defining feature of the sovereignty-based international system. Anderson and Geismar contend[210]:

Cultural property as a distinct category of objects with accompanying sets of obligations, emerged as a way to theorize the ethics of relationship between polities, and an important discourse of diplomacy and respect between nations. The triangulation of sovereignty, national identity, and anthropological notions of culture (...), underpinned by entangled articulations of race, ethnicity and territory, framed the emergence of the nation-state in the nineteenth century and started to forge the very notion of the modern international community.

Yet, at the same time they acknowledge the disservice done by the universalisation of the European template of nation-state to imaginations of cultural heritage that do not conform with this dominant paradigm[211].

[208] p 2
[209] p 6
[210] p 6
[211] In **Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property**, Michael F. Brown analyses the perverse outcomes for heritage conservation when technologically invasive methods come in

In the next two sections, we examine two important expressions signifying international cooperation towards heritage conservation – the World Heritage List and the Universal Museum – using the constructivist paradigm.

World Heritage List: Dynamics, Meanings and Impact of Site Inscription

The idea of common heritage of mankind was originally intended to signify that regardless of where important cultural and natural heritage was located, it was the responsibility of all states to pool efforts for its conservation. Such collective responsibility was vested in states by virtue of a posited unity of human values, at the same time, international cooperation was meant to happen alongside the efforts of states to protect their own heritage domestically. Accordingly, Article IV of the Convention Concerning the Protection of the World Cultural and Natural Heritage states[212]:

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

conflict with sacred knowledge traditions in the case of intangible heritage. An extreme example of perverse outcomes is described as "security through obscurity" where traditions and practices are kept hidden because the approach to conservation is radically in conflict with the concerned community's beliefs. International Journal of Cultural Property (2005) 12:40–61

[212] The World Heritage Convention, UNESCO 1972, https://whc.unesco.org/en/convention/ Accessed June 8, 2020

Thus, while article IV vests primary responsibility with the State where the site is located, Article VII envisages international cooperation in these terms:

For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.

This initial message however has been interpreted selectively and reinterpreted over time. The first reason behind this is the divergent opinions on what makes a certain monument or tradition or natural site inherently valuable. The second important driver has been the simultaneous operation of a range of culturally, historically and economically conditioned responses to the need of conservation – throwing up questions of ownership, location and the tussle between maintaining originality on the one hand and continuity and keeping traditions alive inter-generationally on the other.

Thus, the concept of world heritage fits the characterisation of a "frame" as elaborated by Payne. The inscription of a particular site as "World Heritage" bestows upon it a singular interpretation and also signifies submission to a particular regime of conservation. The efforts of state actors towards applying for inscription, indicate the level of persuasiveness of the framing "World Heritage Site"[213].

As on May 2020, the details of UNESCO's World Heritage List are as follows:

[213] Anglin has documented the national politics and institutional processes that have preceded episodes of site nomination in the cases of United States, Canada, South Africa, India, New Zealand, Nigeria and Botswana In Raechel Anglin (2008), The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide, 20 YALE J.L. & HUMAN

Total Properties Listed[214]: 1121

Transboundary: 39

In Danger: 53

Cultural: 869

Natural: 213

Mixed: 39

The World Heritage List has been criticised for more sites from of certain world regions being listed than others, calling into question how well it represents the common heritage of mankind. Applications for nominations of sites to the list have increasingly been motivated by enhancing the site's attractiveness as a tourism destination. Lasse Steiner and Bruno S. Frey find that "Gini coefficient as a measure of the inequality in the distribution of Sites across the world is increasing over time, depicting an increasing concentration of Sites in a few countries"[215], even after UNESCO attempted to address this concern through the Global Strategy for a Balanced, Representative and Credible World Heritage List in 1994 . Steiner and Frey find that the Gini coefficient as a measure of inequality in the distribution of sites across countries has "has risen almost monotonously over time from 0.34 in 1979 to 0.55 in 2009"[216]. In their assessment, the lack of accountability of the World Heritage Center to the UNESCO General Assembly, combined with the assertion of national interest when states get an opportunity to serve

[214] https://whc.unesco.org/en/list/, Accessed May 17, 2020
[215] Steiner L and Frey BS (2012), CORRECTING THE IMBALANCE OF THE WORLD HERITAGE LIST: DID THE UNESCO STRATEGY WORK?, International Centre for Research on the Economics of Culture, Institutions, and Creativity (EBLA) Centro Studi Silvia Santagata (CSS), Working paper No. 6/2012
[216] Ibid p 16

on the World Heritage Committee[217], results in dominant states (such as the UNSC P5) being over-represented in the World Heritage List. The much higher number of cultural than natural sites is also suggestive of a definitional bias in heritage that favours the European view of the concept. Since the prerogative of nominating sites rests with states, the World Heritage List ends up reflecting the unequal capacities of countries across the world, stemming from diverse economic and political conditions, to succeed in the process. The inscription process itself it "time-consuming, controversial, and politically polarizing" due to "the linkage to specific ethnic groups and achievements, disputed historical territories, current religious and national tensions, and individual biases over cultural values and achievements"[218].

Enrico Bertacchini and Donatella Saccone explain that "having national heritage sites with World Heritage recognition does not guarantee greater protection of or additional resources to the enlisted properties"[219]. This often reduces the utility of the list to prestige value or snob appeal and the maintenance requirements may trigger an increase in reliance on revenues from tourism, enhancing the vulnerability of fragile sites.

Moses Katerega systematically revisits the implications of recognition as a World Heritage Site for the Kasubi Tombs in Uganda[220]. A combination of creative ingenuity,

[217] They cite Bertacchini and Saccone (2011) who "find a clear positive and statistically significant correlation of membership in the Committee and the number of listed Sites", p 12
[218] Meskell L (2013), UNESCO's World Heritage Convention at 40 Challenging the Economic and Political Order of International Heritage Conservation, Current Anthropology Volume 54, Number 4, p485
[219] Bertacchini E and Saccone D. (2011), International Centre for Research on the Economics of Culture, Institutions, and Creativity (EBLA), Centro Studi Silvia Santagata (CSS), Working paper No. 1/2011, p 4

[220] Katerega M. (2014), The Legal Framework and Critical Understanding of the Owners of Heritage: Case Study Kasubi UNESCO site, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg pp 357-363

spiritual significance and technical excellence inspired the nomination of the Kasubi Tombs to the World Heritage List in 2001. Katerega, however, sums up the impact of the label of a UNESCO World Heritage Site as follows:

- A diminution in the role of community practices of conservation
- Confusion around the responsibilities of various stakeholders
- An increase in the attraction of the site as a tourism destination

It was not until the catastrophic fire of 2010 which destroyed the main tomb building that a coordinated effort ensued among local, national and international stakeholders. The noteworthy attribute of the reconstruction process of the site was that international technical assistance was extended to strengthen local efforts and amplify the living cultural traditions capable of recreation of the structure.

Based on the above evaluation of the World Heritage List within the constructivist theoretical framework, a complex picture of the interplay between interests and norms emerges with regard to decision making of states. Persuasion of normative frames may be higher for state-actors holding less power in the international system, while powerful actors may refer to norms simply as a rhetorical device to bolster their independent interests. Here, Onuf's idea that the existence of rules creates the condition of being ruled becomes evident. We see the conjoint operation of the constructivist paradigm where norms influence perceived interests with the realist hunch that the distribution of power in the system yields varying degrees of such influence.

As mentioned above, the Convention Concerning the Protection of the World Cultural and Natural Heritage vests primary responsibility of protecting their own heritage on

state parties. Thus the normative frame of state being the most important actor in International Relations and International law, is reinforced by the Convention. Arguing that such an orientation has created an "administrative mind", Michael F Brown identifies the following gaps in which emerge when it is translated into practice[221]:

First, most are creations of the nation state, whose interests are likely to diverge from those of subcultural communities struggling to maintain a degree of distinctiveness. Even when the state is not aggressively trying to redefine local cultures and heritage sites to suit a nationalist narrative, a predilection for centralised control is likely to put too much power in the hands of credentialed experts far removed from the everyday interactions that keep heritage alive.

The constructivist framework also draws attention to the role that communities of experts play as norm entrepreneurs eventually influencing deliberations around framing the law. Has greater interest from professional and academic communities changed the heritage movement? There is mixed evidence on this question with some evidence suggesting an increase in the role of experts and other evidence pointing to the overshadowing of expert opinion by political calculus[222].

The United States Convention on Cultural Property Implementation Act was discussed in the chapter on Game Theory.

SECTION 306 of the Act states[223]:

[221] Brown MF (2014), The Possibilities and Perils of Heritage Management, in Sandis C (ed) Cultural Heritage Ethics: Between Theory and Practice, Open Book Publishers, pp 171-180
[222] In "A Prelude to a Manifesto on Heritage" Shiv Visvanathan argues that under the influence of esoteric experience, the field of heritage has "becomes bureaucratic and technocratic".
[223] CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT Partial text of Public Law 97-446 [H.R. 4566], 96 Stat. 2329, approved January 12, 1983; as amended by Public Law 100-204 [H.R. 1777], 101 Stat. 1331, approved December 22, 1987

[17] CULTURAL PROPERTY ADVISORY COMMITTEE

…

(2) Appointments made under paragraph (1) shall be made in such a manner so as to insure-

(A) fair representation of the various interests of the public sectors and the private sectors in the international exchange of archaeological and ethnological materials, and (B) that within such sectors, fair representation is accorded to the interests of regional and local institutions and museums.

Thus we see that professional and special interest groups form the pillars of the decision-making process. This can have a negative impact if the idea of heritage is narrowly construed around the goals and motivations of such groups. At the same time, it can have (and some authors argue has had) a positive impact if groups such as archaeologists educate society and policy-makers about the significance of conserving heritage in its original context. According to Lynn Meskell "mounting challenges to expert opinions and decision making, the increasing and overt politicization of the (World Heritage) Committee, and UNESCO's fiscal crisis[224]" are the key current challenges standing in the way of achieving the goals of the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. Meskell observes that over time, the World Heritage Committee has come to be populated by diplomats and politicians rather than experts and attributes the difficulties of overcoming these

https://eca.state.gov/files/bureau/97-446.pdf
Accessed June 11 2020

[224] Meskell L (2013), UNESCO's World Heritage Convention at 40 Challenging the Economic and Political Order of International Heritage Conservation, Current Anthropology Volume 54, Number 4, p484

challenges as much to the power and influence wielded by State Parties, particularly when they have representation on the Committee. She writes[225]:

This statist power structure is inescapable when attempts are made to instigate structural changes, whether creating an indigenous expert advisory panel, recognizing nonstate actors like nongovernmental organizations, or upholding the heritage rights of minorities within nation states.

As expert bodies, the International Centre for the Study of Preservation and Restoration of Cultural Property (ICCROM), the International Council on Monuments and Sites (ICOMOS), and the International Union for Conservation of Nature (IUCN) posses "serious decision-making heft"[226]. However, argues Meskell, in recent years at the level of Committee deliberations, political representatives have managed to drown out the voices of experts in favour of diplomatic bargaining and national priorities. Thus, we find that whether they have been given prominence or not, experts in the various subfields under the umbrella of heritage, have played a noteworthy role, exemplifying the constructivist take on the power of ideas, concepts and terms.

Issue Framing and the Universal Museum

Museums and the rest of the art world in western countries have adopted various linguistic devices to describe their attitude towards cultural objects from other parts of the world and strengthen their ownership claims over these objects. In the colonial era, the works plundered from colonised regions were described as "inferior", "primitive" and symbolising the barbarianism of the other when standing alongside the oeuvres of

[225] Ibid p 485
[226] Ibid p485

the civilising race. Describing the role played by museums such as the Louvre in French nation-building, Flynn recalls: "Here the bourgeois citizen could partake of a narrative vision of civilisation expressed through the carefully arranged collections and locate himself and his country at the apex of that historical development"[227]. In the post-colonial era, the continued accumulation of cultural objects in metropolitan museums was justified in terms of the educational role it supposedly played for the privileged audience. In recent years, the terminology of "universal museum" has been crafted to convey a sense of transcendence of space springing from a technologically derived imagination of globalisation that has no place for the local[228]. With specific reference to claims of repatriation made by countries in Africa, Tapuwa R. Mubaya and Munyaradzi Mawere note that the verbiage Universal Museum has been "deployed chiefly as a defence against repatriation claims"[229]. By way of critique of the construct "Universal Museum", these authors add[230]:

If museums were capable of helping to devise and communicate a universal perspective on cultural values which achieves credibility and currency outside western cultural elites, they would indeed make an invaluable contribution to global society. What makes people of critical minds unconvinced by the idea of universal museums is that the idea is perceived as evidence of cultural insensitivity or an instrument of injustice.

---

[227] Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century? p 13 https://www.academia.edu/20053839/The_Universal_Museum_A_Valid_Model_for_the_21st_Century Accessed may 29, 2020

[228] Tom Flynn traces back the genesis of the universal museum to the elite practice of private collecting which dates back to sixteenth century Europe.

[229] Mubaya TR and Mawere M (2015), 'Orphans in a strange land': Controversies and challenges in the repatriation of African cultural property from European museums, in Mawere, Munyaradzi and Chiwaura (eds.), African Museums in the Making: Reflections on the Politics of Material and Public Culture in Zimbabwe, African Books Collective, p 82

[230] p 93

Thus, we are made aware that language as rhetoric or instrumental ploy should be distinguished from language that represents some form of consensus on underlying normative content in the constructivist paradigm. According to Howlett-Martin the concept of universal museum is the product of an orientalist paradigm "which viewed indigenous people as incapable of understanding, protecting, and appreciating their past and which laid the foundations for the universalist paradigm of a common heritage for all"[231].

In 2002 nineteen prominent museums based in North America and Europe issued The Declaration on the Importance and Value of Universal Museums. The signatories were directors of The Art Institute of Chicago; Bavarian State Museum, Munich (Alte Pinakothek, Neue Pinakothek); State Museums, Berlin; Cleveland Museum of Art; J. Paul Getty Museum, Los Angeles; Solomon R. Guggenheim Museum, New York; Los Angeles County Museum of Art, Louvre Museum, Paris; The Metropolitan Museum of Art, New York, The Museum of Fine Arts, Boston; The Museum of Modern Art, New York; Opificio delle Pietre Dure, Florence; Philadelphia Museum of Art; Prado Museum, Madrid; Rijksmuseum, Amsterdam; State Hermitage Museum, St. Petersburg; Thyssen-Bornemisza Museum, Madrid; Whitney Museum of American Art, New York; The British Museum, London. The main message of the Declaration was that repatriation claims against their collections were unjustified in light of "different sensitivities and values, reflective of that earlier era", when the contested objects were acquired. Such a claim is at first glance incompatible with the 1995 UNIDROIT Conventions which affirms that "the

[231] Howlett-Martin P. (2018), Art, Nationalism and Cultural Heritage: Artworks belong where they are found, Amazon, p 41

adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention"[232]. By citing "different sensitivities" the self-proclaimed universal museums do not engage with provision in UNIDROIT 1995 under Article 4(1) which assures "fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object", demonstrating a lack of confidence in their own due diligence protocols and practices.

Tom Flynn writes that the Declaration was based on an "implicit assumption that an idea born during the eighteenth-century European Enlightenment can be reconciled with more recent scholarship in fields such as postmodernism, post-colonial theory, and the so-called new museology in order to function as a viable philosophical framework for the world's museums in the future"[233]. The debate surrounding the Declaration on the Importance and Value of the Universal Museum is instructive on how a clash of interests plays out as the battle for narrative control. Indeed, as the Declaration itself proclaims: *Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation.*

Critics have pointed out that the 2002 Declaration on the Importance and Value of the Universal museum is endorsed by signatory institutions based in the United States and

[232] UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS, International Institute for the Unification of Private Law, 1995
https://www.unidroit.org/instruments/cultural-property/1995-convention
Accessed June 18, 2020
[233] Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century? P 5
https://www.academia.edu/20053839/The_Universal_Museum_A_Valid_Model_for_the_21st_Century
Accessed may 29, 2020

Europe. This conflation of "global" or "universal" with western is not uncommon. Katherine Burlingame is one of many commentators who have shown that the intended purpose of the declaration was to shield the elite museums in the western world from repatriation claims of source countries[234]. Burlingame demonstrates the vacuity of the "universal" claim by citing examples of museums in Kenya which house large collections documenting and furthering research on human origins and natural history.

Those who claim status as a universal museum often argue that the nation states who claim contested cultural objects are not representative of the ancient cultures in which the objects originated. This argument is an extrapolation of European historical precedent where "universal survey museum that emerged during the eighteenth century made use of traditional religious language and iconography to establish itself as an instrument of the bourgeois nation state"[235]. Besides, even though the nation state appropriates heritage discourse to legitimise itself, we must recognise that the nation state is itself not a universally organic concept and is not uniformly experienced and related to across the world[236].

[234] Burlingame K. (2014), Universal Museum: Cultural and Ethical Implications, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg pp 384-398

[235] Flynn p 12

[236] Rana P.B. Singh's description of the term Sacredscape in the context of India offers an imagination of heritage that is located within but not tied to the nation-state. He writes: "The concept of the holy place in Indian culture (tirtha) is described as a consecration of the cosmic influence in topography wherein culture, geography and spirituality interact with each other in the formation of meaning, symbolism and transcendental power within a territory. The sacred power and the sacred design are experienced through pilgrimage and the totality of the territorial perspective of sacrality and holy landscape is called 'sacredscape' (tirtha kshetra). Pilgrimage is thus an expression of the human quest for a divine connection between man and environment, to experience the spirit of sacredscape. As most sacredscapes became embodied in the built structures focused upon sites of pilgrimages, sacredscapes became part of a newly developing type of pilgrimage tourism. Here heritage is being used in a broad sense involving both natural and cultural milieux, including ideas, beliefs, and ways of life, and above all the intimate link between human psyche and mystical nature. In this way it may be argued that heritage is better understood for its 'psychological resonance' than its precise meaning."
Singh, Rana P.B. 1997. Urban heritage in India; in, Contested Urban Heritage, eds. Shaw & Jones: 101-131

The usage "common heritage of mankind" has been criticized for discounting alternative associations with heritage and history and approaches to conservation that do not fit the hegemonic western mould[237]. According to Sandra Bowdler, "defining something as belonging to that transcendent category is a means of excluding anyone who might have a particular interest in it"[238]. She elaborates by recalling the practices of repainting of ancestral sites in certain aboriginal communities of Western Australia, specifically citing one such project which became controversial and was eventually abandoned after being charged with "desecration" in a complaint filed by a member of the white majority. Thus we see that the universalizing paradigms of World Heritage List, common heritage of mankind and universal museum lead to disregard and dispossession of the views and practices of marginalised communities and regions vis-à-vis cultural life.

Using the tools of constructivism, we are able to delineate the influence of a dominant worldview on the very conception of heritage and approaches to conservation, including in law. The widespread usage of linguistic devices like "cultural property", "world heritage" and "universal museum" reflect an authoritative and disciplinary framework, grounded in cultural institutions such as museums, in material culture that is monumental, sacred, and antique, and in languages of law, policy, and governance" (Anderson and Geismar 2017). Thus constructivism alerts us both to the language of law

[237] Describing her experiences of attending World Heritage Committee meetings, Lynn Meskell writes: "…the properties being proposed still inhabit the familiar taxonomies of Chateaux, churches, mosques, historic cities, forts, and, to a lesser extent, archaeological excavations".
[238] Bowdler S. (1988), Repainting Australian Rock Art, Antiquity, Vol 62, pp 517-523

and the legal language as the constitutive framework for international action in a particular domain.

Autre Temps, Autre Moeurs?

Studying international cooperation from a constructivist lens helps us specify the relationship between social norms and existing legal instruments. As Derek Fincham has stated, "In some cases, norms conflict with the legal regime; in other cases these norms change the law itself"[239]. To put this in constructivist terms, the international law on protection of cultural heritage does not entirely embody the rules of the game, yet, it has shown the ability to reflect gradual change in norms. Constructivism also allows us to interpret institutional evolution in terms of choice rather than as derived based on structurally-determined givens. The analysis of "World Heritage List" and "Universal Museum" in this chapter provides a nuanced take on exercise of choice and its implications.

The constructs of "world heritage" and "universal museum" seek to recontextualise cultural objects. These constructs have currency based upon the assumption that to localise or nationalise heritage is to politicise it whereas to globalise or universalise it is an exercise in depoliticisation. However, the model of globalisation which is espoused by proponents of universal museum is acquisitive. It maintains hubs of accumulated wealth amidst generalised deprivation. It does not question the structures which perpetuate inequality but castigates the ability of those who bear the cost of globalisation for their assumed inability to protect their own resources, culture and traditions. But perhaps

[239] Fincham D (2013), Social Norms and Illicit Cultural Heritage,in Francesco Francioni, and James Gordley (eds), Enforcing International Cultural Heritage Law, OUP, p210

most subversively, it dresses its historical specificities into an alluring garb of universality which transcends both space and time. As a significant body of scholarship has established, the universal museum was and continues to be a figment of empire's mission civilisatrice.

Does constructivism further non-western IR in this case?

Maybe maybe not. But the study of heritage as a question within the ambit of international relations does. Heritage is firstly, not of concern only to hegemonic powers or great powers. Studying international cooperation to protect cultural heritage does not privilege the study of high politics which has conventionally been the case with both international relations and international law, while still allowing us to have discussions about the causes and impact of war and conflict and the structures of global interdependence and inequality. Depending on how we find a way for different ideas about heritage and its conservation to coexist side by side, we may be able to conceive an approach to studying the international that is neither universalising nor ethnocentric.

Shiv Visvanathan offers an alternative perspective on all of the aspects of understanding and managing heritage discussed below. Instead of viewing them as the answer, he argues that heritage "needs to be rescued: first, from the jingoism of the nation state which conscripts it for identity formation; second, from a bureaucracy that forges it into a technical entity closer to the sense of property; and third, from a casual populism that sees it as part of a tourist fixation"[240]. Visvanathan's call for "a language which is less economic, less expert oriented, combining the physical and metaphysical so that it

[240] Visvanathan S (2017), A prelude to a manifesto on heritage, Seminar Online http://www.india-seminar.com/2018/705/705_shiv_visvanathan.htm Accessed June 13, 2020

retains its civilizational and vernacular quality", is a nod to the constructivist emphasis on the primacy of language. Visvanathan speaks not of caring for heritage but of heritage as a form of caring and thereby advocates for trusteeship as the solution. He offers a radical critique of universalism – as a figment and aspiration of western political thought – by reminding us that "both difference and diversity have acquired an innate secondariness, being more part of the problem rather than the problematic of political thought". Thus, a close reading of Visvanathan allows us to see how any claim to "universal", is not only an ironic way of approaching heritage protection, but in fact antithetical to the very idea of heritage. Yet, in critiquing universalism, Visvanathan is wary of reactive provincialism. Therefore, he calls for an understanding of Diversity where "more sensitive to limits and yet provides a different commons of creativity, where the mystery of the whole celebrates the magic of the parts, where the whole is never totally knowable, where the parts can trigger new cosmologies and worldviews" based on a vision of Democracy characterised by "a new dialectic between the universalizing and pluralizing", where, "parts acquire a new legitimacy as they are not provincialized, hegemonized, localized, but are embedded in a new cosmopolitan intimacy of part and whole".

Visvanathan's expiration into our relationship with heritage offers a fresh take on the foundational building blocks of Western political theory, viewed from a non-western lens. As previously discussed, political science and Eurocentric epistemology wield a great influence over International Relations. A discussion about heritage makes it possible to revisit the fundamental ideas of liberty, equality, fraternity and diversity, thereby pointing the way to new possibilities for International Relations and its dialogue with International Law.

Bibliography

Anderson J and Geismar H (eds.) (2017), The Routledge Companion to Cultural Property, Abingdon, Oxon ; New York, NY : Routledge

Bertacchini E and Saccone D. (2011), International Centre for Research on the Economics of Culture, Institutions, and Creativity (EBLA), Centro Studi Silvia Santagata (CSS), Working paper No. 1/2011

Bowdler S. (1988), Repainting Australian Rock Art, Antiquity, Vol 62

Brown MF (2014), The Possibilities and Perils of Heritage Management, in Sandis C (ed) Cultural Heritage Ethics: Between Theory and Practice, Open Book Publishers

Brunee J and Toope SJ (2012), Constructivism and International Law in Jeffrey L. Dunoff and Mark A. Pollack (eds), Interdisciplinary Perspectives on International Law and International Relations: The State of the Art, CUP

Burlingame K. (2014), Universal Museum: Cultural and Ethical Implications, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-

Cixous H and Calle-Gruber M (1997), Helene Cixous Rootprints: Memory and Life Writing, Routledge

Cohen JG (2009), Can International Law Work?, Berkeley J. Int'l Law, Vol 27

Crooke E (2008), An Exploration of the Connections among Museums, Community and Heritage, in The Ashgate Research Companion to Heritage and Identity, edited by Brian Graham, Taylor & Francis Group

Demeter L. (2014), Value Creation Mechanisms and the Heritisation of the Communist Legacy in Romania in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg

Epstein C. (2013), Constructivism or the eternal return of universals in International Relations. Why returning to language is vital to prolonging the owl's flight, European Journal of International Relations, Vol 19

Fincham D (2012), Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes, Virginia Journal of Social Policy & the Law, Vol 20(1), p44

Fincham D (2013), Social Norms and Illicit Cultural Heritage,in Francesco Francioni, and James Gordley (eds), Enforcing International Cultural Heritage Law, OUP

Finnemore M. (2000), Are Legal Norms Distinctive? NYU Journal of International Law and Politics, Vol 32

Finnemore M. and Sikkink K., International Norm Dynamics and Political Change, International Organization Vol. 52 (4)

Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century?, academia.edu

Howlett-Martin P. (2018), Art, Nationalism and Cultural Heritage: Artworks belong where they are found, Amazon

Katerega M. (2014), The Legal Framework and Critical Understanding of the Owners of Heritage: Case Study Kasubi UNESCO site, in Viliekis O. (ed) The Right to [World] Heritage: Conference Proceedings, BTU Cottbus-Senftenberg

Merryman J.H. (1986), Two Ways of Thinking about Cultural Property, The American Journal of International Law, Vol. 80, No. 4

Meskell L (2013), UNESCO's World Heritage Convention at 40 Challenging the Economic and Political Order of International Heritage Conservation, Current Anthropology Volume 54, Number 4

Mubaya TR and Mawere M (2015), 'Orphans in a strange land': Controversies and challenges in the repatriation of African cultural property from European museums, in Mawere, Munyaradzi and Chiwaura (eds.), African Museums in the Making: Reflections on the Politics of Material and Public Culture in Zimbabwe, African Books Collective

Simmons BA (1998), Compliance with International Agreements, Annu. Rev. Polit. Sci

Onuf N (1998), Constructivism: A User's Manual in Vendulka K, Onuf NG and Kowert P., International Relations in a Constructed World, Routledge

Payne R A, Persuasion, Frames and Norm Construction, European Journal of International Relations, 2001 Vol. 7(1)

Price R. (2008), The Ethics of Constructivism in Reus-Smith and Snidal (eds.) The Oxford Handbook of International Relations

Porter BW (2008), Heritage Tourism: Conflicting Identities in the Modern World in The Ashgate Research Companion to Heritage and Identity, edited by Brian Graham, Taylor & Francis Group

Steiner L and Frey BS (2012), CORRECTING THE IMBALANCE OF THE WORLD HERITAGE LIST: DID THE UNESCO STRATEGY WORK?, International Centre for Research on the Economics of Culture, Institutions, and Creativity (EBLA) Centro Studi Silvia Santagata (CSS), Working paper No. 6/2012

Visvanathan S (2017), A prelude to a manifesto on heritage, Seminar Online

Xanthaki A. (2017), International Instruments on Cultural Heritage: Tales of Fragmentation, in Xanthaki et. al. (eds.) Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges, Brill-Nijhoff

Chapter 6

Protecting Cultural Heritage: Responses in International Law

Chapter Highlights

- Approaches to protection of cultural heritage discernible in existing international law are discussed under the rubrics of Legalisation, Criminalisation and Regulation
- The findings that emerge are superimposed over the analysis presented in the last three chapters which focus on dominant paradigms in International Relations
- United Nations General Assembly resolutions are reviewed chronologically to establish the norm emergence and evolution of an opinio juris supporting restitution and repatriation of cultural patrimony in cases of illegal acquisition and export
- Just war theory is revisited in the context of an intercivilisational dialogue with particular reference to intentional and collateral destruction of heritage in conflict

The uniformity and aspiration to objectivity of law starkly contrasts the diversity and subjectivity inherent to the basic concept of heritage. According to Michael F Brown, law encodes meanings to influence social practice driven by a quest for uniformity[241]. The pursuit of uniform approaches to protect heritage globally, through international law, strikes Brown as ironic.

In this chapter, the international law on protection of cultural heritage is reviewed under three clusters of responses: Legalisation, Criminalisation, and Regulation and Restitution.

Our thinking about Just War – jus ad bellum, jus in bello, jus post bellum – has significant implications for how we perceive and deal with threats posed to cultural heritage, both tangible and intangible, in the context of war. The concern with principles of just war is also where international humanitarian law and international criminal law trace their foundations back to. Later in this chapter, this study's emphasis on "other ways of knowing" is applied to Just War thinking. Based on the findings of this exercise, certain conclusions relevant to protecting heritage in the context of war are arrived at.

Legalisation

[241] Brown MF (2014), The Possibilities and Perils of Heritage Management, in Sandis C (ed) Cultural Heritage Ethics: Between Theory and Practice, Open Book Publishers, pp 171-180

Referring to law as both contract and covenant[242], Abbott and Snidal write that in the international realm, "Legalization has effect through normative standards and processes as well as self-interested calculation, and both interests and values are constraints on the success of law"[243]. From the standpoint of International Relations scholars, both hard and soft law are, therefore, equally important. In this section however, the international lawyer's understanding of legalisation as creation of binding obligations through treaty law is our point of departure. In addition to obligation, precision and delegation are important attributes of this view of legalisation.

Alessandro Chechi describes the emergence of international cultural heritage law as a sub-field in international law in these terms[244]:

At the national level, most States have enacted legislation that recognises the specificity of cultural objects and subjects such assets to a legal regime that is more protective and less trade-oriented than the regime normally applied to ordinary goods. At the international level, international organisations progressively adopted rules and principles due to the perception that the body of domestic law in force was not sufficient to cope with the different challenges posed in this specific field.

Retracing the chronological evolution of the idea of protecting cultural property in international law, Kate Fitz Gibbon finds that the Lieber Code of 1863 was influenced by the "notion that it is wrong to impose unnecessary suffering on the losers in a

[242] Abbott and Snidal distinguish between contracts and covenants as follows: States enter into "contracts" to further interests; they enter into "covenants" to manifest normative commitments.
[243] Abbott KW and Snidal D (2000), Hard and Soft Law in International Governance, International Organization, Vol. 54, No. 3, Legalization and World Politics, pp. 421-456
[244] Chechi A., When Private International Law meets Cultural Heritage Law: Problems and Prospects, Yearbook of Private International Law, Volume 19 (2017/2018), pp. 269-293

conflict"[245]. The Roerich Pact of 1935 designated monuments, museums and institutions dedicated to art and culture as neutral institutions. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, vested the ownership of cultural heritage in all of humanity. The 1954 Hague Convention defines cultural property thus:

Article 1. Definition of cultural property For the purposes of the present Convention, the term ' cultural property ' shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ' centers containing monuments ' .

UNESCO's Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970, addressed the concerns with looting and trafficking of cultural goods. The UNESCO Convention Concerning the

[245] Fitz Gibbon K. (2005), Chronology of Cultural property legislation in Fitz Gibbon K. (ed) Who Owns the Past?, American Council for Cultural Property, pp 3-9

Protection of the World Cultural and Natural Heritage, 1972, expanded the definition of heritage which had hitherto been limited to art and antiquities and lays down criteria on the basis of which cultural and natural sites may be included in the World Heritage List. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects signalled an intent to strengthen measures designed to ensure restitution of cultural objects to countries of origin. The UNIDROIT Convention has the following characteristics:

- It allows states and individuals (thereby conferring private litigation rights without state intervention) to claim restitution and bring a cause of action in the country where the disputed object is located, with no retroactive effect
- Theft is sufficient grounds for claiming restitution but illegal export is not
- Compensation for bona fide purchasers of stolen objects is provided for, in an attempt to balance competing interests
- UNIDROIT 1995 was an initiative of UNESCO to address the private international legal aspects of UNESCO 1970 and hence the two instruments are deemed compatible

Thus, we see an evolution in the guiding principles behind the international legal instruments over time. The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003, extended the scope of protections to include living traditions. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, and the United Nations Declaration on the Rights of Indigenous Peoples, 2007, also address intangible cultural heritage.

The discernible divergence in the nationalist or internationalist bent of international legal instruments is captured by Gregory Scott in these words[246]:

In comparing the available international agreements, there is no single directive as to whom, precisely, errant property is to be repatriated, and the relevant documents can in general be grossly divided into two groups that represent varying perspectives. The first, including the *UNESCO Convention on Illicit Art and International Institute for the Unification of Private Law ("UNIDROIT") present a bias favoring a conclusion that cultural property is part of, and necessarily attached to, a particular location or group. To the contrary, the second group represented by The Hague Convention, the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, and certain of Japan's recent enactments take a significantly different and more general view that culture and its proprietary by-products are to be considered the common heritage of mankind.*

However, from a practical standpoint, Scott acknowledges that "due to the complexity of the considerations and the relative dearth of available and effective principles for settling these kinds of disputes, it is not unusual in this context for claims of current entitlement to be founded upon situational moral or serendipitous contemporary social or political biases rather than upon substantive legal principles"[247]. In preceding chapters, we have discovered theoretical frameworks in International Relations help us investigate the influence of moral positions and political circumstances on the conception, evolution, interpretation and implementation of legal principles. In forthcoming sections of this chapter, I centre approaches in international law which

[246] Geoffrey R. Scott, Spoliation, Cultural Property, and Japan , 29 U. Pa. J. Int'l L. 803 (2008)
[247] Pp 823-824

constitute models of cooperation for heritage protection. One could imagine Criminalisation and Regulation/repatriation as two kinds of responses under the broad umbrella of legalisation. Whereas criminalisation pulls international law in a more positivist direction of hard law, regulation and restitution allow us to explore the normative force of international law. Through this analytical exercise, we find support for Abbott and Snidal's contention that "the choice between hard and soft law is not a binary one"[248].

Criminalisation

David Keane and Valencia Azarova suggest that "The definition and institutionalization of the consequence of criminal prosecution for offences against cultural property is rooted in the international legal order. While the 1954 Hague Convention provides for individual criminal responsibility in case of certain breaches, the effectiveness of the provision was undermined by the lack of a list of specific offenses that could give rise to criminal sanctions, later enunciated in Article 15 of the 1999 Second Protocol as part of five "serious violations:" the first three corresponding to grave breaches of the Geneva Conventions and Additional Protocol I of 1977, the fourth and fifth considered serious violations of the 1954 Hague Convention and the 1999 Second Protocol.[249]" Accordingly, the five offences are as follows:

(1) Making cultural property under enhanced protection the object of attack[250];

[248] Ibid p 422
[249] Keane D. And Azarova V. (2013), UNESCO, Palestine and Archaeology in conflict, Denver Journal of International Law & Policy, Vol 41, No 3 pp. 309-343
[250] The list of cultural property under enhanced protection is available here: http://www.unesco.org/culture/1954convention/pdf/Enhanced-Protection-List-2017_EN.pdf
The Enhanced Protection Regime is established under the second protocol of Hague 1954 and basically further narrows the scope of "military necessity".

(2) using cultural property under enhanced protection or its immediate surroundings in support of military action;" (3) "extensive destruction or appropriation of cultural property protected under the Convention and [Protocol II] (4) "making cultural property protected under the Convention . . . the object of attack;" (5) "theft, pillage or misappropriation of, or acts of violence directed against, cultural property protected under the Convention." (1999 Second Protocol)

Criminalisation, as a response, affords us a glimpse into judicial decision-making on issues of heritage protection. Stephen Hall situates judicial decision-making as a source of making of rules and their identification in International law. He writes[251]:

Although there is no doctrine of stare decisis in international law, decisions of international and domestic courts and tribunals are often highly persuasive evidence for determining the content and scope of international norms derived from custom, treaties and the general principles.

Punishing art theft and trafficking in cultural property as a criminal offence has the advantage of being a deterrent, especially when the penalty imposed is imprisonment. This is so because dealers and collectors are generally wealthy individuals who will not be deterred by fines[252]. However, this response also has its share of difficulties. Leila Amineddoleh observes that "Scienter is frequently a stumbling block for prosecutors in

[251] Hall S, Researching International Law, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press, p 254

[252] Karin Orenstein attest to the fact that collectors have conventionally "considered their risk to be financial: the loss of the antiquities' value, the possibility of being sued by a theft victim or of the objects being seized and forfeited by law enforcement, and any legal fees expended in defending such litigation". In Orenstein K (2020), Risking Criminal Liability in Cultural Property Transactions, North Carolina Journal of International Law, Vol. 45, p 548

any theft matter, but it is exponentially more difficult in cases of art theft"[253]. The provenience and provenance of looted antiquities being either unknown or forged in most cases, makes it challenging to establish that the accused knew that they were purchasing a stolen object. Museums are further seen to be immune from fear of prosecution as "board members themselves are the people responsible for overseeing the inner workings of the institutions" and protection of cultural property being in most cases a low priority for government agencies, "public intervention is too sporadic"[254].

Simon Mackenzie has observed that responses in international law to illicit deals in cultural goods have taken the form of criminalising such acts. He cites the inclusion of trafficking in cultural property within the scope of the United Nations Convention on Transnational Organised Crime (UNTOC) as a further development in the same direction. However, Mackenzie is concerned with the inherent tendency in criminology to gaze downward or focus on the lower echelons of society. Instead, he finds the role of dealers and collectors in the cultural property trade to more closely resemble "white-collar crime by individuals and groups, corporate crime, and state and state-corporate crime[255]" and therefore urges an upward gaze or their recognition as crimes of the powerful. Mackenzie further argues that since dealers are the relatively powerful actors in the system, the trade "may be more usefully controlled by a regulatory approach to the trade as opposed to a narrowly legalistic one".

[253] Amineddoleh L. (2013), The Role of Museums in the Trade of Black Market cultural heritage property, Art Antiquity and Law, Vol 17(3) p 243
[254] Amineddoleh p 244
[255] Simon Mackenzie (2011). Illicit deals in cultural objects as crimes of the powerful. Crime, Law and Social Change, Springer Verlag, 56 (2), pp.133-153

According to William Pearlstein, the Convention on Cultural Property Implementation Act passed by the US Congress in 1983 sought to allow enforcement of import restrictions in the US to curb illicit trade while still encouraging a thriving cross-border exchange of cultural objects. The underlying logic was that "the carrot of US import restrictions would be used as a stick to negotiate agreements for partage, museum loans, excavation permits for US archaeologists, cooperation and exchange among curators and art historians, and even export permits for redundant, non-critical objects"[256]. At the domestic level, particularly in the United States, criminalisation has been viewed by some as having favoured "the extraterritorial enforcement of sweeping national-patrimony laws"[257], in the process supressing the legal art market and hurting the interests of the art community and cultural education of the public. Pearlstein, for instance, contrasts the regulatory approach inherent to the Convention on Cultural Property Implementation Act with the approach of criminalisation favoured by US courts under the national Stolen Property Act, describing this as an example of "judicial nullification of congressional intent". He further adds that the stance of US courts in the McClain cases was criticised for being influenced by principles of international law rather than strictly upholding US common law. Others, operating with the lens of private international law list examples where national-patrimony laws have not been upheld in the courts of market countries[258] and focus attention on the illicit trade in antiquities as the more pressing concern.

[256] W.G. Pearlstein, Cultural Property, Congress, the Courts and Customs: The Decline and Fall of the Antiquities Market?, in [256] Fitz Gibbon K. (2005), Chronology of Cultural property legislation in Fitz Gibbon K. (ed) Who Owns the Past?, American Council for Cultural Property, p 9

[257] Pearlstein cites the 1979 US v McClain case in which US courts deemed "knowing importation of cultural property subject to a clear declaration of ownership by a foreign nation" to constitute grounds for criminal prosecution of the importer under the National Stolen Property Act.

[258] Chechi cites the Winkworth case and the Ortiz case

Surveying on-going efforts to address the damage sustained to cultural heritage in Syria, Brian Daniels and Salam al Kuntar address the possibility of international criminal prosecution of heritage related offences in future. Based on existing case law they find that "prosecutors will select to pursue indictments in which a party is unambiguously at fault and there is no significant armed opposition"[259], so as to comply with the military necessity exception. The complex circumstances under which destruction of heritage in Syria has taken place heightens the difficulty of satisfying this condition.

The International Criminal Court's (ICC) successful prosecution of Ahmad Al Faqi Al Mahdi a.k.a Abou Tourab in 2016 for destruction of UNESCO protected and World Heritage sites in Mali during the occupation of Timbuktu by the Ansar Eddine armed group, is an instructive case for criminalisation as a response[260]. The outcome of the case has been lauded for exemplifying speedy prosecution by the ICC with cooperation from the African states of Mali and Niger. The criticisms levelled against the ICC for this case, however, expose the limits of criminalisation as an effective measure for protection of heritage on conflict. Under the Rome statute, "gravity" of the crime is one of two core principles of the ICC, the other being complementarity. Critics of the ICC's decision to prosecute Al-Mahdi have pointed out other instances where the Office of the Prosecutor has failed or declined to intervene, arguing that these incidents meet the "gravity" requirement far more than the destruction of heritage sites. Reservations have also been expressed on whether "Al Mahdi is indeed the most responsible for the crimes"[261]. As seen in the case of Syria, several militia groups, a cross section of the population involved in excavation

[259] Daniels B.I. and Al Quntar S (2016), Responses to the destruction of Syrian cultural heritage: a critical review of current efforts, International Journal of Islamic Architecture, Vol 5(2), p 386
[260] Al Mahdi plead guilty and was convicted pursuant to article 8(2)(e)(iv) of the Rome Statute
[261] Sterio M (2017), Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case, Case Western Reserve Journal of International Law Vol 49, p 72

and the global supply chain of illicit antiquities are all implicated in the destruction of cultural property. In such a situation, there are no straightforward answers to the question: who is most responsible? Another source of debate is interpretation of the word "attack" on cultural property. Two positions are discernible on this point. The first construes attack in a limited sense as undertaken during hostilities through use of military equipment. The other – which is the position taken by the ICC's trial chamber in the Al Mahdi case – is that "the element of direct[ing] an attack encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group"[262]. Based on this distinction, William Schabas has concluded that "Al Mahdi has been convicted of a crime he did not commit"[263].

Regulation, Repatriation and Restitution

The term restitution is used when illegally acquired cultural objects are returned to their original makers/owners or their descendants whereas repatriation refers to return of objects whose status has changed due to change in political conditions resulting from state building or break-up. When demands for restitution are made for objects lost by whatever means during colonial rule, the term "return" of cultural property has been generally used. According to Mackenzie, regulation is an intentional goal-oriented intervention and includes gathering of information, setting of standards and exerting normative influence to produce behaviour modification. He compares a trader in the

[262] Al Mahdi (ICC-01/12-01/15) Judgement and Sentence, 2016, para 15
[263] Schabas W. (2017), Al Mahdi has been convicted of a crime he did not commit, Case Western Reserve Journal of International Law Vol 49, p 76

financial sector with a dealer in the art market and describes the similarities that emerge as follows:

Looking out for oneself is the primary rule in such market settings, the overall market being something that dealers see themselves as exploiting rather than identifying with as their responsibility. The market is on this view a context for their actions rather than constituted by them, and the temptation to take a profitable risk-shifting approach rather than a costly and time-consuming risk-managing one is great.

Mackenzie concludes that this outlook is the basis not only for risk-taking behaviour but also triggers a passing the parcel game of dumping the risk onto other stakeholders (reminiscent of the impact of credit default swaps on pension funds). Therefore, the intended purpose of regulation in this view is to counter risk-taking and risk-shifting attitudes and contain the practices stemming from them. "How might we think about 'crystallising' the risk considerations in any given transaction, or making them more real in the minds of the dealers, so as to prompt more of a risk-management approach?", asks Mackenzie. On the flipside, Mackenzie also recognises the limits to drawing parallels with the financial sector. Specifically, the ordinary citizen who may be a victim of wrongdoing is significantly more likely to report in case of the financial sector compared to the cultural goods sector. On the one hand, this poses a serious challenge for the regulatory approach to contend with, while on the other, it reinforces the need for international law (and legal rhetoric) to inform national and local responses.

Critics of repatriation and restitution, often portray these claims as stemming from extreme nationalist and anti-market parochialism – a characterisation that Tom Flynn terms "McCarthyite condemnation". Instead, explains Flynn, "rather than pursuing

narrow political aims, what many are arguing for is a loosening of the Western museum's proprietorial grasp on the world's material culture and the narratives that circulate around it. Instead they argue for the construction of a more internationalist, collaborative approach that restores the importance and value of context to an object's meaning and identity"[264].

In response to the illegal flow of antiquities from source country to market country, the role of international law is conceptualised as follows: *International regulation of antiquities aims to make up for the regulatory incapacity of source countries by shifting the burden of control to market countries and inducing them to control inflows of antiquities*[265]. Securing cooperation of market countries through enactment and enforcement of import controls seems to have been a significant strategy under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970). Based on the negotiating stance of the United States at the UNESCO 1970 Convention, the position of source countries may be summed up as follows:

1. Selective, rather than blank check system of export/import controls
2. Non-retroactivity with the aim of protecting existing collections of museums and other collectors

[264] Flynn T (2012), The Universal Museum: A Valid Model for the 21st Century? p 8 https://www.academia.edu/20053839/The_Universal_Museum_A_Valid_Model_for_the_21st_Century Accessed may 29, 2020

[265] Efrat p 15

3. Reciprocity by source countries through better domestic protection and conservation measures and openness to cultural exchange agreements

Fitz Gibbon recalls the general rule in private international law with respect to foreign transactions between individuals or corporations, whereby the court may choose either to make its own characterization or follow the characterization under the source country's laws. Given the nature of the antiquities market whereby "thieves and smugglers tend to move cultural property to countries with a weak law enforcement capacity and where the tainted title can be laundered through expiration of the limitation periods required for adverse possession, prescription or estoppel, or the norms protecting bona fide purchasers", Chechi tries to assess the implications of private international law in operation. To begin with, he points out that "restitution claims are normally directed to the courts in the place where the objects are found", however, such rules are only rarely designed with cultural goods in mind and in any case vary across jurisdictions. Lex rei sitae or the principle whereby title is determined under the laws of the country where the last transaction took place is the principle generally used by national courts to decide such claims, according to Chechi. However, Chechi argues that whether such a transaction has taken place in a civil law jurisdiction (where the possessor is assumed to hold title in good faith) or in a common law jurisdiction (where title of stolen property cannot be transferred), as well as the statutes of limitation applicable, greatly influence outcomes of legal action. Chechi identifies lex originis as the most favoured alternative principle in the literature to lex rei sitae, given the significance of cultural goods to countries of origin. It is important to note that restitution or repatriation is not guaranteed through the operation of lex originis and in cases where the cultural artefact predates the coming into being of the state of origin, the principle's

application is contested. Chechi observes that "The 1995 UNIDROIT Convention and Directive 2014/60,64 which endorse the lex originis principle, have struck a balance between the rights of original owners and of good faith possessors by providing for the payment of compensation to the possessor that exercised the required due diligence at the moment of acquisition".

Another constraint which impedes international regulation of trade in cultural goods is the non-applicability of foreign laws, writes Chechi. Here, whether the case for restitution/repatriation is based on the patrimony law or the export control law is of significance. For, while states are obligated to treat illegal removal of another state's heritage as theft, they are not required to enforce the export control laws of another state.

Derek Fincham discussed Mutual Legal Assistance Treaties (MLATs) as a way of overcoming this last barrier to international cooperation. Since the US is a major market country, Fincham believes MLATs to be an effective tool for repatriation efforts, particularly through the modality of forfeiture actions. Defining forfeiture as an action where "the offence is primarily attached to the thing", rather than the offender, Fincham adds that "forfeiture actions have been used extensively by in the United States in actions brought by US prosecutors". Fincham makes some further important points about the implications of deploying MLATs for cooperation in the realm of cultural heritage:

1. Forfeiture actions prioritise repatriation over criminal prosecution of individuals. Thus, they privilege the regulatory approach over criminalisation.

2. They incentivise museums to step up their due diligence efforts prior to acquiring objects. Equally, as financially well-endowed institutions, they hold museums accountable for creating demand for smuggled art and antiquities.

3. Excessive reliance on these treaties by source nations is disincentivised due to the possibility of backlash from affected constituencies and the burden imposed on agencies directly involved in the cooperative effort in market nations.

4. Lawyers specialising in cultural heritage may increase their reliance on existing tools rather than attempting to develop new laws.

Fincham discusses law as a subset of regulation in the case of the global heritage market. He states that "Social norms regulate behaviour when the law is ineffective—and because the antiquities trade works hard at every turn to evade scrutiny, these norms serve as de facto regulation of the sale of antiquities in many cases"[266].

Restitution and repatriation constitute a telling example of norm emergence and adoption in international society and its eventual reflection in international law. In what follows, I trace through history the United Nations General Assembly and United Nations Security Council Resolutions which address this issue as a way of documenting the evolution of this norm.

United Nations General Assembly Resolutions

In 1961, The international Court of Justice said the following, with reference to a series of resolutions of the United Nations General Assembly[267]:

[266] Fincham D (2013), Social Norms and Illicit Cultural Heritage,in Francesco Francioni, and James Gordley (eds), Enforcing International Cultural Heritage Law, OUP, p211
[267] International Court of Justice Reports (1996), Legality of the Threat or Use of Nuclear Weapons, p 226

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule, or the emergence of an opinio juris.

Accordingly, the emergence and evolution of an opinion juris or norm supportive of restitution and repatriation of cultural property to their places of origin is seen through a series of United Nations General Assembly Resolutions discussed below, since the UNESCO Convention of 1970.

United Nations General Assembly Resolution 3026, 1972[268]

- Expressed a fear that "the world may be impoverished by succumbing to uniformity and monotony in modes of life"
- Considered that scientific and technological advancement could both be supportive off and at odds with preservation of cultural values
- Urged states to use their national development plans as an instrument to tackle associated risks

United Nations General Assembly Resolution 2148, 1973[269]

- Clarified that an emphasis on preserving national and local cultures should not lead to "withdrawal of various cultures into themselves"

[268] Human Rights and scientific and technological developments, 2114th plenary meeting, December 18, 1972
[269] Preservation and further development of cultural values, 2201st plenary meeting, December 14, 1973

- Affirmed the right of states to formulate laws and policies for heritage protection as a sovereign right" and recognised cultural exchanges in accordance with these laws as conducive to protection

- Embraced a living conception of culture by encouraging that heritage conservation efforts be linked to development policies

United Nations General Assembly Resolution 3187, 1973[270]

- Taking reference to UNESCO 1970, places a "special obligation" on countries which have come to possess art and cultural objects from other territories by virtue of imperial occupation to undertake prompt restitution of the objects

- Emphasizes the role of cultural understanding – one's own and others – in supporting broader international cooperation

United Nations General Assembly Resolution 3391, 1975[271]

- Invited "Member States to ratify the Convention on the |Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, adopted by the general conference of the United Nations Educational Scientific and Cultural Organisation in 1970".

United Nations General Assembly Resolution 31/39 and 31/40, 1976[272]

[270] Restitution of works of art to countries victims of expropriation, 2206th plenary meeting, December 18, 1973

[271] Restitution of Works of Art to Countries Victims of Expropriation, 2410th plenary session, November 19, 1975

[272] 31/39 Preservation and further development of cultural values and 31/40 Protection and Restitution of works of art as part of the preservation and further development of cultural values, 83rd plenary meeting, November 30, 1976

- Reiterated the link between cooperation on protecting cultural values with positive outcomes for international peace and security and economic development
- Referred to Article 15 of the International Covenant on Economic Social and Cultural Rights, reintroducing the discourse of human rights in the cultural domain
- Renewed calls for restitution of plundered art and cultural objects to countries of origin

United Nations General Assembly Resolution 32/18, 1977[273]

- Urged member states to take steps towards preventing illicit traffic in cultural objects, in particular items from countries formerly under colonial occupation and foreign domination

United Nations General Assembly Resolution 33/50, 1978[274]

- Mentions establishment of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Counties of Origin or its Restitution in case of Illegal Appropriation as a promising step

United Nations General Assembly Resolution 38/34, 1983[275]

[273] Restitution of Works of Art to Countries Victims of Expropriation, 66th plenary meeting, November 11, 1977
[274] Protection, restitution and return of cultural and artistic property as part of the preservation and further development of cultural values, 84th plenary meeting, December 14, 1978
[275] Return or restitution of cultural property to the countries of origin, 71st plenary meeting, November 25, 1983

- Expressed concern over the phenomenon of clandestine excavations on account of which countries and the world at large were sustaining heavy losses to cultural heritage

- Highlighted "the importance of inventories as an essential tool for the understanding and protection of cultural property and for the identification of dispersed heritage and as a contribution to the advancement of scientific and artistic knowledge and intercultural communication".

United Nations General Assembly Resolution 40/19, 1985[276]

- Drew attention to underwater cultural heritage and called on States with historical and cultural links to these treasures to cooperate towards their recovery in accordance with international law

- Pointed out the need for restitution of cultural objects to be accompanied by training of personnel for their maintenance

United Nations General Assembly Resolution 42/7, 1987[277]

- Recommended closer monitoring of licenced excavations by archaeologists

- Recommended that museums should be required to maintain inventories of cultural items not only on display but also in storage

United Nations General Assembly Resolution 46/10, 1991

[276] Return or restitution of cultural property to the countries of origin, 87th plenary meeting, November 21, 1985

[277] Return or restitution of cultural property to the countries of origin, 47th plenary meeting, October 22, 1987

- Highlighted the importance of deploying mass media and educational institutions to create greater awareness about progress on return and restitution of cultural property[278]

United Nations General Assembly Resolution 54/190, 1999[279]

- In addition to the on-going illicit traffic in cultural property, drew attention to "the loss, destruction, damage, removal, theft, pillage or misappropriation of and any acts of vandalism directed against cultural property in areas of armed conflict and territories that are occupied.

United Nations General Assembly Resolution 56/97, 2001[280]

- Lauded the creation of International Fund for the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, to mark the thirtieth anniversary of UNESCO 1970

United Nations General Assembly Resolution 58/17, 2003[281]

- Mentions "adoption of the International Code of Ethics for Dealers in Cultural Property by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 16 November 1999" as a welcome step and urges implementation of the code.

[278] Return or restitution of cultural property to the countries of origin, 35th plenary meeting, October 22nd 1991
[279] Return or restitution of cultural property to the countries of origin, 84th plenary meeting, December 17, 1999
[280] Return or restitution of cultural property to the countries of origin, 86th plenary meeting, December 14, 2001
[281] Return or restitution of cultural property to the countries of origin, 68th plenary meeting, December 3, 2003

United Nations General Assembly Resolution 61/52, 2006[282]

- Acknowledged the scope of application of the Convention on Jurisdictional Immunities of States and their Property (adopted by UN in December 2004) to the protection of cultural heritage and appeals for member state cooperation to ensure the Convention comes into force
- Recognised UNESCO's efforts towards "promotion of bilateral negotiations, for the return or restitution of cultural property, the preparation of inventories of movable cultural property and the implementation of the Object-ID standard related thereto, as well as for the reduction of illicit traffic in cultural property and the dissemination of information to the public"
- Mentioned the Cultural heritage laws database launched by UNESCO in 2005 and urged linking of all existing databases, including through closer cooperation with Interpol
- Noted the inclusion of mediation and conciliation mechanisms in the revised Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

United Nations General Assembly Resolution A.67/L.34, 2012[283]

- Lauded steps taken by UNESCO towards training people in source countries to better equip them to protect cultural heritage while simultaneously engaging

[282] Return or restitution of cultural property to the countries of origin 65th plenary meeting, December 4, 2006
[283] Return or restitution of cultural property to the countries of origin, December 5, 2012

with representatives of the international art trade "in order to improve practices and raise awareness in such areas as provenance investigations, ethics, restitution procedures and knowledge of the international legal framework".

- Implicitly recognised the connection between the illicit trade in cultural objects and other organised crime in calling for cooperation with United Nations Office on Drugs and Crime and the International Criminal Police Organization (INTERPOL)

African nations have taken the lead in sponsoring these UNGA resolutions. Meanwhile many African states have not ratified UNESCO 1970, and fewer still have ratified UNIDROIT 1995 (out of 54 nations, 22 have ratified and 6 accepted UNESCO 1970, whereas only 11 African nations are thus far contracting states for UNIDROIT 1995). However, because conventions carry greater weight than resolutions (as representing emerging opinio juris) in international law, we may have a skewed impression of the will of the international community.

Snidal and Abbott term those "states (and other actors) that have worked to obtain commitments from others, often in the face of strong resistance", as *demandeurs*. They estimate that "Demandeurs should seek hard legalization (1) when the likelihood of opportunism and its costs are high, and noncompliance is difficult to detect; (2) when they wish to limit participation to those strongly committed to an agreement; and (3) when executive officials in other states have preferences compatible with those of the demandeurs, but other elites within those states have divergent preferences. Finally, demandeurs should place greatest reliance on commitments by states that participate actively in legal regimes and have strong legal institutions, professions, and traditions."

In the case of source countries desiring repatriation and restitution of their cultural goods from market countries, one observes that most of these conditions apply. Interest groups in market countries have been seen to repeatedly contrive justifications and maintain a culture of secrecy as well as a great degree of opportunism by exploiting the conditions which fuel illicit excavation and export from source countries. Source countries desire strong commitment on part of market countries as transfer of ownership of cultural property can be a fraught and drawn out process and there is room for debate about which items are of great cultural and national significance. In this case, not the demandeurs but the market countries themselves seek similar levels of commitment from other market countries as the game theory framework discussed previously suggests. In market countries there is usually a significant and vocal section of elite opinion which favours the purported educational needs and cultural enrichment of domestic constituents and thereby opposes restitution and repatriation. Lastly, the market countries have strong legal professions and traditions themselves. Yet, when seeking cooperation on restitution and repatriation of heritage, we find that African states as demandeurs have not chosen to Ratify UNESCO 1970 and UNIDROIT 1995. Instead, they have repeatedly used the forum of United Nations General Assembly Resolutions to foster a normative consensus.

Such a stance by African and other third world states could be attributed to a number of reasons. Through legalisation, African states become enmeshed with powerful non-state actors in market countries, namely museums and collectors, who are politically unaccountable and maintain a culture of secrecy. Legalisation also creates certain obligations for source countries which they may not have a capacity to fully meet. Lastly, whether through the non-aligned movement during the cold war or the inclusion of

second generation rights in the human rights paradigm, or indeed as the above UNGA resolutions demonstrate, in case of heritage conservation, third world states have demonstrated a preference for normative evolution as a driver of change in the international system. My assessment lends credence to Amitav Acharya's view that "the so-called Third World has been a maker of international rules and norms"[284]. Archarya adds that the impact of third world states on the international system "include(s) significant modifications to, and adaptations of, European norms of sovereignty on the basis of preexisting local beliefs and practices, as well as the creation of new rules in the local context and exporting them to the wider regional and global levels to influence and shape relations within the Third World and between the Third World and the West". The discourse of repatriation of cultural heritage and the demonstrated preference for norm-based cooperation over legalisation exemplify such a contribution of third world states.

Heritage and Just War

This section explores how the case study of heritage protection allows us to reassess and reimagine a fundamental building block of international law – particularly international humanitarian law and international criminal law – namely, Just War. Following two major motivations behind this study, the principles of Just War are first gleaned from various non-western traditions. Thereafter, Daniel Brunstetter's framework built on the pillars of necessity tension, civilizational paradox and magnanimity principle is applied to refocus the discussion on destruction of cultural heritage in the context of war.

[284] Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3) p 629

The analysis here is inspired by the two fold understanding that while the relevance of religious doctrine to the international normative framework governing just war is well established, there is an inadequate foundation of analysis spanning a spectrum of religions assessing their respective positions on key individual aspects of cause of war and its conduct, to support the desired international normative project. There is a multitude of desirable human goals and social aspirations across religions and within the same religion across time, and varying degrees of specification as to the proper means to achieve these. As a result, there is a genuine lack of a multi/inter-civilizational understanding of Just War and the widely held belief that, as it stands, the Just War Theory is largely based on relevant ideas in Christianity. To address this limitation, interpretations of Just War in other religious traditions – Manu, Sun Tzu and Shia and Sunni Islam are discussed. I argue that this, more broad-based approach to conceptualizing Just War Theory allows the evolution of International Criminal Law to be more sensitive to civilizational diversity, more responsive to changing nature of warfare and ultimately, a more effective instrument in promoting just peace.

Rescuing Just War from Christian-centricity

Article 227 of the Treaty of Versailles states that the Tribunal constituted under the terms of the treaty aims to vindicate the "validity of international morality". The Charter of the International Criminal Tribunal at Nuremberg counted murder, ill-treatment, or deportation of civilians in occupied territory; murder or ill-treatment of prisoners of war; killing of hostages; plunder of public or private property; wanton destruction of municipalities and devastation not militarily necessary as constituting war crimes. The Geneva Conventions separately identified breaches corresponding to the wounded on

land and sea, prisoners of war and civilians. The Geneva Conventions Additional Protocol I added to the list to include medical experimentation; making civilians and non-defended localities the object or inevitable victims of attack; the perfidious use of the Red Cross or Red Crescent emblem; transfer of an occupying power of parts of its population to occupied territory; unjustifiable delays in repatriation of POWs; apartheid; attack on historic monuments; and depriving protected persons of a fair trial as well as making it incumbent on States to prosecute or assist in prosecuting persons responsible for grave breaches. In-keeping with the changing nature of conflict, Additional Protocol II set out rules addressing the growing trend towards intrastate conflicts.

The laws of war as we know them today may have been formalised in response to a combination of factors such as socio-political developments in the West across the eighteenth and nineteenth centuries, the emerging logic of the military industrial complex and evolution in the technologies of war making. However thinking about the role of war in intercivilizational and interstate relations predates this process of formalization by far. In fact, much of this thinking has happened in the context of religious pronouncements on broader issues of justice, peace and fairness.

The fact that much codification of International Criminal Law based itself upon provisions in the United Nations Charter, which itself was a response to regional and context-specific events, led to a progressive overshadowing of other stakeholders and their perspectives. To the extent that Custom is one of the sources of International Law then, revisiting Just War Theory to incorporate understandings from diverse religious and cultural traditions is a project directed at broadening the customary base and extending

the customary lineage of International Criminal Law, in time and across civilizational boundaries.

While the relevance of religious doctrine to the international normative framework governing Just War is well established, there is an inadequate foundation of analysis spanning a spectrum of religions assessing their respective positions on key individual aspects of cause of war and its conduct, to support the desired international normative project. Academic debate has largely converged on whether religious texts justify violence or are mere subterfuge to mask other, more worldly, motives and further, whether believers of certain religions are more prone to resort to use of force than others[285]. Existing scholarly treatment has largely cast this as an issue of subjective textual interpretation. This obscures the fact that there is a multitude of desirable human goals and social aspirations across religions and within the same religion across time, and

285

Characterizing religions as generally precautionary and opposed to violence, Popovski goes on to acknowledge that "there are circumstances in which religions would find the use of armed force acceptable. (...) With a few exceptions - such as Jainism or Baha'i teachings, known for their extreme pacifism - all traditions admit that war can be, in fact should be, a necessary and proportionate tool to stop and aggressor. (...) Religions accept that war can be the lesser evil - the last resort to defeat a tyrant and restore peace and harmony." (Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War, (United Nations University Press 2009) p. 12)

Reichberg et al point to the seeming contradiction that "on the one hand, it is often assumed that "true" religion requires a renunciation of violence; on the other hand, it seems equally incontrovertible that, when individuals enter war with religious motivations, their use of force will know no limits". (Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War (United Nations University Press 2009), p. 303)

Pearse poses more directly the related question: Is Religion the Primary Cause of violent conflict? "Though many wars in human history have been caused mostly by religious differences, many more have been caused by the things that religion, for the most part keeps in check: greed, pride, revenge, inhuman godless ideologies and disdain for the well-being of others", according to him. (M. Pearse, The gods of war: is religion the primary cause of violent conflict? (Intervarsity Press 2007) p. 42)

varying degrees of specification as to the proper means to achieve these. As a result, there is a genuine lack of a multi/inter-civilizational understanding of Just War and the widely held belief that, as it stands, the Just War Theory is largely based on relevant ideas in Christianity.

In the following sections, I start by reviewing thinkers within Christianity around whose ideas Just War Theory has developed. Thereafter, interpretations of Just War in other religious traditions – Manu, Sun Tzu and Shia and Sunni Islam are discussed. I argue that this, more broad-based approach to conceptualizing Just War Theory allows the evolution of International Criminal Law to be more sensitive to civilizational diversity, more responsive to changing nature of warfare and ultimately, a more effective instrument in promoting just peace.

Augustine and Aquinas

As a bishop in North Africa, Saint Augustine's writing explores various dimensions of faith but much of it has been interpreted by later commentators as relevant to the principles of Just War. An obvious and oft quoted idea in Augustine is that war is just under certain circumstances. But his main stipulation is that war may be waged only by "the good". The good in his conception are those who are guided by supreme reason (divine law) rather than temporal law (prevailing law at any given time). Augustine clearly believes that the good are not motivated by self-defense. Rather, killing an enemy is justified only in defense of others and in situations where virtue and other qualities of the soul are at risk at the hands of wrongdoers.

"Let necessity slay the warring foe, not your will[286]".

As long as war is waged by those vested with legitimate authority to do so (and not everyone is), means adopted by them in order to win do not matter. Augustine insists however that the unarmed and innocent should under no circumstances be subjected to cruelty. To him, this was an important quality separating the Christian from the barbarian. In letter 189 to Boniface Augustine says:

"As violence is returned to one who rebels and resists, so should mercy be to one who has been conquered or captured, especially when there is no fear of a disturbance of peace."

But closer reading suggests that Augustine's main interest is in the weaknesses of human character that supply the basis for war in the first place - pride, malice, hatred. Even as he acknowledges the inevitability of war, he remains skeptical of ensuing victories. To Augustine, the pursuit of peace through war is justifiable merely in a (lesser) human sphere but the human propensity to inordinately value what he terms "goods of the earthly city", ultimately leads to a vicious cycle of misery. In City of God Book XIX Chapter twelve he states:

"...pride imitates God in a distorted way. It hates equality with partners under God, but wants to impose its own domination upon its partners in place of God. Consequently, it hates the just peace of God and loves its own iniquitous peace."

[286] All passages quoted in Augustine and Aquinas are from Reichberg, Syse and Begby (eds.) The Ethics of War: Classic and Contemporary Readings (Blackwell Publishing 2006) p. 70-90 and 169-198 respectively

This prognosis of human nature, together with the fact that scholars have failed to identify a coherent body of thought on just war in Augustine (simply basing themselves on disparate ideas pieced together), necessitates reconceptualization of Augustine's philosophy. It appears that Augustine's point of departure is not Just War but Just Peace.

If the earthy realm followed the laws of God rather than temporal laws which are always subject to change, the need for war would never arise. But when barbarians threaten virtue in others, the good must not stand idly by but defend those in need. The following lines from Letter 229 to Darius suggest that Augustine does acknowledge means of rectifying wrongs short of use of force:

"Preventing war through persuasion and seeking or attaining peace through peaceful means rather than through war are more glorious things than slaying men with the sword."

Moreover, the end goal of victory does not guarantee that peace will permanently prevail; indeed man's pride will ensure this does not happen. In addition, he finds the origins of political authority itself in sin. Thus the same authority that must be counted on to bring wrongdoers to justice, cannot be trusted to establish long-term peace.

In their editorial comments on select passages from Augustine, Reichberg et al argue that his views on the use of force were a response to a contemporary rebellion in the Church staged by the Donatists[287]. This assessment allows us to pinpoint deviations from the path of (Christian) virtue as the prime, and perhaps only, justification for the use of force to be found in Augustine. In sum, war is caused by human proclivity to stray from

[287] Reichberg, Syse and Begby (eds.) The Ethics of War: Classic and Contemporary Readings (Blackwell Publishing 2006) p 85

the path of virtue and the order that results when force is applied being always short of the perfect just peace, will ultimately produce conditions fueling war again. The limits on use of force in Augustine are the possibility of persuasion, legitimate authority and defense of the innocent.

Thomas Aquinas explores war in the context of peace and peace with reference to justice. In his view, inner peace prevails when there is a "union of the appetite's inclinations" i.e. when the heart is free of desires and wants. And peace between individuals prevails when they are in concord as to what is desirable in accordance with Charity, the preeminent Christian virtue.

"Peace is the work of justice indirectly, in so far as justice removes obstacles to peace: but it is the work of charity directly, since charity, according to its very nature causes peace."

When it comes to war, Aquinas appears more favorably disposed to self defense as reasonable grounds for use of force when compared with Augustine. As regards the manner of conducting war, he argues that ambushing the enemy is acceptable. While deception by falsely representing ones intentions is illicit, concealing them from the enemy is not.

In the Summa Theologica, Aquinas justifies war in these words:

"Even those who seek war and dissention, desire nothing but peace, which they deem themselves not to have. For (…) there is no peace when a man concords with another man counter to what he would prefer. Consequently men seek by means of war to break this concord, because it is a defective peace, in order that they may obtain peace, where nothing is contrary to their will."

More broadly, Aquinas seems to be interested in exploring the human quest for a more perfect peace and specifying the conditions that legitimize wielding of political power in general, making his ideas applicable in a context of nonconventional conflict and civil wars as well.

Where does Aquinas place the limits on war? The answer can only be gauged from his discussion on peace in general as he does not articulate his own views but simply synthesizes and sometimes refutes and modifies those of theologians that came before him. A plausible reading would be that the basis for war is removed when the virtue of Charity is attained so that inner harmony is enjoyed and where there is agreement on what the ultimately desirable social goods are so that justice, and thereby outer/communal peace, prevails.

Manu

The Hindu conception of War and its place in society evolved amid the countervailing influences of the idealism in epics such as the Ramayana and Mahabharata, the realism of political texts such as the Arthashastra and the proximity to pacifist streaks in Jainism and Buddhism. Kaushik Roy identifies the concept of Dharmayuddha as the counterpart of Just War in Hinduism[288]:

Dharmayuddha depends on the ends (i.e. the objectives) of war. Any war undertaken against injustice becomes a dharmayuddha. (…) organized violence applied in accordance with certain codes and customs.

[288] K. Roy, Norms of War in Hinduism in Reichberg, Syse and Begby (eds.) The Ethics of War: Classic and Contemporary Readings (Blackwell Publishing 2006), p 33

Manu is the legendary originator of the Hindu/Sanskrit legal code and his writing has been acknowledged by present day scholars and commentators as the place where the notion of war crimes first coherently appeared.

Manu discusses war in the context of a much broader discussion on the nature of kingship, the duties associated with it, moral authority of kings and their conduct. In the first place, the king is to ensure that justice prevails and the (hierarchical) social order maintained. He expounds at length on defensive measures to be put in place by a king to preserve territorial integrity. Once this has been done, the more justly the king rules over his own domain, the higher will be the reputational gains he makes abroad.

Careful reading reveals that Manu envisages the role of warfare as a way for the just and righteous king to amass more resources and enrich his kingdom. Manu's equivalent of the "system" in the Realist school of International Relations is a number of kingdoms, some ruled by more just kings than others and varying in wealth and prestige. Thus the logic of warfare flows from self-preservation and when the opportunity presents itself, self-aggrandizement and enrichment[289]:

"Let the king consider as hostile his immediate neighbor (...), as friendly the immediate neighbor of his foe, and as neutral (the king) beyond these two."

Roy notes that "one of the characteristics of dharmayuddha is its defensive nature". It is crucial, however, to distinguish between defensive tactics and defensive intentions. Indeed, the King being duty bound to increase his power and prestige through conquest,

[289] All passages included in the section on Manu are sourced from sacred-texts.com, The Laws of Manu, last accessed January 15, 2016

clearly suggests that there is no recognition of self-defense as the sole just cause for waging war in this tradition.

Certain caveats do indeed apply to this general position on the right of kings to engage in warfare.

Firstly, establishment of a just, prosperous and secure internal order precedes external military engagement.

"When the king knows that at some future time his superiority is certain, and at the present time he will suffer little injury, then let him have recourse to peaceful measures. But when he thinks all his subjects to be exceedingly contented, and that he himself is most exalted, then let him make war."

Secondly, even when dealing with rival kingdoms, warfare is one of many instruments of statecraft, diplomacy being the most important among them.

"For the ambassador alone makes allies and separates allies; the ambassador transacts that business by which kings are disunited or not. Having learnt exactly (from his ambassador) the designs of the foreign king, let (the king) take such measures that he does not bring evil on himself."

This is also indicative of there being a notion of last resort in Manu. Elsewhere he says:

"He should try to conquer his foes by conciliation, by (well-applied) gifts, and by creating dissention, used either separately or conjointly, never by fighting (if it can be avoided). For when two (princes) fight, victory and defeat in battle are, as experience teaches uncertain; let him therefore avoid an engagement."

And thirdly, all wars must be conducted in accordance with certain laws.

"Thus has been declared the blameless, primeval law for warriors; from this law a Kshatriya must not depart, when he strikes his foes in battle."

His main injunctions in terms of proper war-time conduct are avoiding harm to the innocent and unarmed, humane treatment of wounded and captured warriors and bans on use of certain kinds of weaponry. Manu does not explicitly discuss "legitimate authority", assuming that it is vested in the king; instead he provides specifications as to the character of such a king.

"By him who is pure and faithful to his promise, who acts according to the Institutes (injunctions) of sacred law, who has good assistants and is wise, punishment can be justly inflicted."

Thus punishment being key to orderly human behavior and essential to maintaining internal and external order, the same variable, namely the king's character, legitimizes use of force within the domain and outside.

Manu's teaching as regards the post bellum order, directs the victors to endeavor to restore equilibrium of justice and friendly relations with vanquished former adversaries.

"When he has gained victory, (…) having fully ascertained the wishes of all the (conquered), let him place a relative of the vanquished ruler on the throne, and let him impose his conditions,"

While Manu earlier justifies waging of war to extract bounties from neighboring kingdoms, in his post bellum scenario, the victorious king is ever mindful to balance this against the need to turn former foes into future allies:

"By gaining gold and land a king grows not so much in strength as by obtaining a firm friend, who, though weak, may become powerful in the future".

Another eminent strategist in this tradition is Kautilya, an influential advisor to King Chandragupta of the Maurya dynasty (around 300 BC). Kautilya's mandala theory anticipates the anarchical State system at the heart of structural realism (and commonly attributed to Hobbesian state of nature). Explaining this theory, Roy writes:

Kautilya portrays interstate relations as a circle composed of various kingdoms. This is known as the mandala theory. The manadala is full of disorder, chaos and anarchy (…) the only security in such a dangerous, fluid situation is power. (…) Hence struggle between the various kingdoms is inevitable.

Sun Tzu

Sun Tzu delves deeper into the art and science of warfare rather than setting out a detailed context in which aggression is justified. The wise general is vested with almost limitless freedom when it comes to strategy and tactics. He stands firmly in favor of deception and deployment of overwhelming force against the opponent, indeed, repeatedly advocating them through various metaphors as vital to success in battle. Foraging on resources in hostile territory and disrupting civilian life to drain the adversary's morale are also deemed permissible.

Broadly speaking, Sun Tzu's point of departure is moral law which, he says, causes people to be in complete accord with the ruler and such a ruler always has the upper hand when

it comes to warfare. However the principles of limited objectives and humane treatment of enemy combatants and spies may also be gleaned in his writing[290]:

"There is no instance of a country having benefited from prolonged warfare. (...) In war, then, let your great object be victory, not lengthy campaigns."

"The captured soldiers should be kindly treated and kept. (...) The enemy's spies who have come to spy on us must be sought out, tempted with bribes, led away and comfortably housed. Thus they will become converted spies and available for our service."

As noted above however, Sun Tzu is less categorical on the place of war in the general conduct of political affairs. Perhaps his most frequently cited adage however is that:

"...in war the victorious strategist only seeks battle after the victory has been won, whereas he who is destined to defeat first fights and afterwards looks for victory."

This could simply mean that measures should be taken to ascertain that the enemy is in a weaker position compared to the aggressor at the time of attack. An alternative interpretation, however, raises the more fundamental question as to whether war should be engaged in at all once underlying objectives have been attained.

Shia and Sunni Islam

Feirahi writes that "in Islamic jurisprudence, war is equal to jihad, which is one of the 10 secondary rules of Islam. However it should be noted that one must necessarily distinguish between the Qur'anic and jurisprudential usages of "jihad". In most cases in the Qur'an, jihad means "striving" in the way of God; in its jurisprudential usage,

[290] Sun Tzu on the Art of War, Translated from Chinese by Lionel Giles, Allandale Online Publishing, 2000 https://sites.ualberta.ca/~enoch/Readings/The_Art_Of_War.pdf
Accessed June 23, 2020

however, jihad refers to "war" … [291]" Sonbol maintains the same distinction referring to the first sense as Jihad and the terming the second, narrower, interpretation as "Qatilu"[292]. She also identifies protection of life and human dignity and protecting the helpless as two main overriding concerns in Islam. Seeking to clarify the term Jihad, Mahmud Mamdani offers another distinction: "Scholars distinguish between two broad traditions of jihad: *jihad Akbar* (the greater jihad) and *jihad Asgar* (the lesser jihad), The greater jihad, it is said, is a struggle against weaknesses of self; it is about how to live and attain piety in a contaminated world, The lesser jihad, in contrast, is about self-preservation and self-defense; more externally directed, it is the source of Islamic notions of what Christians call "just war"[293]."

In the specific context of Shiite Islam, Feirahi names "four sources of interpretation: the Holy Qur'an, Tradition (Sunna), Intellect (Aql), and Unanimity (consensus)[294]." Her description of these as sources of interpretation suggests evolutionary growth as per historical circumstance and room for application in accordance with context. On this point too Sonbol is in agreement with the qualification that there are indeed "consistent references and beliefs that represent essential points that appear in the writings of important thinkers over the ages". Within (and perhaps stemming from) this interpretive flexibility, there appears a cleavage between thinkers who believe the qualifying

[291] D. Ferahi, Norms of War in Shia Islam in Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War (United Nations University Press 2009), p. 256

[292] A. Sonbol, Norms of War in Sunni Islam in Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War (United Nations University Press 2009), p. 284

[293] M. Mamdani, Good Muslim, Bad Muslim, American Anthropologist 104 (3)p. 768

[294] D. Ferahi, Norms of War in Shia Islam in Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War (United Nations University Press 2009), p. 255

secondary verses are central to reading the main injunctions on War and those that maintain that the primary verses overrule secondary qualifications.

The general principle guiding all followers is that use of force is justified when there is persecution of Muslims, in particular displacement and attacks on holy sites. But beyond this first point of departure, a spectrum of opinion exists on defensive versus offensive jihad. On this point Feirahi writes: "The classic Islamic jurisprudence, whether Shiite or Sunnite, classifies jihad on two levels: offensive and defensive. In this classical approach, the main meaning of jihad is offensive jihad, which is an obligatory act for any Muslim. Particularly among Sunnites, it is believed that the Qur'anic verses on jihad nullified (nasikh) the Qur'anic verses on peace…"

The quotes below from two prominent jurisprudents starkly convey this difference of opinion:

"It is our obligation to commence war on them (non-believers), though they may not intend to commence a war on us. Because Allah has made it an obligation on us to kill the unbelievers, so nobody (Lawful or Unlawful Governors) would be in a position to suspend this rule, so that all the people would say that there is no god but Allah.[295]*"*

"But if Muslims are attacked by the enemy and the religion or lives of Muslims are in danger, in such a case Jihad and defence is a religious duty even under an unjust ruler, of course not as an offensive Jihad, but as one defending the lives of Islam and Muslims.[296]*"*

[295] Ferahi citing the author of Tabyin al-Hagha'igh p. 257

[296] Feirahi citing the Shiite jurisprudent Sheikh Al-Taefa Abu Ja'far Mohammad al-Tousi (995-1075) p. 258

The above quotes also allude to the question of legitimate authority and herein lies the main difference between Shiite and Sunni Islam. In Shiite Islam, only the infallible Imam is vested with the authority to declare war. The fact that the twelfth infallible Imam is in occultation, coupled with the responsibility of believers in Islam to engage in jihad discussed above, may lead us to conclude that defensive jihad has the upper hand in Shiite Islam. This reading also finds resonance in the words[297] of the First infallible Imam, Ali, who lived in the seventh century:

Peace is closer to salvation and is more beneficial up to the moment that Islam is not in peril.

Analysis

Based on review of principles embedded in the traditions discussed above, one can plausibly conclude that Just War Theory embraces their understanding of conduct during war more broadly than it does the competing conceptions of just cause for war. Both are separately discussed below and implications for relevant aspects of International Criminal Law assessed in each case.

The two pillars of Jus in Bello – Discrimination and Proportionality – find mention in all of the traditions studied but an exact overlap of scope and rationale is not in evidence. All religious tenets forbid attacks on the unarmed. There is general agreement that humane treatment must be extended to captured enemy combatants. However, in Sun Tzu, this is inspired not by a humanitarian logic but as an extension of strategy to the extent that it is justified for purposes of gathering information about the enemy. As regards

[297] D. Ferahi, Norms of War in Shia Islam in Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War (United Nations University Press 2009), p. 263

proportionality, it has been noted above that disruption of civilian life is acceptable in Sun Tzu as a means to gain the psychological edge over the adversary. Hindu philosophy legitimizes attack on all assets in enemy territory, although it equally holds the victor responsible for restoring order to defeated regions and populations post bellum.

The table below summarises the broad orientation to offensive and defensive war in the traditions considered and juxtaposes them against the locus of legitimacy.

	Offensive War	Defensive War
Legitimacy vested in individuals	Augustine Manu Sun Tzu	Aquinas Shia Islam
Legitimacy derived from text		Sunni Islam

In Sunni Islam, there is consensus around the idea that enemies of Islam and its homelands should be opposed and by violent means if necessary. Less widely shared but certainly prevalent is the belief that offensive jihad may be waged against nonbelievers. In the table above it is therefore classified under traditions which legitimise Defensive War. In Shia Islam too we find this justification for defensive war when Islam and its believers are in jeopardy but with the additional requirement that resort to violence must be certified by the Imam (in occultation). This is unlike in Sunni Islam where only the message contained in religious texts matters.

Manu and Sun Tzu are classified under offensive war in the table simply because both speak of waging war necessarily from a position of strength. The fact that the Hindu king is permitted to wage war to augment the resources of his kingdom suggests that unprovoked aggression is not ruled out. It is noteworthy however, that this decision rests with the just king and involves the exercise of the wisdom, discretion and sense of fairness that he embodies. Sun Tzu also accords significant weight to the wise general's assessment of when and for what reasons resorting to force is acceptable. The fact that both these traditions make room for offensive war in no way means, however, that war is inevitable. They lay great emphasis on the role of diplomacy and other instruments of statecraft in ensuring harmonious interstate relations.

To conclude, it is instructive to recall what the judgement of the Nuremberg International Military Tribunal reads[298]:

The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.

The analysis above shows that there are indeed divergent perceptions of offensive and defensive war not fully captured in the Just War Theory as it has been understood and which thereby remain unrepresented in International Criminal Law despite their significance in real world conflict scenarios. We also find that proportionality is not uniformly defined across all traditions. As battlefields of the future evolve to include, for instance, cyber warfare, this finding can help us take more effective measures to ensure

[298] INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG) Judgment of 1 October 1946, p54

emerging risks to civilian life are insured against. One of the traditions reviewed above upholds the right to defend one's home and territory based on interpretation of textual sources. Seen from this perspective, it does not matter that the "invading force" terms the intervention as humanitarian. Thus, a broader reconceptualization of Just War Theory calls into question a one-size-fits-all approach to Humanitarian Intervention. Lastly, since so much of the theological literature reviewed discusses justice and peace in relation to each other, it provides valuable insights towards addressing a concern at the heart of International Criminal Law: How to balance considerations of peace and reconciliation with the aspiration of bringing wrongdoers to justice?

Just war, protecting heritage and intercivilisational dialogue

Brunstetter counts "scholasticism, neoscholasticism, canon law, chivalric code, holy war, secular natural law, positive law, various types of reformism, and realism" among the influences that have shaped the recurring themes constituting a body of thought that is Just War[299]. He identifies three themes that are most pertinent to any discussion on the threat of heritage destruction in war:

1. Necessity Tension which refers to "the dilemmas that military planners and soldiers face when deciding whether to destroy or preserve cultural heritage sites to advance toward victory[300]"

2. Civilisational paradox or the question as to "who defines which sites are intrinsically valuable?[301]"

[299] Brunstetter DR (2018), A tale of two cities: the just war tradition and cultural heritage in times of war, Global Intellectual History, p 2
[300] Ibid p3
[301] Ibid p3

3. Magnanimity Principle which refers to "the positive effects that could ensue in choosing not to pursue the full range of acts the laws of war permit in times of necessity[302]"

It is true that all cultures through history have partaken in plundering and spoliation of each other's heritage. However, a multi-civilisational perspective on Just War helps us address some of the nuances of the problematic of protecting heritage amid conflict. Firstly, the justifications for attacking the enemy's heritage might be found to vary. Brunstetter gives the example of the ancient Romans whose "worldview that clearly distinguished between the civilized and the barbarians would impact how it fought its wars, and what respect was ultimately paid to the cultural heritage of its enemies[303]". From the foregoing discussion about various traditions, one could extrapolate a motivation of obtaining precious materials by plundering well-endowed heritage sites from Manu's justification of waging war to augment the resources of the kingdom/state.

Secondly, this analytical exercise helps us transcend the necessity tension – already reflected in existing law in the form of "military necessity" and discussed in previous chapters – and tap the Magnanimity Principle for it is promise. Sun Tzu's emphasis on limited objectives and non-disruption of civilian life serve as a boost to the magnanimity principle. Manu's insistence on a just ruler as a precondition for just war points towards a magnanimous attitude towards the enemy's culture and way of life.

Thirdly, it would be possible to glean a range of prescriptions on action to be taken concerning destroyed or looted heritage after the end of hostilities – Manu, for instance,

[302] Ibid p3
[303] Ibid p4

would advocate restitution if it enhances the prospects of converting a former adversary into an ally.

Fourthly, it gives us grounds to argue against the destruction of heritage in the name of religious prescription – in fact, use of force is justified in Shiite Islam if holy sites are attacked. This aspect is particularly important considering the deliberate destruction of heritage in recent years as part of the strategy of non-conventional warfare. Lastly, it evades the risk of a hegemonic interpretation of the value of heritage by preventing the views of a particular tradition from becoming generalized and predominant. In other words, an intercivilisational dialogue of this kind enables us to arrive at a more balanced and multi-faceted response to Brunstetter's question "who decides which sites are intrinsically valuable?".

An intercivilisational dialogue is greatly instructive in determining what puts heritage at risk during war and how heritage protection might be reimagined both during hostilities and as part of post-conflict reconstruction.

Response -→ Paradigm	Regulation/ restitution/ repatriation	Criminalisation	Legalisation
Game Theory	UNIDROIT 1995 (setting out the terms for restitution and		UNESCO 1970 (concrete obligations for state parties)

	repatriation with fair compensation) Hague 1954 first protocol (prevention of export during occupation)		UNIDROIT 1995 (obligation and delegation strengthened via private international law) Hague 1954 second protocol (enhanced obligation and precision building on existing instruments)
Human Security		Hague 1954 second protocol (introduction of individual criminal responsibility) Al-Mahdi judgement and sentence (protection in the context of non-	

		international armed conflict)	
Constructivism	United Nations General Assembly Resolutions (norm evolution and development of opinion juris)		Hague 1954 (introduces internationalist paradigm in international legal discourse on heritage protection) UNESCO 1972 (Concept and language of World Heritage)

In the last three chapters we applied the paradigms of Game Theory, Human Security and Constructivism to international cooperation on protecting cultural patrimony. In this chapter we evaluated major international legal responses as falling under the three clusters of legalisation, criminalisation, and regulation, restitution and repatriation. To conclude this chapter the above table brings the entire discussion together and shows how approaches from International Relations and International Law working together present international cooperation in a particular domain in different light, as a step towards reconceptualising the role of law in international politics.

Bibliography

Abbott KW and Snidal D (2000), Hard and Soft Law in International Governance, International Organization, Vol. 54, No. 3, Legalization and World Politics

Acharya A. (2011), Dialogue and Discovery: In search of International Relations Theories beyond the West, Millennium: Journal of International Studies 39(3)

Amineddoleh L. (2013), The Role of Museums in the Trade of Black Market cultural heritage property, Art Antiquity and Law, Vol 17(3)

Brown MF (2014), The Possibilities and Perils of Heritage Management, in Sandis C (ed) Cultural Heritage Ethics: Between Theory and Practice, Open Book Publishers

Brunstetter DR (2018), A tale of two cities: the just war tradition and cultural heritage in times of war, Global Intellectual History

Chechi A., When Private International Law meets Cultural Heritage Law: Problems and Prospects, Yearbook of Private International Law, Volume 19

Daniels B.I. and Al Quntar S (2016), Responses to the destruction of Syrian cultural heritage: a critical review of current efforts, International Journal of Islamic Architecture, Vol 5(2)

Ferahi D., Norms of War in Shia Islam in Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War (United Nations University Press 2009)

Fincham D (2013), Social Norms and Illicit Cultural Heritage,in Francesco Francioni, and James Gordley (eds), Enforcing International Cultural Heritage Law, OUP

Fitz Gibbon K. (2005), Chronology of Cultural property legislation in Fitz Gibbon K. (ed) Who Owns the Past?, American Council for Cultural Property

Geoffrey R. Scott, Spoliation, Cultural Property, and Japan , 29 U. Pa. J. Int'l L.

Hall S, Researching International Law, in McConville M and Chui WH (eds.) (2017), Research Methods for Law, Edinburg University Press

Keane D. And Azarova V. (2013), UNESCO, Palestine and Archaeology in conflict, Denver Journal of International Law & Policy, Vol 41, No 3

Mackenzie S (2011). Illicit deals in cultural objects as crimes of the powerful. Crime, Law and Social Change, Springer Verlag, 56 (2)

Mamdani M., Good Muslim, Bad Muslim, American Anthropologist 104 (3)

Pearlstein W.G., Cultural Property, Congress, the Courts and Customs: The Decline and Fall of the Antiquities Market?, in [1] Fitz Gibbon K. (2005), Chronology of Cultural property legislation in Fitz Gibbon K. (ed) Who Owns the Past?, American Council for Cultural Property

Reichberg, Syse and Begby (eds.) The Ethics of War: Classic and Contemporary Readings (Blackwell Publishing 2006)

Roy K, Norms of War in Hinduism in Reichberg, Syse and Begby (eds.) The Ethics of War: Classic and Contemporary Readings (Blackwell Publishing 2006)

Schabas W. (2017), Al Mahdi has been convicted of a crime he did not commit, Case Western Reserve Journal of International Law Vol 49

Sonbol A., Norms of War in Sunni Islam in Popovsky, Reichberg, Turner (eds.), World Religions and Norms of War (United Nations University Press 2009)

Sterio M (2017), Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case, Case Western Reserve Journal of International Law Vol 49

Chapter 7

Conclusion

"Did an aggregate of entities boasting their sovereignty and insisting upon the absoluteness of their particular interests constitute a societas where jus could reign? Could the norms alleged to govern their conduct without benefit of authoritative agencies of interpretation and enforcement, and subject therefore to literally interminable debate between parties, be classified as law? Were they not rather a purely tentative code, observed in fair weather, discarded in storm? Most lawyers seemed content to leave the matter there.[304]"

This series of queries raised by P.E. Corbett over half a century ago fairly sum up the inspiration behind conducting this study at the intersection of International Relations and International Law.

The most significant contribution of this study lies in the innovative engagement it orchestrates between the disciplines of International Relations and International Law as its basic methodological orientation. This methodological enterprise is not directed at finding common ground between the disciplines, as most existing literature has aimed for, but at isolating those incompatibilities which illuminate and energise both disciplines.

The approach taken in analysing our case study from the lenses of rational choice/game theory, human security and constructivism departs sharply from the inductive and hierarchical approach to legal research but is instead selective and non-hierarchical. This study has attempted to show that the clash between International Relations and

[304] P.E. Corbett, Lawyers and the Law of Nations 1965, International Studies, vol. 7, 3: pp. 419-428

International Law research methods offers a new way forward for research by uniquely accessing the potential of international law.

In a practical and practice sense, the trend of foreign ministries being increasingly staffed by lawyers throws up questions about the distinctiveness of legal norms and the emphasis laid on them over social, cultural, professional, religious and other types of norms[305], as well as of the influence of epistemic and practice communities more generally. This phenomenon and its ramifications for conducting the business of the international society enhances the urgency of a meaningful collaboration between International Relations and International Law. On the opposite end, International Relations scholars operating on their own have been able to show how norms with domestic origins come to be internationalised. In conversation with International Legal scholars however, they have been able to examine how norm entrepreneurs operating at the international level can effect social and legal change in the domestic realm. Such an understanding is crucial as we navigate a paradoxical contemporary milieu of strident global social movements on the one hand and the inward pull of nationalism and populism building on the disenchantment and discontents of globalisation on the other.

The choice of heritage protection as my case study sidesteps the tendency in International Relations to arrive at generalisations and middle-range theorisation based almost exclusively on studying issues of high politics. As succinctly stated by Finnemore "the 'null hypothesis' in international law debates is that soft law does not matter or does not matter as much as hard law"[306]. This study proves that soft law matters but

[305] Martha Finnemore flagged these questions in Finnemore M (2000) Are Legal Norms Distinctive?, NYU Journal of International Law and Politics, Vol 32 pp 699-705
[306] Ibid p701

transcends the very debate by investigating how the language of international law is used and received by policy makers and those social groups whose interests are at stake. By examining international legal responses in a particular domain (heritage protection and cultural property) through the categories of legalisation, criminalisation and regulation, the study also uncovers the picture that emerges when the very binary between hard and soft law has been purposefully dismantled. In the case of restitution and repatriation, for instance, we observed that both hard and soft law coexist. Further we discovered that legalisation does not necessarily mean that there is no space left for norm evolution in that particular domain. In fact, we found that states will often appropriate the products of legalisation (conventions and treaties) for their normative content rather than their binding force.

Another achievement of this study is that its methodological framework allows us to transcend investigating international law purely for its form and function. The human security approach to heritage protection enabled detection of trauma as a source of conflict and contributed to an enhanced and extended conception of the security we aim for. The constructivist paradigm cast aside the presumed neutrality of language when it comes to articulating our moral positions and forming our world views. Going beyond form and function to look into the normative ambitions and ramifications of international law can make all the difference – either it will shore up structures of oppression or unleash cooperation for common good.

Bibliography

Corbett P.E. (1965), Lawyers and the Law of Nations, International Studies, vol. 7, (3)

Martha Finnemore flagged these questions in Finnemore M (2000) Are Legal Norms Distinctive?, NYU Journal of International Law and Politics, Vol 32