The Cultural Wealth of Nations in International Law

Valentina Vadi*

Vita brevis, ars longa†

International cultural law has emerged as the new frontier of international law. Governing cultural phenomena in their various forms, international cultural law includes extremely diverse components and constitutes a good example of legal pluralism. International cultural law has been approached in a fragmented fashion, adopting a variety of perspectives, methods, and finalities. This Article aims at defining international cultural law as an emerging field of study and mapping its current contours by systematising the state of art and clarifying its substantive focus (the cultural wealth of nations), analytical tools (theoretical and legal paradigms), and normative underpinnings. This Article contributes to the existing literature on international cultural law, adding a systematic conceptualisation and overview of the same and identifying key themes and emerging challenges.

 Marie Curie post-doctoral fellow, Maastricht University, the Netherlands. Parts of this Article were presented at the Association for Law, Property and Society's 3rd Annual Meeting, Georgetown Law Center, Washington D.C., United States (Mar. 2-3, 2012). The research leading to these results has received funding from the European Union Seventh Framework Programme (FP7/2007-2013) under grant agreement n.273063. The Article reflects the author's views only and the Union is not liable for any use that may be made of the information contained therein.

† HIPPOCRATES, THE GENUINE WORKS OF HIPPOCRATES 292 (Francis Adams trans. 1939) ("Life is short, and the Art long."). Although "art" (Latin: *ars*, Greek: τέχνη) is better interpreted as "technique, craft" and not as "fine art"—Hippocrates being a doctor and this being the start of a medical text—for the limited purpose of this Article, the text is here translated more freely or with *artistic* license.

I. INTRODUCTION

International cultural law has come of age. Once the domain of elitist practitioners and scholars, international cultural law has emerged as the new frontier of international law and has come to the forefront of legal debate. The rise of international cultural law as a distinct field of study reflects the *zeitgeist* characterised by the increasing spread of globalisation[1] and the growing vitality of international law in governing global phenomena.

International cultural law has made headlines[2] and attracted the varied interests of academics and policymakers, museum curators and collectors, human rights activists and investment lawyers, thieves and guards, and artists and economists, to mention a few. International cultural law aims at governing cultural phenomena in their various forms; as such, it includes extremely diverse components and constitutes a good example of legal pluralism. The return of cultural artefacts to the legitimate owners, the recovery of underwater riches, the governance of sites of outstanding and universal value, the protection and promotion of artistic expressions, and the protection of cultural sites in times of war are just some of the issues governed by such field of study.

While some scholars have pinpointed the emergence of international cultural law as a distinct field of law,[3] a systematic analysis

---

1. Globalisation refers to both the worldwide process of liberalising state controls on the international movement of goods, service, and capital and the social, economic, and political consequences of that liberalisation. *See generally* SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS (1998).

2. *See, e.g.*, Al Goodman, *U.S. Court Backs Spain over $500M Sea Treasure*, CNN, http://www.cnn.com/2012/02/01/world/europe/spain-u-s--treasure-dispute/index.html (last updated Feb. 4, 2012, 7:57 AM) (addressing the restitution of gold and silver coins found on the wreck of a Spanish warship); Nicolas Rapold, *The Multidimensional Fate of a 1912 Schiele Portrait*, N.Y. TIMES (May 10, 2012), http://movies.nytimes.com/2012/05/11/movies/portrait-of-wally-documentary-on-schiele-painting.html (discussing the controversy surrounding a Schiele portrait confiscated during the Nazi regime); Sarah Elks, *Aborigines Risk 'Cultural Impoverishment', Says Noel Pearson*, AUSTRALIAN (Oct. 27, 2011, 12:00 AM), http://www.theaustralian.com.au/national-affairs/indigenous/aborigines-risk-cultural-impoverishment-says-pearson/story-fn9hm1pm-1226177788044 (addressing the extinction of indigenous languages and dialects); Rossella Lorenzi, *Cultural Treasures Crushed in Italy Quake*, DISCOVERY NEWS (May 21, 2012, 1:19 PM), http://news.discovery.com/history/cultural-damage-italy-quake-12052l.html ("Castles, bell towers and medieval churches [in an area including Ferrara, a world heritage site] have been reduced to rubble and dust.").

3. CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS (James A.R. Nafziger et al. eds., 2010); *see* James A.R. Nafziger & Mark W. Janis, *The Development of International Cultural Law*, 100 AM. SOC'Y INT'L L. PROC. 317 (2006); Ana Filipa Vrdoljak, *History and Evolution of International Cultural Heritage Law*, Proceedings of the Expert Meeting and First Extraordinary Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Seoul (Nov. 25-28, 2008), http://ssrn.com/abstract=1336359.

of this field of study has not yet been accomplished. There exists no general theory of international cultural law by which to navigate, despite the flourishing in this field of study. International cultural law has been approached in a fragmented fashion through a variety of perspectives, methods, and (veiled and unveiled) finalities. Even without the multifarious contributions of archaeologists, anthropologists, ethicists, architects, and conservation engineers, the growing amount of legal scholarship on this field is unabashed. While human rights scholars have focused on the human rights aspects of cultural governance,[4] international trade law scholars have highlighted the interplay between their field and cultural diversity.[5] Analogously, international criminal law scholars have mapped the difficult interplay between human dignity, cultural heritage, and humanitarian law.[6] On the other hand, international private lawyers have investigated the complex ethical and legal issues relating to the restitution of artefacts looted during the dramatic events of the Second World War or removed from their home countries during the colonial period.[7] In sum, one may wonder whether international cultural law is (or perhaps should be) an autonomous field of study, or rather constitutes a bundle of different and relatively autonomous fields of study with unrelated rationalities. As challenging and complex as the task may be, the time is ripe for a systematic analysis and a critical assessment of international cultural law as a field of study.

---

4. *See generally* Athanasios Yupsanis, *The Concept and Categories of Cultural Rights in International Law—Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties*, 37 SYRACUSE J. INT'L L. & COM. 207, 207-09 (2010).

5. *See generally* Mira Burri-Nenova, *Trade and Culture in International Law: Paths to (Re)conciliation*, 44 J. WORLD TRADE 49 (2010); Anke Dahrendorf, *Free Trade Meets Cultural Diversity: The Legal Relationship Between WTO Rules and the UNESCO Convention on the Protection of the Diversity of Cultural Expressions*, *in* PROTECTION OF CULTURAL DIVERSITY FROM A EUROPEAN AND INTERNATIONAL PERSPECTIVE 31 (Hildegard Schneider & Peter Van den Bossche eds., 2008); LAURENCE MAYER-ROBITAILLE, LE STATUT JURIDIQUE DES BIENS ET SERVICES CULTURELS DANS LES ACCORDS COMMERCIAUX INTERNATIONAUX (2008); Alex Khachaturian, *The New Cultural Diversity Convention and Its Implications on the WTO International Trade Regime: A Critical Comparative Analysis*, 42 TEX. INT'L L.J. 191 (2006); Rostam J. Neuwirth, *The 'Culture and Trade' Debate from the* Exception Culturelle *via Cultural Diversity to the Creative Economy—What's* Law *Got To Do with It?* (Soc'y of Int'l Econ. Law, Working Paper No. 22, 2012), *available at* http://papers.ssrn.com/sol3/papers.cmf?abstract_id=2091132; Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INT'L ECON. L. 553 (2006); Mary E. Footer & Christoph Beat Graber, *Trade Liberalization and Cultural Policy*, 3 J. INT'L ECON. L. 115 (2000); Michael Braun & Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?*, 22 DENV. J. INT'L L. & POL'Y 155 (1993).

6. *See generally* LA TUTELA INTERNAZIONALE DEI BENI CULTURALI NEI CONFLITTI ARMATI (Paolo Benvenuti & Rosario Sapienza eds., 2007).

7. *See* ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS 140 (2006).

This Article aims at defining international cultural law and mapping its current contours by systematising the state of art and clarifying its substantive focus (the *what*), analytical tools (the *how*), and normative underpinnings (the *why*). Such an endeavour is deeply needed as different stakeholders approach this field of study, adopting a variety of perspectives. While such diversity of approaches makes this field of study wide-ranging, it risks fragmenting it without any coherence. This Article aims to map the uncharted territory of international cultural law (or the cultural life of international law), contributing to the wealth of literature that focuses on its different aspects, while adding a systematic overview of the same and identifying common themes, vices, and virtues of its different components. It is argued that international cultural law constitutes something more than the sum of its parts and that, through its constant interactions with other fields of international law, it is contributing to the development of international law itself. I maintain that international cultural law offers diverging convergences among diverse regulations and actors and presents inherent tensions that may be irreconcilable in practice. At the same time, this branch of international law offers a legal matrix where different kinds of knowledge based on different epistemological roots get crossed.

This Article proceeds as follows. First, it defines international cultural law and investigates its genealogy. Second, it defines the concept of the cultural wealth of nations, which is the substantive focus of international cultural law. Third, the Article identifies and examines the major legal and analytical tools through which the cultural wealth of nations can be scrutinised. The governance of the cultural wealth of nations relies on a complex regime, which can be articulated in five theoretical and legal streams: (1) the property paradigm, (2) the law and economics approaches, (3) the human rights approaches, (4) the good cultural governance paradigm, and (5) the linkage paradigm. Through the analysis of each of these paradigms, the main features of international cultural law and its normative underpinnings are explored and contextualised in the broader framework of international law. Finally, the Article concludes with a preliminary assessment of the current approaches to international cultural law and briefly highlights some of the pressing challenges ahead.

II. A GENEALOGY OF INTERNATIONAL CULTURAL LAW

The interplay between law and culture is an ancient one that traces its roots to the beginning of mankind.[8] As noted by Gideon Koren, "[I]n the history of Greece, Rome, the Middle Ages and the Renaissance and Baroque periods . . . evidence [confirms] the attempt to confront the difficulties of preserving the heritage, including local legislation . . . ."[9] For instance, the Athenians preserved the ship of Theseus, the mythical founder of Athens, in the harbour as a memorial, replacing the old planks as they decayed with new, stronger timber, something that made Greek philosophers debate whether the ship remained the same or whether it had become another boat entirely.[10] In Olympia, the wooden pillars of the Temple of Hera were replaced with new pillars of marble.[11] In Rome, Theodoric the Great, the king of the Goths, appointed an *architectus publicorum* to oversee the care and protection of all important monuments of the city.[12] Renaissance architects dedicated a more systematic interest to historic buildings, and Leon Battista Alberti wrote a treatise on their restoration and maintenance.[13] Worry over the ruin "of Roman heritage and antiquities resulted in the appointment of Raphael as Commissioner of Monuments, with the role of overseeing all activities connected to ancient ruins."[14] According to some, "[t]his can be considered as the first step towards the modern involvement of the state in the protection of monuments."[15]

However, for centuries, cultural resources have been seen often as extras or add-ons. Only in the twentieth century has the cultural wealth of nations come into mainstream international law and policy.[16] The tenet that "the conservation of the artistic and archaeological property of

---

8. For the mapping of the different approaches to law and culture, see generally Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).

9. Gideon Koren, *Limitations in Enforcement of International Conventions: Implications for Protection of Monuments and Sites*, *in* ICOMOS 13TH GEN. ASSEMBLY & INT'L SYMP.: INT'L SCI. SYMP. 90 (2002).

10. PLUTARCH, THE RISE AND FALL OF ATHENS: NINE GREEK LIVES 28-29 (Ian Scott-Kilvert trans., 1960).

11. Koren, *supra* note 9, at 90.

12. *See* Wojciech W. Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law*, *in* 288 RECUEIL DES COURS 9, 18 & n.4 (2002). *See generally* JUKKA JOKILEHTO, A HISTORY OF ARCHITECTURAL CONSERVATION 1-2 (1999).

13. *See generally* LEON BATTISTA ALBERTI, ON THE ART OF BUILDING IN TEN BOOKS (Joseph Rykwert et al. trans., 1988).

14. Dina F. D'Ayala & Michael Forsyth, *What Is Conservation Engineering?*, *in* STRUCTURES & CONSTRUCTION IN HISTORIC BUILDING CONSERVATION 3 (Michael Forsyth ed., 2007).

15. *Id.*

16. *See* CULTURE AND INTERNATIONAL LAW (Paul Meerts ed., 2008).

mankind is one that interests the community of the States" was affirmed in the 1931 Athens Charter, which also marked the symbolic beginnings of international cultural co-operation in the preservation of artistic and historic monuments.[17] The idea that cultural resources are of general interest to humanity is also found in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)[18] and the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO Constitution).[19]

Now, culture and creativity have moved from the margins to the forefront of legal debate, shaped by a complex regime of international, regional, and national laws and regulations.[20] In addition, a growing body of international law instruments has been enacted under the aegis of UNESCO[21] since the end of the Second World War, covering the most varied areas of international cultural law, including the illicit traffic of cultural goods, the protection of natural, intangible, and underwater cultural heritage, and the importance of cultural diversity, to mention a few.[22]

---

17. First International Congress of Architects and Technicians of Historic Monuments, The Athens Charter for the Restoration of Historic Monuments (1931), *available at* http://www.icomos.org/en/charters-and-texts?id=167:the-athens-charter-for-the-restoration-of-historic-monuments.

18. Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbl., May 14, 1954, 249 U.N.T.S. 240.

19. Constitution of the United Nations Educational, Scientific and Cultural Organisation, pmbl., Nov. 16, 1945, 61 Stat. 2495, 4 U.N.T.S. 275 [hereinafter UNESCO Constitution].

20. *See, e.g.*, Fiona Macmillan, *Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of a Relationship*, *in* INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT 73, 74-75 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008); Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3, 3 (Keith Maskus & Jerome Reichman eds., 2005).

21. UNESCO is a specialised agency of the United Nations. Its stated purpose is to "contribute to peace and security by promoting [international] collaboration . . . through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms" proclaimed in the U.N. Charter. UNESCO Constitution, *supra* note 19, art. 1. The UNESCO Constitution, signed on November 16, 1945, came into force on November 4, 1946. *Id.*

22. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231; Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151; Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3; Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, UNESCO Doc. 31/C/RES/24; UNESCO Universal Declaration on Cultural Diversity, Nov. 2, 2001, UNESCO Doc. 31/C/RES/25.

However, most scholars would now agree that international cultural law is much more than the sum of its parts. It is "cultural" in the sense that it relates to the multifaceted concept of culture. It is "international" in the sense that the legal and/or the cultural phenomena in question exist all around the world, and their governance necessarily transcends national boundaries and assumes an international character. International cultural law lies within the matrix of international law and presents both public and private aspects. On the one hand, it is perceived as the law regulating the cultural relations of nations[23] and penetrating the regional and national spheres by presenting elements of globalisation or multilevel governance. On the other hand, international cultural law also comprises elements of private international law (or conflict of laws) concerning non-state actors, including individuals and collectives, auction houses and cultural industries, treasure hunters, and other relevant stakeholders. In this specific field of study, public and private actors and activities are in constant interaction. Finally, it is "law" in the sense that there is an increasing codification of international cultural law in the form of treaties and "soft" laws,[24] conventions and best practices, and model laws or standards, while customs and general principles of law still play a significant role. In addition, an emerging jurisprudence is coalescing in the field.[25]

III. THE CULTURAL WEALTH OF NATIONS

The cultural wealth of nations that is the substantive focus of international cultural law is not a legal concept, but a working definition that captures the variety of (tangible and intangible) cultural resources.[26] In order to properly define the cultural wealth of nations, one needs to

---

23. Despite identifiable trends towards specialisation and fragmentation within international law, the interpretation and development of international cultural law influences—and is influenced by—the interpretation and development of international law as a whole. Mary Robinson, *Foreword* to ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND, at xv (2007).

24. Soft law norms are non-binding and include guidelines, resolutions, declarations, and recommendations that are made by the parties to an international agreement in the course of its implementation. Although soft law is not binding, it may be persuasive in the way that it influences the conduct of states. *See, e.g.*, Dinah Shelton, *Law, Non-Law and the Problem of 'Soft Law,' in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 3, 3 (Dinah Shelton ed., 2000).

25. Although there is no such thing as binding precedent or stare decisis in international law, international courts and tribunals do refer to previous cases, and there is a cross-pollination (or judicial borrowing) of concepts that contributes to the coalescence of these distinctive principles of law. *See, e.g.*, STAMATOPOULOU, *supra* note 23, at 180-81.

26. Nina Bandelj & Frederick F. Wherry, *Introduction* to THE CULTURAL WEALTH OF NATIONS 1, 1-2 (Nina Bandelj & Frederick F. Wherry eds., 2011).

examine its three elements: (1) "culture," (2) "wealth," and (3) the qualifier "of nations." While it is relatively easy to define "wealth" as abundance, prosperity, and resources, the concept of culture is a complex one.

Culture is a multifaceted concept that not only relates to the cultural artefacts that derive from cultural practices, but also represents the inherited values, ideas, beliefs, and knowledge that characterise social groups and their behaviour.[27] UNESCO has defined culture as the "distinctive . . . features [that characterise] society or a social group," that includes arts and literature, their ways of life, the manner in which they live together, their value systems, and their traditions and beliefs.[28] However, culture is not a static concept but rather a dynamic force that evolves through time and crosses borders.

Earlier studies distinguished between "Culture" (with a capital letter) and "culture" (with a lower-case letter)—that is, between "high arts and *belles lettres*" on the one hand and culture in an anthropological sense (i.e., the practices and traditions of a specific group) on the other.[29] However, more recent studies have identified a tripartite meaning of culture. According to these studies, culture has three different, albeit related, meanings: first, culture indicates the cultural heritage, meant as the tangible outcome of cultural activities; second, culture means the process of artistic and scientific creativity; and third, in an anthropological sense, culture refers to the compilation of elements that establish the way of life of a certain group and the various ways that this development distinguishes one group from another group.[30] This composite definition has the theoretical merit of capturing the multifaceted concept of culture and has been gradually reflected in the UNESCO instruments, which show a shift from protecting only masterpieces to protecting culture as a way of life and a process of artistic creation.[31] Finally, the cultural wealth "of nations" encapsulates

---

27. COLLINS DICTIONARY OF THE ENGLISH LANGUAGE 379 (2d ed. 1986).

28. Universal Declaration on Cultural Diversity, *supra* note 22, pmbl.

29. Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, *in* THE RIGHTS OF PEOPLES 93, 94 (James Crawford ed., 1988).

30. Asbjørn Eide, *Cultural Rights as Individual Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 229, 230 (Asbjørn Eide et al. eds., 1995); Rodolfo Stavenhagen, *Cultural Rights and Universal Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, *supra*, at 63, 65-66.

31. For instance, the UNESCO Declaration on Cultural Diversity defines culture as "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs." UNESCO Universal Declaration on Cultural Diversity, *supra* note 22, pmbl.

the concept of cultural resources to be maintained "for some sort of 'common good.'"[32]

The cultural wealth of nations does not refer to any form of collective, communal, or internationalised property—this expression refers to the fact that the protection of cultural wealth promotes community interests and the public wealth.[33] For instance, world heritage sites, unlike the "common heritage of mankind,"[34] remain subject to the territorial sovereignty of the territorial state, and property rights are left untouched by the World Heritage Convention.[35] At the same time, state sovereignty (including the regulation of private property) must be exercised in such a way to respect international law obligations that require the state to protect cultural sites located in its territory in the general interest of its population and the international community.

Therefore, the cultural wealth of nations sensibly differs from the notion of the common heritage of mankind.[36] The areas that are designated as "common heritage" cannot be appropriated and/or subjected to claims of sovereignty; rather, they are *res publica* (governed by an international authority), and the benefits derived from their exploitation are to be shared equitably and for the benefit of mankind.[37]

---

32. Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 700 (2007) (addressing the ongoing debate among archaeologists, collectors, museums, and governments over the rightful place and ownership of cultural artefacts).

33. The concept of community interests is an ancient one. *See, e.g.*, Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suárez*, 85 AM. J. INT'L L. 110, 110, 113-14 (1991).

34. The concept of common heritage has been elaborated in relation to the status of resources in common spaces, notably the deep seabed and the moon. United Nations Convention on the Law of the Sea art. 136, Dec. 10, 1982, 1833 U.N.T.S. 397 ("The Area and its resources are the common heritage of mankind."); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 5, 1979, 1363 U.N.T.S. 3 ("The Moon and its natural resources are the common heritage of mankind . . . ."). The concept of common heritage has also been used in some international cultural law instruments to indicate a general interest of the international community in the conservation and enjoyment of cultural goods. In this sense, in the cultural sector, such a concept would be akin to the concept of common concern of mankind, developed in relation to environmental goods. *See, e.g.*, UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions pmbl., Oct. 20, 2005, 2440 U.N.T.S. 311 ("[C]ultural diversity forms a common heritage of humanity . . . .").

35. Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 22, pmbl.

36. *See* Rafaela Urueña Álvarez, *La Protección del Patrimonio Cutural* [sic] *en Tiempo de Guerra y de Paz*, 14 CUADERNOS DE ESTUDIOS EMPRESARIALES 245, 260 & n.19 (2004) (noting the distinction between the concept of common heritage of mankind and cultural heritage of mankind).

37. KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW, at xxi (1998); Graham Nicholson, *The Common Heritage of Mankind and*

The notion of common heritage challenged the "structural relationship between rich and poor countries" and amounted to "a revolution not merely in the [l]aw of the [s]ea but also in international relations."[38] By contrast, the cultural wealth of nations is not a revolutionary legal concept, but a useful theoretical tool that sums up current trends of international cultural law. While the common heritage of mankind is a legal concept, expressly mentioned in a number of international law instruments, the cultural wealth of nations is not a legal concept, but a working definition.

The cultural wealth of nations conveys the idea that culture can be an engine of growth and welfare, being central in wealth creation and people's lives, enriching their existence in both a material and an immaterial sense. On the one hand, "[t]he study of the cultural wealth of nations provides a novel approach to understanding economic development."[39] On the other hand, making a sustainable "use of the valuable cultural resources that every society possesses" and bringing them within the reach of everyone determines cultural empowerment, which is a tool that reduces disparities and enhances individual capabilities.[40] At the same time, the protection of such cultural wealth must be seen as a component of international cooperation, "reinforc[ing] the bonds between people which promote peace."[41]

Mining: An Analysis of the Law as to the High Seas, Outer Space, the Antarctic and World Heritage, 6 N.Z. J. ENVTL. L. 177, 178 & n.2 (2002).

38. Professor Arvid Pardo, Address at the South-South Conference on the Role of Regional Integration in the Present World Economic Crisis (Feb. 23, 1984), 6 THIRD WORLD Q. 559, 568-69 (1984). The concept was not uncontroversial though. While developing countries favoured it because if minerals found in the deep seabed were common heritage, profits from the resources should be shared with the rest of the world; "[c]ritics of this view, including the United States, argued that . . . the concept of 'common heritage of mankind' was founded on wishful thinking . . . and a serious philosophical misunderstanding of property rights and of the true common heritage of humanity." *See* Anne M. Cottrell, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law To Protect Historic Shipwrecks*, 17 FORDHAM INT'L L.J. 667, 675-76 n.42 (1993). According to Bernard H. Oxman, "It is . . . not clear whether the common-heritage principle, as incorporated into an elaborate Convention, has legal content apart from that contained in the other requirements of the Convention." *See* Bernard H. Oxman, *Marine Archaeology and the International Law of the Sea*, 12 COLUM.-VLA J.L. & ARTS 353, 361 n.23 (1988).

39. Bandelj & Wherry, *supra* note 26, at 2.

40. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 21: Right of Everyone To Take Part in Cultural Life, ¶¶ 68-69, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter General Comment No. 21].

41. *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1, 176 (Austl.). As Justice Lionel Murphy held:

> The preservation of the world's heritage must not be looked at in isolation but as part of the co-operation between nations which is calculated to achieve intellectual and

The term "cultural wealth of nations" is preferred here to the term "cultural capital."[42] Culture has been represented as "cultural capital" or "the accumulated material heritage of humankind."[43] However, this approach treats culture as an object, separate from the people who interact with it, and suggests static, quantitative, and material accumulation. Instead, the cultural wealth of nations is an expression that accommodates the dynamic nature of culture as an ever-changing force and alludes to the concept of common wealth. As Rosemary Coombe puts it: "Culture considered as a resource encompasses a wider range of values than the purely economic emphasis that culture conceived of as an asset tends to project. These values include social cohesion, community autonomy [and] political recognition . . . ."[44] In sum, the term cultural wealth of nations encompasses human flourishing and dignity as an alternative to materialistic, capital-accumulation rhetoric and as a complement to sustainable growth.

The cultural wealth of nations is a working definition built upon the landmark tome, *The Wealth of Nations*, by Adam Smith, a standard reading in the political economy field.[45] In 1776, Smith had already linked the wealth of nations to culture. In investigating what makes the polity thrive, Smith highlighted the transformational force of cultural resources in a community.[46] After noting that among the different means of spending, some contribute more to the growth and prosperity of a country,[47] Smith asserted that investing in culture can contribute to the

---

> moral solidarity of mankind and so reinforce the bonds between people which promote peace and displace those of narrow nationalism and alienation which promote war . . . .
>
> . . . The encouragement of people to think internationally, to regard the culture of their own country as part of world culture, to conceive a physical, spiritual and intellectual world heritage, is important in the endeavour to avoid the destruction of humanity.

Id.

42. In sociology, cultural capital means an individual's societal skills. *See* Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 241, 243-48 (John G. Richardson ed., 1986). In economics, the concept of cultural capital conceives cultural goods as capital assets and as instrumental to the production of further cultural goods and services. *See* David Throsby, *Cultural Capital*, 23 J. CULTURAL ECON. 3, 3, 5-7 (1999).

43. Rodolfo Stavenhagen, *Cultural Rights and Human Rights: A Social Science Perspective*, *in* HUMAN RIGHTS IN THE MAYA REGION 27, 29 (Pedro Pitarch et al. eds., 2008).

44. Rosemary J. Coombe, *The Expanding Purview of Cultural Properties and Their Politics*, 5 ANN. REV. L. & SOC. SCI. 393, 394 (2009).

45. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, at v (Arlington House 1966) (1776).

46. *See id.* at v-vii.

47. "Some modes of expence, however, seem to contribute more to the growth of public opulence than others." *Id.* at 371.

wealth of nations.[48] If a person mainly invested in durable commodities such as buildings, book collections, statues or paintings, his or her wealth "would be continually increasing;"[49] likewise, if a state invested in such commodities, its wealth would be continually increasing too.[50] While recognising that such spending "in durable commodities, gives maintenance, commonly to a greater number of people,"[51] Smith emphasised, "Noble palaces, magnificent villas, great collections of books, statues, pictures, and other curiosities, are frequently both an ornament and an honour, not only to the neighbourhood, but to the whole country to which they belong."[52] Therefore, as cultural economic sociologists put it, culture and economy can be envisioned "not as two separate spheres but as connected worlds that always intermingle in various ways."[53] Their interplay is well-captured in the concept of cultural wealth of nations.[54]

In a sociological sense, a nation's cultural wealth has been deemed to derive from the "cultural products of that nation"[55] and to include "its cultural and natural heritage sites, its stock of art and artifacts exhibited in . . . museums . . . , and the number of widely recognized international prizes earned by its citizens."[56] Cultural sociologists warn that it would be a mistake to measure the cultural wealth by quantity.[57] They stress that the "stocks of cultural resources may change over time"[58] and that "any region or nation in the world has latent cultural wealth."[59] However, they

---

48. *Id.* at 371-72.

49. *Id.* ("[T]he magnificence of the person whose expence had been chiefly in durable commodities, would be continually increasing . . . .").

50. "As the one mode of expence is more favourable than the other to the opulence of an individual, so is it likewise to that of a nation." *Id.* at 371.

51. *Id.* at 373.

52. *Id.* Smith also adds:

> Versailles is an ornament and an honour to France, Stowe and Wilton to England. Italy still continues to command some sort of veneration by the number of monuments of this kind which it possesses, though the wealth which produced them has decayed, and though the genius which planned them seems to be extinguished, perhaps from not having the same employment.

Id. (citation omitted).

53. Bandelj & Wherry, *supra* note 26, at 6.

54. *Id.* at 6-7.

55. *Id.* at 7.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 8.

also caution, "Cultures and cultural products need to be understood in their social and historical contexts."[60]

Drawing upon these sociological insights, but mainly relying on well-established legal categories, I define the cultural wealth of nations as a broad concept including five components: (1) world cultural heritage (natural and cultural sites of outstanding and universal value); (2) cultural diversity, including cultural objects (books, statues, pictures, movies, etc.); (3) intangible cultural heritage (languages, traditions, folklore, etc.); (4) underwater cultural heritage (objects that have been underwater for more than one hundred years); and (5) indigenous cultural heritage (the cultural wealth of indigenous peoples).[61]

Such categories may overlap because certain goods may belong to two or more categories. For instance, cultural landscapes inhabited by indigenous peoples are a form of indigenous cultural heritage; at the same time, they may represent world heritage (provided they present outstanding and universal value) and a form of intangible cultural heritage for their historical associative values. Analogously, maritime landscapes, such as the Strait of Malacca, constitute world heritage sites and may include underwater cultural heritage such as sunken shipwrecks. Although these categories may overlap, their distinctiveness helps to frame legal discourse on the cultural wealth of nations and global cultural governance.

IV. THE LEGAL PARADIGMS

The governance of the cultural wealth of nations relies on a complex regime that can be articulated in five theoretical and legal streams: (1) the property paradigm, (2) the law and economics approaches, (3) the human rights approaches, (4) the good cultural

60. Miguel A. Centeno, Nina Bandelj & Frederick F. Wherry, *The Political Economy of Cultural Wealth*, *in* THE CULTURAL WEALTH OF NATIONS, *supra* note 26, at 23, 26.

61. The last category obviously partially overlaps with the other categories (world cultural heritage, cultural diversity, intangible cultural heritage, and even underwater cultural heritage), and one could argue that there is no need to create an additional "indigenous cultural heritage" category within the general concept of cultural wealth of nations. Nonetheless, because of its inclusion in a number of provisions in human rights treaties and international law instruments, the category of indigenous cultural heritage deserves special scrutiny and attention. As Ana Filipa Vrdoljak puts it, indigenous cultural heritage differs from the general notion of cultural heritage in that it presents a holistic nature, it relates to land and natural resources, it involves "collective and intergenerational custodianship," and it centers on customary law. *See* ANA FILIPA VRDOLJAK, *Reparations for Cultural Loss*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 197, 199 (Frederico Lenzerini ed., 2008). For a seminal study, see U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Working Paper on the Question of the Ownership and Control of the Cultural Property of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub. 2/1991/34 (July 3, 1991) (Erica-Irene Daes).

governance paradigm, and (5) the linkage paradigm. This Part introduces and explores such paradigms, indicating *how* cultural phenomena have been approached and dealt with by the relevant epistemic communities.

As the salience and use of particular legal categories influence our way of thinking, it is important to highlight these epistemic premises to illuminate the meaning and content of the current state of international cultural law. The use of such theoretical and legal frameworks also promotes the awareness of alternative and/or complementary viewpoints, addressing the field broadly at the interplay of diverse regulatory and theoretical traditions. For the sake of analytical completeness, this Part articulates and explores these different paradigms, their premises, and their contribution to the protection of the cultural wealth of nations.

This Part also highlights how the different approaches to international cultural law have increasingly intersected. As such, it is no longer possible to approach international cultural law from a single paradigm: a more comprehensive approach and holistic understanding are needed.

A. The Cultural Property Paradigm

The cultural property paradigm is the most traditional way to govern cultural phenomena, because for centuries, cultural outputs have been protected as a form of property.[62] According to this structure, moveable cultural goods are personal property, cultural sites are real property,[63] and intangible cultural goods can be a form of intellectual property.[64] Not only does the cultural property paradigm cross the boundaries between properties—real, personal, and intellectual—it also crosses the boundaries between international, regional, and national law. Because the property paradigm is well-established in most legal traditions, cultural property has been mainly regulated by the same provisions of property (sometimes, but not always) with some derogations due to the cultural features of the protected good.

At the international law level, the 1907 Hague Regulations Concerning the Laws and Customs of War on Land already protected

---

62. Janet Blake, *On Defining the Cultural Heritage*, 49 INT'L & COMP. L.Q. 61, 61 (2000).

63. *See* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1142-45 (1990) (addressing the public interest in preserving cultural heritage, including land).

64. *See* Coombe, *supra* note 44, at 394; Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 808-09 (2001).

historic monuments from bombardments.[65] However, the first convention to introduce the notion of cultural property—and to deal exclusively with the same—was adopted only after the Second World War in response to the war devastations.[66] The 1954 Hague Convention defines cultural property as "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 . . . ; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest."[67] Other international law instruments protecting cultural property followed, including the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.[68] At the regional and international level, cultural property has also received implicit protection as a component of the right to property.

However, recent shifts in international law show that the cultural property protection paradigm has increasingly been perceived as inadequate and that other approaches are gaining pre-eminence.[69] While the property paradigm has been predominant in the past, it now seems to be losing ground because of its inability to address the complexities of cultural phenomena. Admittedly, cultural property constitutes a significant breakthrough in classic economic theories of property, embodying "several layers of incompatibility from within."[70]

First, as Patty Gerstenblith illustrates, the cultural property paradigm is based upon two conflicting elements: "culture," which encapsulates collective values, and "property," which is an individual right.[71] The cultural property model has been perceived as not entirely satisfying because it tends to emphasise the interests of the rights holder

---

65. Blake, *supra* note 62, at 61 n.3.

66. *See* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 835–36 (1986).

67. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 18, art. 1.

68. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 22; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172.

69. *See, e.g.*, Manlio Frigo, *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, 86 INT'L REV. RED CROSS 367, 367, 369-70, 375 (2004).

70. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1038 (2009).

71. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 567 (1995).

vis-à-vis those of society.[72] However, cultural outputs can benefit society as a whole, and their destiny can be "momentous for the community at large."[73]

Second, the property model also presents a formalistic and rigid structure that may be ill-suited to address values that are incommensurable.[74] According to Naomi Mezey, cultural property presents two paradoxes. First, while "[p]roperty is fixed, possessed, controlled by its owner, and alienable[, c]ulture is none of these things";[75] culture is a dynamic force that changes over time and includes intangible values. Second, Mezey pinpoints, "Within cultural property discourse, the idea of property has so colonized the idea of culture that there is not much culture left in cultural property."[76] In this sense, the expansive character of the notion of property has even led some scholars to deem cultural property not sufficiently distinct from ordinary property to justify its own regulation.[77] In sum, in the cultural property model, property would have feudalised cultural processes and outputs.[78]

Third, questions have arisen as to whether intangible forms of cultural expression are adequately protected by intellectual property law. The notion of cultural property "is rooted in the Western intellectual tradition,"[79] and "Western societies prize material possession over process."[80] However, other societies—for instance, indigenous peoples—refuse a compartmentalised vision of culture; rather, they adopt a holistic approach to nature and culture. Therefore, intellectual property is unable to capture the importance of cultural processes, such as rituals and folklore, and the anthropological meaning of culture as a way of life.[81]

---

72. *Id.* ("The definition of a particular cultural group is often comparative; its scope . . . depend[s] on the characteristics of the larger universe of which the cultural group is a subset.").

73. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 4 (1999).

74. John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1182-84 (1989).

75. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2005 (2007).

76. *Id.*

77. *See* Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213, 214-15 (2007).

78. *See generally* PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2002).

79. Kathryn Last, *The Resolution of Cultural Property Disputes: Some Issues of Definition*, *in* RESOLUTION OF CULTURAL PROPERTY DISPUTES 53, 55 (Int'l Bureau of the Permanent Court of Arbitration ed., 2004).

80. Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 309 (1999).

81. *Id.* at 309-11.

Finally, as Janet Blake pointed out, "Implicit . . . in the use of the term 'cultural property' is the idea of assigning to it a market value, in other words the 'commodification' of cultural artefacts and related elements by treating them as commodities to be bought and sold."[82] The process of cultural commodification comprises phenomena as diverse as the economic exploitation of cultural sites (e.g., by fostering tourism) and intangible heritage (e.g., the patenting of indigenous traditional knowledge).[83] While classic economic theories of property are based on the assumption of fungibility, cultural phenomena may present unique features that cannot be replaced.[84]

In the past decades, the concept of cultural heritage has emerged to govern the cultural wealth of nations.[85] The shift to cultural property as world "heritage" occurred with the 1972 Convention for the Protection of the World Cultural and Natural Heritage (1972 World Heritage Convention).[86] While respecting each states' national sovereignty and property rights regime, the states parties recognised that "world heritage,"[87] or natural and cultural sites of "outstanding universal value,"[88] should be protected in the interest of humanity as a whole.[89] Conceptualised as *erga omnes* obligation, cultural heritage protection is mandatory and owed to the international community.[90] The more recent UNESCO instruments also refer to cultural heritage, not cultural property.[91]

---

82. Blake, *supra* note 62, at 66; *see also* Michael F. Brown, *Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley's "In Defense of Property,"* 17 INT'L J. CULTURAL PROP. 569, 570 (2010).

83. JOHN L. COMAROFF & JEAN COMAROFF, ETHNICITY, INC. 3 (2009).

84. Carpenter, Katyal & Riley, *supra* note 70, at 1038.

85. *See, e.g.*, Lyndel V. Prott & Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property'?*, 1 INT'L J. CULTURAL PROP. 307, 311 (1992); Michael Rowlands, *Cultural Rights and Wrongs: Uses of the Concept of Property*, *in* PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY 207, 208 (Katherine Verdery & Caroline Humphrey eds., 2004) ("[C]ultural rights are seen to restrict individual ownership and the alienation of goods.").

86. Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 22.

87. *Id.* art. 6.

88. *Id.* arts. 1-2.

89. *Id.* pmbl.

90. As the International Court of Justice authoritatively indicated, *erga omnes* obligations are owed by every state to the international community as a whole rather than to individual states. *See In re* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 4, ¶ 33 (Feb. 5).

91. *See, e.g.*, Convention on the Protection of the Underwater Cultural Heritage, *supra* note 22, pmbl.; Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 22, pmbl.; UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Oct. 17, 2003, UNESCO Doc. 32/C/RES/33.

"Cultural heritage is a protean concept,"[92] and its vagueness is furthered by the fact that the various language versions of the term do not convey exactly the same meaning.[93] Furthermore, each international instrument provides its definition of the concept to delimit its scope of application.[94] Finally, the indefinite nature of the concept of cultural heritage is also due to its cultural component and its reliance on disciplines, such as art history, archaeology, and anthropology, to inform its application.[95]

The concept of heritage does not replace the notion of cultural property but constitutes an addition to the same.[96] The concept of heritage is distinguished from that of property for three different, albeit related, reasons. First, cultural heritage embodies a sense of legacy, expressing a public interest to be protected irrespective of ownership.[97] Cultural heritage conservation contributes to cultural identity and to inter-generational and intra-generational equity. As Lyndel Prott and Patrick O'Keefe explain:

> Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors. There is today a broad acceptance of a duty to pass them on to our successors, augmented by the creations of the present.[98]

Second, it is best to view cultural heritage as containing elements of cultural property; as such, they are necessarily interconnected, but not the same concept.[99] This view is also reflected in the 1954 Hague Convention, which refers to cultural property as "property of great

---

92. Last, *supra* note 79, at 58; *see also* Lyndel V. Prott, *Problems of Private International Law for the Protection of the Cultural Heritage*, 217 RECUEIL DES COURS 224 (1990) ("[T]he legal definition of the cultural heritage is one of the most difficult problems confronting scholars today."); Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN. ST. L. REV. 641, 641 (2011).

93. Frigo, *supra* note 69, at 370 ("[E]xpressions such as 'patrimoine culturel', 'patrimonio culturale' and 'património cultural' do not convey exactly the same or an equivalent concept.").

94. *Id.* at 375.

95. *Id.* at 376.

96. As Janet Blake puts it, "The relationship between 'cultural property' or 'cultural heritage' is unclear, appearing interchangeable in some cases, while in others, cultural property is a sub-group within 'cultural heritage.'" Blake, *supra* note 62, at 66.

97. *See* Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, *in* CULTURAL HUMAN RIGHTS 1, 5 (Francesco Francioni & Martin Scheinin eds., 2008); Alan Audi, *A Semiotics of Cultural Property Argument*, 14 INT'L J. CULTURAL PROP. 131, 132 (2007); Tolina Loulanski, *Revising the Concept for Cultural Heritage: The Argument for a Functional Approach*, 13 INT'L J. CULTURAL PROP. 207, 207-08 (2006).

98. Prott & O' Keefe, *supra* note 85, at 311.

99. Last, *supra* note 79, at 57.

importance to the cultural heritage."[100] The notion of heritage, however, does not merely include cultural property but has been expanded to include intangible elements.[101] Third, the regulation of cultural heritage can consider moral claims. As Blake puts it, cultural heritage is an inclusive notion that "has grown beyond the much narrower definitions included on a text-by-text basis."[102] At the same time, it constitutes an important corrective of many of the limitations on applying the concept and law of property to culture.[103]

The emergence of the concept of cultural heritage has not entailed the abandonment of the property paradigm. For instance, the Inter-American Court of Human Rights (IACHR) has interpreted "the sense and scope of right to private property, consecrated in article 21 of the American Convention," as entailing collective and cultural entitlements.[104] Adopting an evolutionary interpretation to article 21 of the American Convention on Human Rights, the IACHR deemed that the right to property also "guarantees the enjoyment of immaterial benefits."[105] The IACHR looked at the significance of land in indigenous communities and noted how that relationship forms "a fundamental basis of their culture" as a result of its importance "for the preservation and transmission of their culture to their future generations."[106] Property has become inclusive of immaterial and collective elements, including the preservation of indigenous cultural legacy.[107] Scholars have similarly argued the concept of property should be broadened to encompass the concept of stewardship or "nonowners' fiduciary obligations toward cultural resources."[108] More generally, even property law scholars deem that property should be conceived as a system of social relations that

---

100. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 18, art. 1.

101. Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. INT'L L. 101 (2011).

102. Blake, *supra* note 62, at 64.

103. *See* Prott & O' Keefe, *supra* note 85, at 312.

104. Mario Melo, *Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights*, 4 SUR-INT'L J. ON HUM. RTS. 31, 34 (2006).

105. *Id.* at 36.

106. *Id.* (internal quotation marks omitted).

107. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 124, 131 (June 17, 2005).

108. Carpenter, Katyal & Riley, *supra* note 70, at 1022.

takes into account the rights of owners and the public in furtherance of "human values."[109]

Without delving into the complexities of property theory, this Part highlights the false dichotomy between cultural property and cultural heritage and the "heritagisation" of the former vis-à-vis the increasing inclusiveness and pervasiveness of the latter.[110] The heritagisation of culture shifts the focus of inquiry away from the question "who owns culture?"[111] to the question of whether cultural heritage is adequately protected. On the other hand, discourses on cultural property remain central with regard to cases concerning the restitution of looted goods.[112]

B. The Cultural Wealth of Nations as a Global Public Good

The cultural wealth of nations can be scrutinised by adopting law and economics approaches. Such approaches refer to the application of the methods of economics to legal problems and/or the use of economic concepts in the context of legal analysis.[113] Economic analysis of law has been extremely influential, especially in the last quarter of the twentieth century, and has been applied to many branches of law, including international law.[114] This Part explores such law and economics approaches as they provide useful theoretical tools to examine state conduct and the role of private actors in international cultural law. The use of law and economics approaches is not meant to be exhaustive and/or definitive, but rather a component of a broader analysis, providing a useful, complementary paradigm because economic concepts are currently used in discourse related to heritage conservation. It is

---

109. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 130-31 (2000).

110. *See* Chiara de Cesari, *World Heritage and Mosaic Universalism*, 10 J. SOC. ARCHAEOLOGY 299, 307 (2010) (introducing the term "heritigization," albeit in a different sense, namely as indicating the conflict between the conservation of cultural heritage and the potentially different interests of the locals).

111. Many scholars have focused on this question. *See, e.g.*, SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005); WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW (Kate Fitz Gibbon ed., 2005); WHOSE CULTURE? THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES (James Cuno ed., 2009); JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE (2008); M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws*, 14 ARIZ. J. INT'L & COMP. L. 223 (1997).

112. *See* KATJA LUBINA, CONTESTED CULTURAL PROPERTY: THE RETURN OF NAZI SPOLIATED ART AND HUMAN REMAINS FROM PUBLIC COLLECTIONS (2009).

113. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

114. *See* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999); Jeffery L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999).

acknowledged that fundamental criticisms have been lodged against the law and economics current. For instance, economic analysis does not capture the importance of human rights and other noneconomic concerns that characterise legal systems.[115] Law and economics approaches are here examined for the sake of completeness.

Adopting a law and economics approach, one may question whether the cultural wealth of nations can be categorised as a global public good, given the collective benefits it provides and its positive intergenerational and intragenerational spillovers.[116] Global public goods present two main features: (1) an element of publicness and (2) a global nature.[117] With regard to the first feature, although the concept of public goods traces its roots back to antiquity (originating in the writings of Plato, Aristotle, and Cicero (*res publica*)[118]), the current meaning of public goods—goods that are nonrivalrous and nonexcludable—derives from economic literature and was elaborated by Paul Samuelson in 1954.[119] Nonrivalry is the ability of multiple consumers to consume the same good; nonexcludability means that no one can be excluded from using the good. Common examples of public goods include lighthouses,[120] clean air, environmental goods, and others. The second feature of global public goods, their global character, is given by the fact that their benefits are almost "universal in terms of countries, . . . peoples, . . . and generations."[121]

A number of cultural goods present the features of (global) common goods because they provide collective benefits and can be nonrivalrous and nonexcludable. For instance, a poem can be read by many people without reducing the enjoyment of that good by others. Cathedrals, mosques, and equivalent buildings of cultural significance

---

115. *See, e.g.*, Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U. CHI. L. REV. 1167, 1173-74 (1997); George J. Stigler, *Law or Economics?*, 35 J.L. & ECON. 455, 457, 463 (1992).

116. *See* Todd Sandler, *Intergenerational Public Goods: Strategies, Efficiency and Institutions*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 20 (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999) (deeming the preservation of culture and the development of cultural norms as types of intergenerational public good).

117. Inge Kaul, Isabelle Grunberg & Marc A. Stern, *Defining Global Public Goods*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY, *supra* note 116, at 2-3.

118. Claire Andre & Manuel Velasquez, *The Common Good*, 5 ISSUES IN ETHICS (1992), *available at* http://www.scu.edu/ethics/publications/iie/v5nl/common.html.

119. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954).

120. *See* Ronald Harry Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 357 (1974).

121. Kaul, Grunberg & Stern, *supra* note 117, at 3.

constitute public goods "to the extent that, first, no one can be excluded from the complex combination of benefits that they give, including such identity formation and architectural beauty, and, second, the appreciation of them by some does not reduce the possibility of others receiving the same benefits."[122] Similarly, a world heritage site can be visited by some without reducing the enjoyment of the site by others.

However, cultural goods may also belong to private owners, and some aspects of cultural heritage conservation can be privatised: for example, access to a site can be restricted and require payment. Thus only some components of the cultural wealth of nations can be categorised as public goods in a strict economic sense.

If one adopts a broader notion of public goods as legal goods (i.e., goods that are shaped and constituted by law and benefit—and are available to—all states or humankind as a whole),[123] cultural goods can be considered public goods, because everybody can enjoy them without reducing the enjoyment of those goods by others. Their benefits extend to both developing and industrialised countries, poor and rich, and people of different cultures irrespective of age, gender, religion, or political or philosophical belief. In parallel, international cultural law and international law can be conceptualised as "intermediate" public goods, i.e., goods that are instrumental to achieve the common wealth.[124]

The conceptualisation of the cultural wealth of nations as an international public good or cultural heritage of mankind is evident in a number of international law instruments, such as the 1954 Hague Convention, which recognises that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[125] Similarly, the 1972 World Heritage Convention acknowledges, "[D]eterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world."[126] Even cultural rights present a collective dimension: while human rights treaties "define cultural rights

---

122. Séverine Deneulin & Nicholas Townsend, *Public Goods, Global Public Goods and the Common Good*, 34 INT'L J. SOC. ECON. 19, 24 (2007).

123. Indeed, "[t]he recent literature on global public goods assumes that they are instrumentally essential to a flourishing human life." *Id.* at 23.

124. "Intermediate public goods, such as international regimes, contribute towards the provision of final global public goods." Kaul, Grunberg & Stern, *supra* note 117, at 13.

125. Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 18, pmbl.

126. Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 22, pmbl.

as individual rights," enjoyment of those rights is necessarily linked to the other members of a given cultural community.[127]

As public goods, cultural goods cannot easily be provided by the "invisible hand" of the market. While private markets financed by admission revenue, sponsorship, and donations can foster the recovery and protection of cultural goods, market forces alone may not supply such goods efficiently.[128] As a seminal study highlighted, "[T]here will be cases where the market can work reasonably efficiently and cases where it may not . . . ."[129] In some cases, cultural goods are characterised by market failures because their value is mainly historical or archaeological rather than economic. For instance, if the economic value of a building was less than the value of the land plus the value of what can be recovered from the demolished building and what can be built on its place, then by adopting pure economic efficiency criteria, demolition would be "the best use of the property."[130] The same applies to shipwrecks: even historically important shipwrecks have been completely dismantled to recover scrap metals.[131] Furthermore, some types of cultural activities may gradually become obsolete vis-à-vis new forms; the fact that they are not marketable does not imply that they do not hold cultural value.

In cases of market failures, "government intervention is not only necessary, but desirable to improve the market mechanism"[132] and to regulate and/or finance cultural goods for the commonwealth.[133] In turn, international regulation allows states to address the shortcomings of national regulation.[134] Finally, international regulation is needed because

---

127. Yvonne M. Donders, *Culture and Human Rights*, *in* 1 ENCYCLOPEDIA OF HUMAN RIGHTS 441, 445 (David P. Forsythe ed., 2009); *see also* Stephen A. Hansen, *The Right To Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(A) of the International Covenant on Economic, Social and Cultural Rights*, *in* CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 279, 288 (Audrey Chapman & Sage Russell eds., 2002) ("[C]ultural rights . . . can exist only when they are practised with other members of a group.").

128. U.N. INDUS. DEV. ORG. (UNIDO), PUBLIC GOODS FOR ECONOMIC DEVELOPMENT, at 1, U.N. Sales No. E.08.11.B36 (2008).

129. Alan Peacock, *Preserving the Past: An International Economic Dilemma*, 2 J. CULTURAL ECON. 1, 2 (1978).

130. *See* Rosemary D. Hale, *Economic Aspects of Historic Preservation*, 2 J. CULTURAL ECON. 43, 44-45 (1978).

131. Valentina Vadi, *War, Memory and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law*, 37 TUL. MAR. L.J. 2 (forthcoming 2012-2013).

132. Hale, *supra* note 130, at 47.

133. UNIDO, *supra* note 128, at 1.

134. Asif Efrat, *A Theory of Internationally Regulated Goods*, 32 FORDHAM INT'L L.J. 1466, 1467 (2009).

"[n]ations, and regions may not fully, or sufficiently, appreciate the value of cultural and natural sites as a global public good."[135]

According to mainstream economic literature, two main problems affect the provision of public goods: (1) "free riding" and (2) "the prisoner's dilemma."[136] Free riding refers to the powerful incentive to avoid contributing personal resources to common endeavours. Let us consider the following example. Ancient shipwrecks constitute an important source of knowledge, and the recent UNESCO Convention on the Protection of the Underwater Cultural Heritage requires their conservation and protection.[137] While a number of states have ratified this Convention, other states are reluctant to do so, fearing that by ratifying it they could jeopardise the "salvage" industry—that is, the number of companies that, after locating shipwrecks, claim property or a salvage award, recovering their expenses through the sale of the recovered artefacts. While the salvage industry seems to be a profitable one, underwater cultural heritage is a finite resource, and once the goods are sold, they are lost forever. If a state behaves as a pure *homo economicus*, i.e., rational and narrowly self-interested human, it will seek to "free ride" by allowing other states to commit themselves to a binding regime and then by allowing private actors to exploit the scarce and finite underwater cultural goods. Garrett Hardin reformulated this problem, calling it the "tragedy of the commons,"[138] whereby the pursuit of individual self-interest can jeopardise resources that should sustain current and future generations.

The prisoner's dilemma refers to a situation in which cooperation would lead to a better outcome, but because individual players are driven by self-interest, they ultimately pick the outcome that seems individually guaranteed to be more desirable.[139] In the given scenario, two prisoners are held in separate rooms and so are unable to agree on a common line of defence.[140] In the meanwhile, the prosecutors give the prisoners the following three options: (1) if both deny the charge, they will each get one year in prison; (2) "[i]f one confesses while the other denies, the one who collaborates will be rewarded with freedom, while the other will get five years in prison"; (3) if both confess, they will each get three years in

---

135. Bruno S. Frey & Lasse Steiner, *World Heritage List: Does It Make Sense?*, 17 INT'L J. CULTURAL POL'Y 555, 567 (2011).

136. Kaul, Grunberg & Stern, *supra* note 117, at 6.

137. Convention on the Protection of the Underwater Cultural Heritage, *supra* note 22, arts. 1-2.

138. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

139. Kaul, Grunberg & Stern, *supra* note 117, at 7-8.

140. *Id.* at 7.

prison.[141] Ultimately, both prisoners will select the option of confessing to minimise the higher risk.[142] Lacking the possibility to talk, they also lack the possibility to cooperate and optimise their chances.[143]

The prisoner's dilemma clarifies that parties to a regime may have an incentive to defect from the system unless mechanisms are established to facilitate communication and cooperation.[144] For instance, states may have economic incentive to defect from the 1972 World Heritage Convention, which demands the conservation of world heritage sites, when a given site presents natural resources and thus is suitable for mineral exploitation.[145] However, the risk that a particular site be delisted from the World Heritage List and placed on the List of World Heritage in Danger constitutes a mechanism of blame and shame, and a number of states have taken action to prevent delisting because of the consequential perceived loss of reputation.[146]

Should the state and the international community intervene to protect the wealth of nations? How much should be left to the private sector to allocate scarce resources through the market-based mechanisms? If a state internationally behaves like a pure *homo economicus*,[147] driven by national self-interest, the risk of state failure in providing global common goods is systemic.[148]

Conceptualising the cultural wealth of nations as a global common good is useful in that it emphasises the positive spillovers and common benefits that derive from cultural assets. The paradigm also provides useful theoretical tools to examine state conduct and the pervasive role of private actors in the cultural domain. However, the use of law and economics is not meant to be exclusive but as a component of a broader

---

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 8.

145. Convention for the Protection of the World and Natural Heritage, *supra* note 22.

146. According to Jens David Ohlin, states "make rational decisions regarding strategy in light of strategies selected by other states," thus generating a "Nash Equilibrium" and, ultimately, a stable social contract. *See* Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869, 876 (2011) ("A Nash Equilibrium functions as a kind of focal point, where participants in the game gravitate toward a particular legal norm and choose 'compliance' as their strategy if and only if the other players in the game are also choosing compliance as their strategy.").

147. *Homo economicus*, or economic human, is a concept elaborated by political economists in the nineteenth century; this school of thought sees humans as rational and narrowly self-interested actors "who desire[] to possess wealth, and who [are] capable of judging the comparative efficacy of means for obtaining that end." John Stuart Mill, *Essays on Some Unsettled Questions of Political Economy* 137 (London: Harrison & Co. 1844). *See generally* Joseph Persky, *The Ethology of* Homo Economicus, 9 J. ECON. PERSP. 221 (1995).

148. Kaul, Grunberg & Stern, *supra* note 117, at 15.

analysis: cultural phenomena present elements of incommensurability that cannot be quantified by economic analysis.

C. Human Rights Approaches

The cultural wealth of nations can be (and has been) scrutinised through the lenses of human rights. Although cultural rights have been neglected for a long time in human rights scholarship, they have attracted increased attention in recent years, and a number of volumes have been published on this theme.[149] After a brief scrutiny of the theory and practice of cultural rights, this Part examines the interplay between the protection of human rights and the cultural wealth of nations.

Does man have a right to culture? Can people freely express their own cultural distinctiveness, be it through language, physical appearance, or specific norms and values? Should the state intervene to support and protect cultural rights of individuals, minority groups, or even the majority? And what role can the international community play in this endeavour to further cultural rights? Can a careful and balanced scrutiny of cultural claims contribute to a constructive "dialogue among civilizations"?[150] Does culture necessarily clash with other human rights?

Notwithstanding early case law and the formal entry of cultural rights into the human rights pantheon after the Second World War,[151] cultural rights have been neglected for a long time and have been less developed than civil, political, economic, and social rights.[152] There is no autonomous general right to enjoy one's own culture under the International Covenant on Civil and Political Rights (ICCPR).[153] Article 27 of the ICCPR only relates to the cultural, religious, and linguistic

---

149. *See generally* CULTURAL HUMAN RIGHTS, *supra* note 97; STAMATOPOULOU, *supra* note 23, at xv.

150. G.A. Res. 56/6, pmbl., U.N. Doc. A/RES/56/6 (Nov. 21, 2001).

151. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 22, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

152. *See* Janusz Symonides, *Cultural Rights: A Neglected Category of Human Rights*, 50 INT'L SOC. SCI. J. 559, 559 (1998) (highlighting that cultural rights are the least developed in terms of "their scope, legal content and enforceability"). In the human rights discourse, cultural rights are considered to be human rights of "second generation" in contrast to civil and political rights, which are referred to as the "first generation" of human rights. Mashood A. Baderin & Robert McCorquodale, *The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 3, 9 (Mashood A. Baderin & Robert G. McCorquodale eds., 2007). Furthermore, as Asbjørn Eide highlights, "The expression 'economic, social and cultural rights' is widely used, but in most cases the concern appears to be limited to the economic and social rights." Eide, *supra* note 30, at 229. Cultural rights have been treated as a residual category. Yupsanis, *supra* note 4, at 208.

153. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

rights of ethnic, religious, or linguistic minorities.[154] However, given the fact that cultural rights are strictly related to private and family life, freedom of expression, freedom of religion, and freedom of association, cultural entitlements have received a general, albeit indirect, protection under the ICCPR under related provisions.[155] Other international law instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration on Human Rights, do refer to cultural rights, including a number of different entitlements, such as the right to education, "the right to participate in cultural life," the right to enjoy the benefits of scientific progress, the freedom for scientific research, and the possibility for individuals to speak their own dialects, to name a few.[156] Still, cultural rights remain a less developed legal category vis-à-vis other human rights because of complex legal and political reasons.[157]

From a legal standpoint, cultural rights remain difficult to define because culture has a fluid and elusive nature.[158] From a political standpoint, governments have feared that cultural entitlements could drive claims of self-determination and ultimately jeopardise the national unity.[159] In this sense, scholars have emphasised the linkage between culture, politics, and international conflicts.[160] Furthermore, during the Cold War, economic, social, and cultural rights tended to be debated in ideological terms. While the West stressed civil and political rights, the Soviet bloc stressed (in principle if not in practice) economic, social, and

---

154. *Id.* art. 27.

155. For instance, in the case *Hopu v. France*, which involved the construction of a hotel complex on the site traditionally owned by the petitioners that included a burial ground, the Human Rights Committee concluded that "there ha[d] been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1." The claimants complained that "the construction of [a] hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23." Hopu v. France, U.N. Hum. Rts. Comm., Communication No. 549/1993, ¶ 10.3, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (Dec. 29, 1997).

156. *See* STAMATOPOULOU, *supra* note 23, at 110 & nn.7-8 (internal quotation marks omitted).

157. Yvonne Donders, *The Legal Framework of the Right To Take Part in Cultural Life*, *in* HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE 231, 232 (Yvonne Donders & Vladimir Volodin eds., 2007).

158. Yupsanis, *supra* note 4, at 210.

159. *See* Ana Filipa Vrdoljak, *Self-Determination and Cultural Rights*, *in* CULTURAL HUMAN RIGHTS, *supra* note 97, at 41, 52.

160. SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

cultural rights.[161] The distinction between the two sets of rights was based on the perceived characterisation of civil and political rights as entailing negative obligations on the part of the state, and economic, social, and cultural rights as requiring positive duties.[162] Finally, authors have discussed how cultural elements may clash with other human rights standards.[163]

In the past decade, however, cultural rights have received increased attention.[164] In a preliminary way, cultural entitlements do not necessarily clash with other human rights, and if a conflict arises, international law instruments address this tension in favour of internationally proclaimed human rights.[165] Cultural rights are neither absolute nor unlimited. For instance, cultural diversity cannot be invoked to infringe upon human rights guarantees.[166]

Human rights literature has highlighted the indivisibility and interrelatedness of all human rights, particularly since the adoption of the Vienna Declaration and Programme of Action at the 1993 World Conference on Human Rights.[167] Economic, social, and cultural rights and civil and political rights entail a series of positive and negative state obligations. For instance, the right to take part in cultural life requires from states parties "both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services" or the obligation not to destroy cultural heritage) "and positive action ([i.e.,] ensuring . . . access to and preservation of cultural goods)."[168] As Víctor Abramovich puts it:

---

161. HARRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEST: LAW, POLITICS, MORALS 257-67 (1996).

162. *Id.* at 280.

163. *See* Mary Robinson, *Foreword* to STAMATOPOULOU, *supra* note 23, at xv.

164. *See* Francioni, *supra* note 97, at 1.

165. International Convention on the Elimination of All Forms of Racial Discrimination art. 7, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women pmbl., Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child pmbl., Nov. 20, 1989, 1577 U.N.T.S. 3; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, art. 4, U.N. Doc. A/RES/47/135 (Dec. 18, 1992); Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 22, art. 2.

166. General Comment No. 21, *supra* note 40, ¶ 18. In addition, the UNESCO Declaration on Cultural Diversity states, "No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope." UNESCO Universal Declaration on Cultural Diversity, *supra* note 22, art. 4.

167. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

168. General Comment No. 21, *supra* note 40, ¶ 6.

> [A]ssignment of a right to the category of civil and political rights or economic, social and cultural rights has a heuristic, ordering and classifying purpose; nevertheless, a stricter conceptualization would produce a *continuum* of rights, in which the place of each right would be determined by the symbolic weight of the positive or negative obligations components outlined in it.[169]

With regard to the content of cultural rights, since 1989 the U.N. treaty bodies have played a crucial role in clarifying the content of economic, social, and cultural rights. In 2005, the Committee on Economic, Social and Cultural Rights (CESCR) issued General Comment No. 17, which gave treatment to article 15 of the ICCPR and its enumeration of "rights covering different aspects of cultural participation."[170] In 2009, the same Committee adopted General Comment No. 21, the Right of Everyone To Take Part in Cultural Life.[171]

Finally, notwithstanding some earlier opinions to the contrary,[172] cultural rights have a legal nature because they belong to national, regional, and international law.[173] Their binding nature has been affirmed by the International Court of Justice (ICJ),[174] international bodies, and domestic courts.[175] The trend is likely to continue with the adoption by the U.N. General Assembly in 2008 of a complaints and inquiry procedure under the ICESCR.[176] In 2008, the General Assembly unanimously adopted an Optional Protocol to the ICESCR, which provides the CESCR competence to receive and consider communications.[177]

As to the content of cultural rights, obligations of states parties under the ICESCR are not uniform or universal, but are instead relative

---

169. Víctor E. Abramovich, *Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies*, 2 SUR-INT'L J. ON HUM. RTS. 181, 186 (2005).

170. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone To Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author, ¶ 6, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006).

171. General Comment No. 21, *supra* note 40.

172. Some authors even argued that the cultural provisions in the existing legal instruments do not establish rights, but rather political commitments of a programmatic character. *See, e.g.*, E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT'L L. 69, 103 (1978).

173. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 160 (1987).

174. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Wall), Advisory Opinion, 2004 I.C.J. 136, ¶ 112 (July 9).

175. Francioni, *supra* note 97, at 3.

176. G.A. Res. 63/117, art. 2, U.N. Doc. A/Res/63/117 (Dec. 10, 2008).

177. *Id.* art. 1(1).

to levels of development and available resources.[178] While the ICESCR allows "progressive realisation," it also mandates certain obligations that require immediate effect (for example, the obligation to begin taking steps to implement the ICESCR's provisions "and to eliminate discrimination in the enjoyment of ESC rights").[179]

Cultural rights, like other human rights, impose three types or levels of state obligations: to respect, to protect, and to fulfil.[180] The obligation to respect requires states parties to refrain from interfering, directly or indirectly, with the enjoyment of cultural rights. For instance, the obligation to respect includes, inter alia, the adoption of specific measures to allow everyone "[t]o have access to their own cultural . . . heritage and to that of others."[181] States parties must also respect the cultural heritage of indigenous peoples and their rights of ownership over their ancestral lands and resources.[182] As part of the obligation to respect, states parties are to "ensure that companies demonstrate due diligence [and] do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities."[183]

The obligation to protect requires states parties to take steps to prevent the interference of third parties from impeding the exercise of cultural rights.[184] For example, states parties are required to "[r]espect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters," preserving and restoring historical sites,

---

178.

> The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time . . . . It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'etre*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question.

U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990).

179. Manisuli Ssenyonjo, *Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law*, 15 INT'L J. HUM. RTS. 969, 971 (2011).

180. Asbjørn Eide, *Economic and Social Rights*, *in* HUMAN RIGHTS: CONCEPTS AND STANDARDS 109, 127-28 (Janusz Symonides ed., 2000).

181. General Comment No. 21, *supra* note 40, ¶ 49(d).

182. *Id.*

183. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, ¶ 4, U.N. Doc. E/C.12/2011/1 (May 20, 2011).

184. General Comment No. 21, *supra* note 40, ¶ 50.

monuments, and works of art, among others.[185] The obligation to protect also includes "protection from illegal or unjust exploitation of [indigenous peoples'] lands . . . by State entities or private or transnational enterprises and corporations."[186]

Finally, the obligation to fulfil requires that states parties take appropriate measures to ensure the realisation of cultural rights.[187] One requirement of the obligation to fulfil is the adoption of policies that protect and promote cultural diversity; this includes "measures aimed at enhancing diversity through public broadcasting in regional and minority languages."[188] The obligation to fulfil also requires "[p]rogrammes aimed at preserving and restoring cultural heritage."[189]

Cultural rights have a minimum core content that corresponds to state obligations to ensure the satisfaction of "minimum essential levels" of cultural rights.[190] Core obligations include, inter alia, the adoption of measures to ensure gender equality in the right to take part in cultural life[191] and the requirement of "free and informed prior consent when the preservation of [indigenous peoples'] cultural resources, especially those associated with their way of life and cultural expression, are at risk."[192] The CESCR has held "that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the[se] core obligations."[193]

Cultural rights present a dual dimension, as individual and collective entitlements. With regard to their individual dimension, cultural rights include a series of different entitlements, like the right to education, the right to participate in cultural life, the performance of cultural practices, the possibility for individuals to speak their own dialects and languages, and the freedom of academic research, to name a few.[194] With regard to their collective dimension, people need cultural, political, and social interaction to develop their personality. In this sense,

---

185. *Id.* ¶ 50(a).
186. *Id.* ¶ 50(c).
187. *Id.* ¶ 48.
188. *Id.* ¶ 52(a).
189. *Id.* ¶ 54(b).
190. *See generally* Audrey R. Chapman & Sage Russell, *Introduction* to CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 127, at 9 (internal quotation marks omitted).
191. General Comment No. 21, *supra* note 40, ¶ 55(a).
192. *Id.* ¶ 55(e).
193. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 47, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).
194. General Comment No. 21, *supra* note 40, ¶ 55.

culture does not exist in a vacuum, but it arises from social practice and interaction.

What has the cultural wealth of nations got to do with cultural rights? Cultural rights are deemed to include the interplay between individuals and their cultural expressions, including cultural heritage.[195] Individual entitlements to enjoy one's own culture are paralleled by the state duty to protect and respect cultural heritage. States have both a "negative obligation not to interfere with cultural freedoms" and a positive obligation to protect cultural communities, cultural property, and sacred sites.[196] The protection of cultural heritage is deeply linked to human dignity and cultural identity, promoting the enjoyment of other human rights.[197] Although a right to cultural heritage does not exist yet, one may deem that "rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights"[198] and other international law instruments. For instance, the 1981 Banjul Charter of the Organisation of African Unity (OAU) refers to the right of all people to "their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."[199] Article 12(1) of the U.N. Declaration on the Rights of Indigenous Peoples provides that indigenous peoples "have the right to . . . maintain, protect, and have access . . . to their religious and cultural sites."[200]

D. Good Cultural Governance

UNESCO has been particularly active in adopting a number of international law instruments regarding cultural matters, furthering international co-operation in the cultural sector, and empowering states to adopt cultural policies in respect of existing human rights instruments. From the outset, UNESCO has contributed to the formation of

---

195. The right to participate or to take part in cultural life is deemed to include the right "to benefit from the cultural heritage." *Id.* ¶ 15(b).

196. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1213 (2004).

197. As Andrew Ross puts it, "Increasingly, respect for people's cultural identities . . . has come to be seen as a major condition of equal access to income, health, education, free association, [and] religious freedom." Andrew Ross, *Components of Cultural Justice*, *in* LAW IN THE DOMAINS OF CULTURE 203, 204 (Austin Sarat & Thomas R. Kearns eds., 1998).

198. Council of Europe, Framework Convention on the Value of Cultural Heritage for Society art. 1, Oct. 27, 2005, C.E.T.S. No. 199 [hereinafter Faro Convention].

199. Organisation of African Unity (OAU), African Charter on Human Rights and Peoples' Rights (Banjul Charter) art. 22(1), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

200. Declaration on the Rights of Indigenous Peoples, art. 12(1), G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

international cultural law and thus contributed significantly to global cultural governance.[201]

UNESCO conventions and declarations have laid down legal obligations, standards of conduct, and benchmarks that offer useful criteria for identifying permitted and best practices for governing cultural resources. As Pierre-Marie Dupuy highlights, the standards developed under the aegis of UNESCO constitute canons of good conduct analogous to the canon of "the *bonus pater familias* of Roman law or of the *well-governed state* mentioned in the old Alabama arbitration (1872)."[202] In this sense, UNESCO has shaped a body of law that helps states to develop *good cultural governance* and requires *due diligence* in the conduct of cultural policies. While *cultural governance* expresses the need to govern cultural phenomena by means of processes mandated by law (so as to protect the cultural interests of present and future generations),[203] *good cultural governance* refers to the exercise of state authority[204] according to due process and the rule of law that includes the respect for human rights and fundamental freedoms.[205] For instance, states that have world heritage sites are required to adapt their administrations to the international regime established by the 1972 World Heritage Convention and to respect other norms of international law.[206]

However, authors have stressed: "[A] comprehensive global regulatory regime to complement the law of cultural property is still some way off. Instead, more regimes are being established, depending on

---

201. Christian Tietje, *The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture*, 42 GERMAN Y.B. INT'L L. 26, 35 (1999) ("Global governance serves as an analytical model for a better understanding of the mechanisms of cooperative, multi-level approaches toward the management of common concerns of societies.").

202. Pierre-Marie Dupuy, *The Impact of Legal Instruments Adopted by UNESCO on General International Law*, *in* 1 STANDARD-SETTING IN UNESCO: NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE 351, 358 (Abdulqawi A. Yusuf ed., 2007) (internal quotation marks omitted).

203. Here, I slightly reformulate the definition provided by Ariél du Plessis and Christa Rautenbach. Cultural governance entails a number of "legislative, executive and administrative functions, instruments and ancillary processes that could be used by governments . . . to organise and regulate culturally relevant activities." Ariél Du Plessis & Christa Rautenbach, *Legal Perspectives on the Role of Culture in Sustainable Development*, 13 POTCHEFSTROOM ELECTRONIC L.J. 27, 46 (2010).

204. Governance refers to the exercise of state authority which includes (1) "the power to enact and enforce legislation, [(2) the power] to take decisions that may potentially affect the rights of other persons, and [(3) the power] to exercise discretion in matters of public administration." *Id.* at 48.

205. *See id.* at 62.

206. Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 22, art. 5.

the kind of properties and on the public interest at stake . . . ."[207] Authors highlight the existence of a "complex of cultural property regimes"[208] or a fragmentation of international cultural law, in both vertical and horizontal senses. At the vertical level, such fragmentation is reflected in the coexistence of different layers of heritage protection, at the national, regional, and international levels.[209] At the horizontal level, such fragmentation is evident in the varied sources of cultural heritage law. At the international level, the incremental and ad hoc adoption of conventions and soft law instruments by UNESCO has not led to a homogenous and well-co-ordinated system: these different regulations are not necessarily harmonised and at times overlap.[210] For instance, the fact that each convention adopts its own definition of cultural property or cultural heritage does not contribute to the systematisation of the field. Analogously, at the national level, authors have highlighted the existence of fragmented legal frameworks "giv[ing] rise to legal uncertainty, duplication of responsibilities . . . , time delays and ultimately governance inefficiencies."[211]

As a tapestry of national, regional, and international law instruments imposes extensive obligations on states to respect and protect cultural heritage,[212] some authors have argued that an emerging legal principle, i.e., norm of customary law, requires states to protect cultural heritage.[213] This argument is also based on the consideration that the protection of cultural heritage is firmly linked to the protection of

---

207. Lorenzo Casini, *"Italian Hours": The Globalization of Cultural Property Law*, 9 INT'L J. CONST. L. 369, 373 (2011).

208. *Id.*

209. *Id.* at 387.

210. *See, e.g.*, Lyndel V. Prott, *UNESCO International Framework for the Protection of Cultural Heritage*, *in* CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 257, 276 (James A.R. Nafziger & Ann M. Nicgorski eds., 2009) (criticising the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions for its "sloppy language, inadequate definitions, and 'permissive' rather than precise language").

211. *See, e.g.*, Louis Kotzé & Stephen de la Harpe, *The Good, the Bad and the Ugly: Using Good and Cooperative Governance to Improve Environmental Governance of South African World Heritage Sites: A Case Study of the Vredefort Dome*, 11 POTCHEFSTROOM ELECTRONIC L.J. 1, 27 (2008) (referring to the specific case of South Africa).

212. Almost all states have regulation governing and protecting cultural heritage at the national level. *See, e.g.*, 1 LYNDEL V. PROTT & PATRICK J. O'KEEFE, LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION 387 app. 1 (1984).

213. Dupuy, *supra* note 202, at 359-60; Francesco Francioni, *Au-delà des Traités: L'émergence d'un Nouveau Droit Coutumier pour la Protection du Patrimoine Culturel*, 111 REVUE GÉNÉRALE DE DROIT INT'L PUB. 19 (2007).

fundamental human rights.[214] Although not all the existing international legal instruments are formally binding on states, they may contribute to the formation of the *opinio juris ac necessitatis*.[215] Some cases point in this direction.[216] However, the practice is far from uniform. While it may be held that *customary* international law is gradually emerging in the field, the question as to whether such a norm already exists in international law is far from settled.[217] It is clear, however, that UNESCO is contributing to the *gestalt* of general principles of law in the area of cultural heritage protection.[218]

UNESCO instruments do not "expropriate" the states of their cultural sovereignty or cultural governance;[219] rather, they are part of what Jacob Katz Cogan calls "the regulatory turn" in international law, "shor[ing] up and back[ing] up states . . . in their regulatory responsibilities"[220] and contributing to multilevel governance.[221] When states enter into a treaty, they exercise—not abandon—their sovereignty,[222] thereby

---

214. Francioni, *supra* note 196, at 1213. *But see* Roger O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 INT'L & COMP. L.Q. 189, 190-91 (2004).

215. A custom is made up by two elements: a consistent practice (*usus* or *diuturnitas*) and the understanding that such a practice reflects existing international law (*opinio juris*) or is made compulsory by impelling social, economic, or political needs (*opinio necessitatis*). The literature is extensive. *See generally* Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1977); Michael Byers, *Custom, Power, and the Power of Rules*, 17 MICH. J. INT'L L. 109 (1995); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155 (1999); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001); Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523 (2004).

216. *See, e.g.*, Eritrea v. Ethiopia, 26 R.I.A.A. 115 (Eri.-Eth. Claims Comm'n 2004), *available at* http://untreaty.un.org/cod/riaa/cases/vol_XXVI/115-153.pdf. The Eritrea-Ethiopia Claims Commission held that "the felling of the stela [of Matara] was a violation of customary international humanitarian law," and it found Ethiopia "liable for the unlawful damage inflicted upon the Stela of Matara in May 2000." *Id.* ¶¶ 113-114.

217. *Id.* ¶ 23.

218. *See* Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 322, 330 (2011).

219. *See* Natasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*, 24 PACE ENVTL. L. REV. 35, 36 (2007).

220. Cogan, *supra* note 218, at 330.

221. *Id.* at 331, 365 ("By endorsing governmental power, international law risks justifying or increasing the likelihood of governmental abuse."); *id.* at 367 (questioning "whether human rights and rule of law protections have been sufficiently incorporated into the law of the regulatory turn").

222. *See generally* S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17) (stating that the right to enter into international engagements is an act of state sovereignty).

triggering the basic rule of *pacta sunt servanda*.[223] According to general international law, a state must fulfil its obligations resulting from treaties, but it is, in principle, free to select the means of implementing the treaty.[224] Furthermore, UNESCO instruments expressly affirm that states remain uniquely placed in protecting the cultural wealth of nations.[225] However, when implementing their obligations, states are not unbound. Drawing an analogy from human rights treaties, the implementation of UNESCO treaties must be "reasonable or proportionate with respect to the attainment of the relevant rights, compl[iant] with human rights and democratic principles, [and] subject to an adequate framework of monitoring and accountability."[226]

About fifty per cent of UNESCO treaty law, including the Convention for the Safeguarding of the Intangible Cultural Heritage and the 1972 World Heritage Convention, lacks a dispute settlement provision *tout court*.[227] As Professor Sabine von Schorlemer rightly points out, "[I]t is possible to assume that UNESCO Member States wanted to give preference to diplomatic means of dispute settlement, as opposed to choosing a clear operational modus vivendi."[228] Codifying such mechanisms in the treaty text may make widespread ratification more difficult to achieve.

Given the lack of dedicated courts or tribunals,[229] disputes with cultural elements have been adjudicated before national, regional, and international courts and tribunals. At the international law level, the ICJ has rarely adjudicated culture related disputes. One such dispute is the

---

223. *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

224. LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, 517 (June 27) (referring to "means of [the state's] own choosing").

225. For instance, the recent UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions highlighted "the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of . . . cultural expressions on their territory." Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *supra* note 34, art. 1(h). Analogously, the 1992 World Heritage Convention recognises that "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the [world] cultural and natural heritage . . . situated on its territory, belongs primarily to that State." Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 22, art. 4.

226. General Comment No. 21, *supra* note 40, ¶ 61.

227. Sabine von Schorlemer, *UNESCO Dispute Settlement*, *in* 1 STANDARD-SETTING IN UNESCO: NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE, *supra* note 202, at 78.

228. *Id.*

229. *See id.*

case of the Temple of Preah Vihear,[230] which has been recently revived.[231] The ICJ held that Thailand had to return the cultural property that had been removed from the site of the temple, an ancient sanctuary of considerable artistic and archaeological interest.[232] In a case brought under the Genocide Convention, Bosnia and Herzegovina alleged inter alia that Serbian forces' attempt "to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property," inflicted on the Bosnian Muslims "conditions of life calculated to bring about [their] physical destruction."[233] The ICJ considered that there was

> conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group. . . . However, in the Court's view, the destruction of historical, cultural and religious heritage c[ould] not be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group, [and thus] it d[id] not fall within the categories of acts of genocide set out in Article II of the Convention.[234]

Finally, in the Navigational and Related Rights case,[235] the ICJ deemed the subsistence-fishing practices of the local peoples to be a customary right.[236] Other culture-related cases have been attracted by other courts and tribunals.

E. The Linkage Paradigm

The linkage paradigm explores the connection between international cultural law and other branches of international law. International cultural law often interacts with other areas of the law; a number of scholars have addressed the interplay between international

---

230. Temple of Preah Vihear (Cambodia v. Thai.), Judgement, 1962 I.C.J. 6, 36-37 (June 15). The International Court of Justice found "that the Temple of Preah Vihear [was] situated in territory under the sovereignty of Cambodia [and,] in consequence . . . that Thailand [was] under an obligation to withdraw any military or police forces" that it had stationed at the Temple and to restore to Cambodia any sculptures, stelae, or fragments of monuments that had been removed from the Temple by Thai authorities.

231. Temple of Preah Vihear (Cambodia v. Thai.), Provisional Measures/Request for Interpretation of Judgement, 2011 I.C.J. 151 (July 18).

232. For commentary, see, e.g., D.H.N. Johnson, The Case Concerning the Temple of Preah Vihear, 11 INT'L & COMP. L.Q. 1183 (1962); G.M. Kelly, *The* Temple *Case in Historical Perspective*, 39 BRIT. Y.B. INT'L L. 462, 464 (1963).

233. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb.& Montenegro), Judgement, 2007 I.C.J. 43, ¶ 320 (Feb. 26).

234. *Id.* ¶ 344.

235. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgement, 2009 I.C.J. 213 (July 13).

236. *Id.* ¶¶ 134-144.

cultural law and the law of armed conflict,[237] international trade law,[238] international investment law,[239] and international intellectual property law,[240] to mention a few.

In addition to the culture-related cases adjudicated before the ICJ and mentioned above, a number of culture-related cases have been adjudicated before (1) human rights bodies, (2) international economic fora, and (3) ad hoc international criminal courts and tribunals.[241] While the culture-related jurisprudence of international criminal tribunals has been dealt with by a number of scholarly contributions,[242] it is worth briefly mentioning the culture-related jurisprudence of human rights courts and international economic fora.

The jurisprudence of human rights courts and tribunals has increasingly dealt with cultural entitlements and the clash between property rights and the preservation of the cultural (and natural) wealth of nations. Although a systematic analysis of this case law would go outside the limited scope of this Study, it suffices to mention that the European Court of Human Rights (ECtHR) has adjudicated a number of

---

237. *See generally* LA TUTELA INTERNAZIONALE DEI BENI CULTURALI NEI CONFLITTI ARMATI, *supra* note 6.

238. *See generally* Peter Van den Bossche, Free Trade and Culture (Maastricht Faculty of Law, Working Paper No. 4, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979530; JOHN MORIJN, REFRAMING HUMAN RIGHTS AND TRADE: POTENTIAL AND LIMITS OF A HUMAN RIGHTS PERSPECTIVE OF WTO LAW ON CULTURAL AND EDUCATIONAL GOODS AND SERVICES (2010); Dahrendorf, *supra* note 5, at 31; TANIA VOON, CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION (2007).

239. Annette Froehlich, *Cultural Matters in Investment Agreements and Decisions*, *in* INTERNATIONAL INVESTMENT LAW IN CONTEXT 141 (August Reinisch & Christina Knahr eds., 2008); Annette Froehlich, *L'enjeu de la Culture dans son Contexte Économique International*, *in* CULTURE AND INTERNATIONAL LAW 83 (P. Meerts ed., 2008); Valentina Sara Vadi, *Fragmentation or Cohesion? Investment Versus Cultural Protection Rules*, 10 J. WORLD INVESTMENT & TRADE 573 (2009).

240. *See* Johnlee Scelba Curtis, *Culture and the Digital Copyright Chimera: Assessing the International Regulatory System of the Music Industry in Relation to Cultural Diversity*, 13 INT'L J. CULTURAL PROP. 59 (2006); Valentina Vadi, *Intangible Heritage: Traditional Medicine and Knowledge Governance*, 2 J. INTELL. PROP. L. & PRAC. 682 (2007); Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTEL. PROP. L. REV. 155 (2006); Daniel J. Gervais, *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT'L & COMP. L. 467 (2003).

241. RESEARCH DIV., EUR. COURT OF HUMAN RIGHTS, CULTURAL RIGHTS IN THE CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS 5 (2011).

242. *See generally* Micaela Frulli, *The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT'L L. 203 (2011); PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010); Micaela Frulli, *Advancing the Protection of Cultural Property Through the Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the Former Yugoslavia*, 15 ITALIAN Y.B. INT'L L. 195 (2005).

cases in which private individuals alleged that their private property rights had been infringed upon by state conduct allegedly embodying cultural policies.[243] In such cases, the ECtHR has balanced the different interests at stake, adopting an equilibratory stance to the interplay between property rights and the protection of cultural goods. In this sense, the ECtHR can be seen as favouring a concept of good cultural governance, according to which the protection of cultural goods is considered to be a public objective that is worthy of protection insofar as other human rights, including property rights, are not disproportionately and/or arbitrarily affected.[244]

In parallel, the American Court of Human Rights (ACtHR) has gone further, adopting an evolutionary interpretation to the notion of property encapsulated in article 21 of the American Convention on Human Rights.[245] The ACtHR has interpreted the right to property as embodying the collective entitlements of indigenous peoples to the lands they traditionally inhabit.[246]

In turn, the African Commission on Human and Peoples' Rights (ACHPR) has elaborated on the interplay between the protection of world heritage and indigenous peoples' rights. The ACHPR recently noted that "there are numerous World Heritage sites in Africa that have been inscribed without the free, prior and informed consent of the indigenous peoples in whose territories they are located" and that the management frameworks of such sites "are not consistent with the principles of the UN Declaration on the Rights of Indigenous Peoples."[247] Therefore, the ACHPR urged UNESCO to "revise current procedures and Operational Guidelines . . . in order to ensure that the implementation of the World Heritage Convention is consistent with the UN Declaration on the Rights of Indigenous Peoples and that indigenous peoples' rights, and human rights generally, are respected, protected and fulfilled in World Heritage areas."[248] The protection of a world heritage site should include the respect for and protection of the lifestyle of its inhabitants. In this sense, the ACHPR recommended the restitution of

---

243. *See, e.g.*, Beyeler v. Italy, 2000 Eur. Ct. H.R. 32; Sud Fondi Srl c. Italie, 2009 Eur. Ct. H.R. 34.

244. *See, e.g.*, Beyeler v. Italy, 2000 Eur. Ct. H.R. 32; Sud Fondi Srl c. Italie, 2009 Eur. Ct. H.R. 34.

245. Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

246. *See id.*

247. Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the designation of Lake Bogoria as a World Heritage Site, ACHPR/Res. 197 (Nov. 5, 2011).

248. *Id.*

land belonging to the Kenyan Endorois tribe after its eviction in the 1970s from a world heritage site.[249]

Investigating the case law of international economic fora concerning cultural goods has been a promising endeavour for several reasons. First (adopting a comparative institutional analysis), although the panels and the Appellate Body of the World Trade Organization[250] and the investment arbitral tribunals constitute powerful and effective dispute settlement mechanisms, the dispute settlement mechanisms provided by UNESCO instruments lack teeth. Rarely have UNESCO instruments included reference to judicial means of dispute settlement, i.e., arbitration or recourse to the ICJ;[251] rather, they generally provide for negotiation, good offices, inquiry, fact finding, mediation, and conciliation.[252] Not surprisingly, very limited "[s]tate practice exists with regard to the use of existing dispute settlement procedures within UNESCO."[253] Furthermore, such dispute settlement mechanisms only commit parties to the UNESCO instruments, i.e., states, and are not available to non-state actors.[254] Therefore, international disputes relating to cultural matters have been attracted by economic fora.

Second, given the fact that culture-related disputes are adjudicated before international economic fora that present a distinct culture,[255] it is important to scrutinise this emerging jurisprudence through a cultural lens, because it is the nature of international economic law experts to address these disputes from an international economic law perspective.[256] At the substantive level, while international economic goods receive strong protection in international economic law, cultural goods receive much weaker consideration (if any). For instance, in the General

---

249. Ctr. for Minority Rights Dev. (Kenya) *ex rel.* Endorois Welfare Council v. Kenya, 276/2003, African Comm'n on Human & Peoples' Rights (Feb. 4, 2010). For commentary, see Leila Lankarani, *La Notion de Dispersion en Droit International des Patrimoines Culturels (Immatériel, Naturel et Mondial)*, 2 J. DROIT INT'L 283, 298 (2011).

250. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

251. *See, e.g.*, Convention on the Protection of the Underwater Cultural Heritage, *supra* note 22, art. 25.

252. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *supra* note 34, art. 25.

253. von Schorlemer, *supra* note 227, at 74.

254. *Id.* at 73.

255. *See* Debra P. Steger, *The Culture of the WTO: Why It Needs To Change*, 10 J. INT'L ECON. L. 483 (2007); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269 (2009).

256. *See* Valentina Sara Vadi, *Socio-Legal Perspectives on the Adjudication of Cultural Diversity Disputes in International Economic Law* (Oñati Int'l Inst. for the Soc. of Law, Onati Socio-Legal Series, Vol. 1, No. 4, 2011), http://opo.iisj.net/index.php/osls/article/view/59.

Agreement on Tariffs and Trade 1994 (GATT),[257] cultural artefacts are mentioned only in article XX among the general exceptions.[258] Rarely are cultural concerns mentioned in investment treaties.

Third, exploring the culture-related cases before international economic fora can test the effectiveness of international cultural law. These cases put international cultural law to the test in that they show its low levels of effectiveness and comprehensiveness in addressing emerging issues in international cultural law in relation to other branches of international economic law. Furthermore, the power of attraction exercised by international economic fora towards culture-related disputes risks overemphasising economic values vis-à-vis cultural values, leading to a clash of cultures.[259]

Fourth, exploring the available culture-related cases before international economic fora tests the linkage between international cultural law and general international law. More precisely, is international cultural law a self-contained regime,[260] or is it an integral and responsive branch of international law?

Although "[t]he international legal system has undergone a process of 'functional differentiation' in many different areas,"[261] adopting a unitarian approach,[262] this Article supports the argument that international

---

257. General Agreement on Tariffs and Trade 1994 (GATT 1994), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 11 (1994).

258.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . .
>
> . . . (*f*) imposed for the protection of national treasures of artistic, historic or archaeological value.

General Agreement on Tariffs and Trade (GATT 1947) art. XX(f), Oct. 30, 1947, 55 U.N.T.S. 187.

259. Valentina Vadi, *Culture Clash: Valuing Heritage in Investment Disputes*, *in* SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT (Amanda Perry Kessaris ed., forthcoming 2012).

260. The term "self-contained regime" was first used by the ICJ in the United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgement, 1980 I.C.J. 3, ¶ 86 (May 24) ("The rules of diplomatic law . . . constitute a self-contained regime.").

261. Rainer Hofmann & Christian J. Tams, *International Investment Law: Situating an Exotic Special Regime Within the Framework of General International Law*, *in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 9, 10 (Rainer Hofmann & Christian J. Tams eds., 2011).

262. *See, e.g.*, Rep. of the Int'l Law Comm'n, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, ¶ 193, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) ("No legal regime is isolated from general international law."); *id.* ¶ 192 ("[N]o regime is self-contained.").

law, albeit decentralised, is not an anarchic amalgam of different norms, but has a structure similar to a system.[263] To say that there is *continuity* between international law and international cultural law does not imply a sort of *pre-established harmony* between the system and its sub-system.[264] Rather, the appropriate equilibrium needs to be found by the interpreters, who should act as cartographers of international law.

This is particularly the case with regard to the linkage between investment law and cultural heritage law, which has increasingly come to the fore. Are investment treaties compatible with states' obligations to protect the cultural wealth of nations? Is investor-state arbitration a suitable forum to protect public interests? At the substantive level, investment treaties provide an extensive protection to investors' rights in order to encourage foreign direct investment. Thus, a potential tension exists when a state adopts regulation interfering with foreign investments because this may breach investment treaty provisions. At the procedural level, investment treaties offer investors direct access to an international arbitral tribunal.[265] Therefore, foreign investors can directly seek compensation for the impact on their business of such regulation.

A series of problematic cases involving elements of cultural heritage have shown the increasing interrelatedness of foreign investment and economic development, on the one hand, and the cultural wealth of nations, on the other.[266] The survey of these cases shows that international law has not yet developed any institutional machinery for the protection of cultural heritage through investment dispute settlement.[267] However, in recent years, a jurisprudential trend has emerged that does take cultural heritage into consideration. This trend seems to confirm the power of centripetal forces leading to systemic integration and unity of public international law.

---

263. As Joost Pauwelyn highlights, "Modern international law is, indeed, composed increasingly of treaty-based sub-systems . . . . [T]o talk of these sub-regimes as being separate 'international laws' . . . would lose sight of general international law in creating the impression that these sub-regimes are 'self-contained regimes' to be evaluated exclusively with reference to norms created *within* the particular sub-regime." *See* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 9 (2003).

264. These terms belong to the philosophical discourse. *See* GOTTFRIED LEIBNIZ, DISCOURSE ON METAPHYSICS: CORRESPONDENCE WITH ARNAULD AND MONADOLOGY, at xv (Paul, Trench, Truber & Co., 1908) (1686).

265. *E.g.*, Agreement Relating to the Agreement of Oct. 24, 2000, U.S.-Austria, Jan. 23, 2001, T.I.A.S. No. 13,143.

266. Vadi, *supra* note 259.

267. *Id.*

V. CRITICAL ASSESSMENT

This Part offers a preliminary assessment of the current approaches to international cultural law and briefly highlights some of the pressing challenges ahead. While international cultural law offers a legal matrix where different kinds of knowledge based on different epistemological roots get crossed, there are common threads running through the different paradigms and the related legal processes. Although international cultural law presents inherent tensions that may be irreconcilable in practice, convergences exist among diverse regulations and actors, signalling an increasing awareness of cultural entitlements and a need to protect the cultural wealth of nations.

An important issue is whether or not international cultural law needs to place greater emphasis on dispute settlement mechanisms and deterrence in order to be more effective. UNESCO instruments tend to be widely ratified because of their perceived soft law character; however, they tend to lack compulsory adjudication and enforcement mechanisms.[268] The critical question then becomes whether it is better to have a strong treaty with fewer states parties or a weak treaty with broader ratification and applicability. Given the increasing relevance of international cultural law and the rise of cultural wealth related disputes, further reflection is crucial.

The proposals to establish a World Heritage Court or permanent arbitral tribunal for the settlement of disputes with cultural elements have not been successful. Many political considerations oppose the establishment of such a dispute settlement mechanism. First, how do we define a "cultural" dispute? Second, would states ever relinquish their sovereignty on issues related to cultural identity, nationhood, and sovereign rights? As one author points out, "[C]ultural heritage disputes are often multidimensional, involving not only complex legal issues, but also sensitive, not necessarily legal elements, of an emotional, ethical, historical, moral, political, religious, or spiritual nature."[269] For instance, a judicial dispute settlement mechanism would have a hard time settling disputes when neighbours apply for UNESCO recognition of traditions

268. For instance, Naomi Mezey has argued that "the 2005 UNESCO Convention [on Cultural Diversity] is primarily aspirational rather than obligatory." *See* Mezey, *supra* note 75, at 2013.

269. *Art and Cultural Heritage Dispute Resolution*, WIPO MAG., Aug. 2009, at 17, *available at* http://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html.

that share similarities.[270] Therefore, litigation may not be the proper context for settling these kinds of disputes.

Given the lack of dedicated courts or tribunals, disputes with cultural elements have been adjudicated before national, regional, and international courts and tribunals.[271] International cultural law has increasingly intersected with other areas of international law, and such linkage has generated different streams of cases before human rights courts, international criminal courts, and international economic fora.[272] While the World Trade Organization panels and the Appellate Body have not paid much attention to cultural concerns, a different trend arises from the case law of investment tribunals.[273]

Nonetheless, from a cultural heritage law perspective, concerns remain. One may wonder whether these developments are enough to protect cultural heritage when foreign investments are at stake. At the end of the day, these cases represent an *ex post* remedy, that is, a remedy that is available only after an investor files a state claim. What if an investor did not file a claim, but cultural heritage concerns arose nonetheless? What about the other relevant stakeholders, that is, the affected communities in the context of investment disputes? The institutional structure, the processes, and the outcomes that arbitral tribunals sanction can be far from what would be required of a body to which significant human rights authority could be entrusted. Furthermore, there is a risk of "epistemological misappropriation," that is, defining cultural heritage and related cultural rights in a way that is discordant from the jurisprudential developments and interpretations of human rights courts and tribunals.[274] What weight is given to

---

270. See, for instance, the current conflict between China and South Korea over the origins of a festival belonging to their intangible cultural heritage. China's Dragon Boat Festival was included on the 2009 UNESCO Intangible Heritage List. However, South Korea's Gangneung Danoje Festival had won the same distinction four years earlier. "Some Chinese say the South Korean festival originated from China's Dragon Boat Festival, and therefore [should] not be recognized by the UNESCO as a South Korean tradition." *Foreign Countries Dispute on Chinese Intangible Heritage*, CCTV.COM (Aug. 27, 2010), http://english.cntv.cn/program/china24/20100827/101845.shtml; *Squabbles over the Dragon Boat Festival*, CULTURE'S DIARY, http://culturesdiary.com/view/51925/squabbles_over_the_dragon_boat_festival (last visited Nov. 5, 2012).

271. RESEARCH DIV., *supra* note 241, at 5-11; Justice C. Nwobike, *The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights Under the African Charter:* Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, 1 AFRICAN J. LEGAL STUD. 129, 142 (2005).

272. RESEARCH DIV., *supra* note 241, at 5-6.

273. *See* Vadi, *supra* note 256.

274. Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 842-43 (2002).

anthropological studies in legal discourse? What relevance, if any, do the narratives of indigenous peoples have in the context of investor-state arbitration? Much more study is needed to explore ways in which international economic law and international cultural law can best be reconciled and rendered complementary to the greatest extent possible.

An additional concern centers on the fact that under global cultural governance, decision-making processes tend to be elitist and opaque, with few participants and no agreed-upon protocol.[275] Lack of defined participatory mechanisms can lead to perceptions of "imposed governance" rather than "democratic governance."[276] For instance, when city planners approved the plan to build skyscrapers in an area close to the Cologne Cathedral, which is a world heritage site, the World Heritage Committee feared that the planned buildings would obstruct the view to the same from the western areas of the city.[277] In Cologne, the local authorities initially contested the legitimacy of such an (expansive) interpretation of cultural heritage protection: reportedly, "the Mayor declared that it was impossible that a city should stop all further development because it had a cathedral"[278] and "that city planning did not fall into the Foreign Ministry's competences."[279] At the end of the day, however, the City of Cologne rescaled the projects, and the intervention of the World Heritage Committee had the power to shape discourse.[280] To what extent may decisions reached by the World Heritage Committee be considered democratic simply because the governments of its members are democratic? As professor of archaeology Cornelius Holtorf puts it, there is a risk that "[t]he relevant . . . authorities are seen as the nasty heritage police bothering house owners unnecessarily and preventing industrial development and economic growth by increasing construction costs."[281] Heritage managers can be perceived as "no-sayers to the people's wishes."[282] As administrative law scholar Martin Shapiro once

---

275. *See generally* Affolder, *supra* note 219.

276. *See* Diana Zacharias, *Cologne Cathedral Versus Skyscrapers—World Cultural Heritage Protection as Archetype of a Multilevel System*, 10 MAX PLANCK Y.B. UNITED NATIONS L. 273, 299 (2006).

277. *Id.* at 276.

278. *Id.* at 277.

279. *Id.* at 279.

280. *Id.* at 298.

281. Cornelius Holtorf, *What Does Not Move Any Hearts—Why Should It Be Saved? The Denkmalpflegediskussion in Germany*, 14 INT'L J. CULTURAL PROP. 33, 48, 52 n.27 (2007) ("This negative image is beautifully expressed by the following graffiti: 'Gott schütze uns vor Staub und Schmutz, vor Feuer, Krieg, und Denkmalschutz.'" ["May God protect us from dust and dirt, from fire, war and the preservation of cultural heritage."]).

282. *Id.* at 52 n.27.

put it, "It is not at all clear . . . whether procedural rules that emphasize transparency and participation can simply be moved 'up' from national to transnational settings."[283] Like many international law norms, international cultural law expresses top-down approaches rather than bottom-up approaches.

Finally, states should make better use of the international cultural law framework that is already in place. This means signing on and becoming party to the existing treaties. But also, greater commitment is needed from those countries that are already signatories to the key conventions.

VI. CONCLUSION

International cultural law has emerged as the new frontier of international law. Governing cultural phenomena in their diversified forms, international cultural law includes extremely diverse components and constitutes a good example of legal pluralism. International cultural law has been approached in a fragmented fashion, adopting a variety of perspectives, methods, and finalities. This Article has defined international cultural law as an emerging field of study and mapped its current contours by systematising the state of art and clarifying its substantive focus (the cultural wealth of nations), analytical tools (theoretical and legal paradigms), and normative goals (the protection of cultural identity and cultural heritage, among others). This Article contributes to the existing literature on international cultural law by adding a systematic conceptualisation and overview of the same, identifying common themes and emerging trends of its different components.

This Article highlights that international cultural law constitutes something more than the sum of its parts, and through its constant interactions with other fields of international law, it is contributing to the development of international law itself. It is "cultural" in the sense that it relates to the multifaceted concept of culture. It is "international" in the sense that the legal and/or the cultural phenomena in question exist all around the world. It is "law" because it includes a number of binding treaties, conventions, customs, and general principles of law.

This Article also enucleates the substantive focus of international cultural law, defining the concept of the cultural wealth of nations. While the cultural wealth of nations is not a legal concept but a working

283. Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 375 (2001).

definition, it captures the variety of (tangible and intangible) cultural resources. The cultural wealth of nations conveys the idea that culture can be an engine of growth and welfare, being central in wealth creation and people's lives, enriching their existence in both a material and immaterial sense. Drawing upon sociological insights, but mainly relying on well-established legal categories, the cultural wealth of nations has been defined as a broad concept, including world cultural heritage, cultural diversity, intangible cultural heritage, underwater cultural heritage, and indigenous cultural heritage. Although such categories may overlap, their individual distinctiveness helps to frame legal discourse on the cultural wealth of nations and global cultural governance.

The proposed systematisation of the field is not meant to be definitive, as the field of study is evolving and expanding fast, but to constitute a useful starting point for further enquiry into specific currents, methodologies, and aspects of international cultural law. While the proposed structure cannot be as exhaustive as entire books that can be (and have been) dedicated to each paradigm (and even sub-paradigm), such systematisation aims at mapping the current approaches and bringing coherence out of an apparently chaotic development of an emerging area of international law.

In particular, this Study highlights the need for further studies in the area of compliance and dispute settlement. Despite decades of protection of cultural heritage in many states, and the growing body of international cultural law, widespread noncompliance by individuals and corporations and lack of enforcement have been the norm rather than the exception. International cultural law emerged after the Second World War in a piecemeal fashion, through a series of international instruments and burgeoning case law and the coalescence of customs and general principles of law. While this branch of law has come of age, it lacks a dispute settlement mechanism. Given the increasingly large number of disputes with cultural elements before international, regional, and national fora, the interaction between international law and international cultural law deserves further scrutiny. The Article also calls for bottom-up approaches to cultural governance and increased sensitivity to democratic concerns—the human dimension of cultural governance should be at the heart of international cultural law.