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INTERNATIONAL CULTURAL
HERITAGE LAW

Janet Blake



CULTURAL HERITAGE LAW AND POLICY

CULTURAL HERITAGE LAW AND POLICY

Series Editors

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International Cultural Heritage Law

CULTURAL HERITAGE LAW AND POLICY

The aim of this series is to publish significant and original research on and scholarly analysis of all aspects of cultural heritage law through the lens of international law, private international law, and comparative law. The series is wide in scope, traversing disciplines, regions, and viewpoints. Topics given particular prominence are those which, while of interest to academic lawyers, have significant bearing on policymaking and current public discourse on the interaction between art, heritage, and the law.

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International Cultural Heritage Law

JANET BLAKE

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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First Edition published in 2015

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: yet to receive

ISBN 978-0-19-872351-6

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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To
Nasser and Daniel,
for their endless patience
And to
Professor Iain Scobbie,
for his invaluable support and guidance

Series Editors' Preface

The books in this series thus far have provided a detailed viewpoint of specialist areas of international law covering the protection of cultural heritage. The very fact that such book length treatments are possible reflects the accelerated development of this field of law.

This volume by Janet Blake is a different but equally important contribution to this series. The author endeavours to provide a detailed overview of the field of cultural heritage law as a whole. A number of academics have sought to undertake this task in the last century and their efforts reflect the gradual evolution and growing density of this field of law – from its disparate beginnings to a panoply of specialist instruments at the international and regional levels covering immovable and movable, tangible and intangible heritage during war and peacetime, today. These treaties have been adopted over time and accordingly are often defined by differing (even competing) objectives. Therefore, bringing these various threads together in a comprehensive and logical whole is a significant challenge but one which the author embraces fully.

Importantly, Janet Blake also places these specialist developments in cultural heritage law within other related areas of international law including human rights law, environmental law, and intellectual property. This approach emphasises its synergies, as well as possible normative conflicts, between these specialist areas of international law. It also enables readers to better understand and appreciate the concepts, ideas and concerns which connect this volume with those that have preceded it in the series and those that shall follow.

Francesco Francioni
Ana Filipa Vrdoljak

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- International Covenant on Economic, Social and Cultural Rights (1966) 146, 289, 299, 304, 305, 307
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- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) 283
- Universal Declaration of Human Rights (1948) 284, 289, 290, 304
- World Intellectual Property Organization**
- Agreement on Trade-related Aspects of Intellectual Property Rights ('TRIPS') (1994) 167, 207, 208, 238, 242, 253–5
- Convention for the Protection of Industrial Property (???) ('Paris Convention') (as revised 1900, 1911, 1925, 1934, 1958, 1967 and 1979) 234, 235
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List of Abbreviations

ABS	access and benefit-sharing
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ASEAN	South-east Asia
BPR	Register of Best Practices
CBD	UN Convention on Biological Diversity
CCD	Convention to Combat Desertification
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CHM	common heritage of mankind
CITES	Convention on the International Trade in Endangered Species
CMS	Bonn Convention on the Conservation of Migratory Species of Wild Animals
COP	Conference of the Parties
DOALOS	UN Division of Ocean Affairs and the Law of the Sea
ECOSOC	UN Committee for Economic, Social and Cultural Rights
EEZ	Exclusive Economic Zone
EF	expressions of folklore
EPBC Act	Australian Environment Protection and Biodiversity Conservation Act 1999
FAC	Fund for Assistance of Culture
FAO	Food and Agriculture Organization
FCCC	UN Framework Convention on Climate Change
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	intangible cultural heritage
ICOMOS	International Council on Monuments and Sites
IFAR	International Fund for Art Research
IFREMER	French Institute for the Research and Exploration of the Sea
IKO	Institut für Informations und Kommunikationsökologie
ILA	International Law Association
ILC	International Law Commission
IOM	International Organization for Migration
IP	intellectual property
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
LOSC	Law of the Sea Convention
MFA	Museum of Fine Arts
NAM	Non-Aligned Movement
NAS	Nautical Archaeology Society
NSPA	National Stolen Property Act
OAS	Organization of American States

OIC	Organization of the Islamic Conference
PIC	Prior Informed Consent
RDG	Restricted Drafting Group
RL	Representative List of Intangible Heritage of Humanity
RMST	RMS Titanic Inc
SIDS	Small Island Developing States
TCEs	traditional cultural expressions
TEK	Traditional Ecological Knowledge
TK	Traditional Knowledge
TKC	Traditional Knowledge Commons
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRNC	Turkish Republic of North Cyprus
TSC	Territorial Sea Convention
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDOC	UN Office for Drugs and Crime
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organization
UPOV	Union for the Protection of New Varieties of Plants
USL	List of Intangible Cultural Heritage in Need of Urgent Safeguarding
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1

Cultural Heritage Law

Contextual Issues

This opening chapter is aimed at providing a brief overview of the field of international cultural heritage law, its early development, some important issues, and its current form and purposes. This is therefore intended to introduce the reader to the field in general terms and to lay the basis for the chapters that follow. Although the subject here is international law of cultural heritage, I will not address international law in detail save for a few basic principles that are crucial to understanding how international law operates to provide a protective framework for cultural heritage. Readers who wish to learn more about this aspect of the question can consult the introduction provided in Forrest's book on cultural heritage law or an introductory textbook on international law, such as that by Dixon.¹ I mostly use the term 'cultural heritage' in this book as the predominant term of art today in the field, although there are contexts in which 'cultural property' may be more appropriate (eg in relation to cases where the point at issue is primarily the ownership of a cultural object), or other formulations such as 'cultural expressions' or 'cultural goods and services'. The specific usages of these terms will be made clear in the following chapters that address such issues as illicit trade in cultural objects, intellectual property approaches to protecting traditional cultural expressions, and protecting the rights of cultural creators and producers in global markets, for example. This raises the fundamental point that cultural heritage is a portmanteau term with a myriad of possible meanings and interpretations and both this fact and terminological choices will be considered later in this chapter.

Valuing and Protecting Cultural Heritage

From ancient times to the late nineteenth century

Placing a value on monuments and artefacts which reflect the cultural and religious expressions of a society is by no means a modern impulse. Examples can be

¹ Craig Forrest, *International Law and the Protection of Cultural Heritage* (London and New York: Routledge, 2010) at pp 31–55. See also: Martin Dixon, *Textbook on International Law* (Blackstone Press, 1990).

found from ancient times of concern for the protection of cultural artefacts such as an early museum of antiquities established in ancient Babylon by the daughter of King Nabonidus in the sixth century BC.² In the following century in Greece, Thucydides attempted to use archaeological finds as the basis for historical explanation when he considered that Delos had been settled by Carians since the type of armour and weapons he found in many of the graves there resembled those of the Carians of his day.³ The Chinese historian Sima Qian visited ancient ruins and studied antiquities when writing his history⁴ in the second century BC. In the late Roman Republic, Cicero attacked Verres, the Roman Proconsul of Sicily between 71 and 73 BC, in his court orations⁵ for removing looted artworks to Rome.

It seems, however, that early antiquities legislation developed first in Europe in the fifteenth century AD with the papal Bull⁶ promulgated by Pope Pius II in 1462 aimed at the preservation of the ancient monuments located in the papal States. In 1630, King Gustavus Adolphus of Sweden appointed a state antiquarian, thus demonstrating a desire to protect and preserve important state cultural heritage. In 1684, he issued a Royal Decree aimed at protecting archaeological remains located in the ground which were rendered Crown property, in return for a finder's reward.⁷ The Ottoman Turkish authorities began to develop a legislative and administrative system for the preservation of antiquities in the late nineteenth century in what was one of the earliest 'modern' antiquities protection regimes. In 1846, they established in Istanbul the Assemblage of Ancient Weapons and Antiquities which, in the late 1860s, became the Imperial Museum; under the directorship of Osman Hamdi Bey, it undertook the first archaeological excavations by an Ottoman team.⁸ The first Ottoman Historic Monuments Act was adopted in 1874⁹ and is one of the earliest examples of a modern antiquities legislation. It stated, inter alia, that excavation finds should be shared between the excavation team, the owner of the land, and the State¹⁰ and it placed all foreign excavation teams under the control and supervision of the Ministry of Education (a forerunner to the later Turkish system of granting permits for excavation work). The third version of this law adopted in 1884 included the significant provision of granting state ownership of all antiquities¹¹ and established the Department of Antiquities to administer the legislation.

² Ennigaldi lived in sixth century BC and is said to have acted as a museum curator. Vicki León, *Uppity Women of Ancient Times* (Conari Press, 1995) pp 36–7.

³ Thucydides, *The History of the Peloponnesian War*, Book I.

⁴ The *Shi Ji* was a history of China's dynastic empires, written between the end of the second century and the beginning of the first century BC by legendary scholars Sima Tan and his son Sima Qian of the Han Dynasty.

⁵ *In Verrem*, Acta I and II.

⁶ Papal Bull entitled *Cum Alma in Nostram Urbem*, cited in Lyndel V Prott and Patrick J O'Keefe, *Law and the Cultural Heritage*, vol 1 (Abingdon: Professional Books, 1984) at p 34.

⁷ Prott and O'Keefe, *Law and the Cultural Heritage* (n 6) at p 35.

⁸ Information on the Ottoman law from Emre Madran, *The Restoration and Preservation of Historical Monuments in Turkey (From the Ottoman Empire to the Republic of Turkey)* (Ankara, 1989). See also: A Çilingiroglu and B Umar, *Eski Eserler Hukuku (Ancient Monuments Law)* (Ankara Üniversitesi Basimevi, Ankara, 1990) [in Turkish].

⁹ *Asari Antika Nizamnamesi*.

¹⁰ The best third being given to the State.

¹¹ The importance of such a provision is explored more fully in Chapter 2 on the illicit trade in cultural objects.

The case of the Ottoman Empire and, later, the Turkish Republic is an informative one in this context since it illustrates both a growing sense of the importance of cultural heritage to state identity and also the beginning of a reaction towards the large-scale removal of antiquities from Turkey, Greece, Egypt,¹² and Italy by European travellers, diplomats,¹³ and colonizers. In the case of the Ottoman Empire, it found itself the home to antiquities which many Europeans regarded as their own heritage from ancient Greece and Rome—and to which they, as Turks from eastern Asia, had no direct link other than geographical and territorial. The activities of nineteenth-century European archaeologists were, in many cases, really a form of officially sanctioned treasure-hunting through which they filled the museums of London, Paris, and Berlin with antiquities from the Near, Middle, and Far East. The photograph of Schliemann's wife wearing gold jewellery from ancient Troy¹⁴ is a powerful image of such attitudes.

They were, of course, the basis for a powerful tension and for competing claims over this heritage which the Ottomans began to respond to in the mid- to late-nineteenth century. Interestingly, they had felt no such connection with the sculptural frieze on the Parthenon which, as the power controlling Athens in the late-eighteenth century, they were happy to allow Lord Elgin to remove to the British Museum in 1799 under a *firman* issued by the Sublime Porte of the Ottoman Empire.¹⁵ Lowenthal makes clear the connection between a global view of heritage and the Eurocentric colonial tradition, '[i]n the course of dispensing global benefits, Western powers also acquired global heritage and then came to construe their spoils of conquest as global stewardship. European mandates to plunder stemmed from the common view that their Christian and scientific legacy was immeasurably superior to the barbarous customs of others'.¹⁶ The approach taken by Europeans towards the ruins of Great Zimbabwe is a striking example of such mechanisms at play as is the keeping of anatomic specimens and skeletal remains of African and Australian indigenous people in the natural history museums of Europe and North America. Thus consideration of the competing claims

¹² By Napoleon's conquering army, amongst others.

¹³ Such as Sir William Hamilton who served as the British Ambassador to the Kingdom of Naples in 1764 to 1800 and who was a famous 'connoisseur' of antiquities who followed in the footsteps of his Roman predecessor Verres by collecting antiquities from southern Italy and Sicily, many of which he removed to Britain. David Constantine, *Fields of Fire: a Life of Sir William Hamilton* (London: Wiedenfeld and Nicholson, 2001).

¹⁴ This image is easily accessible online. Accessed 30 November 2014 at <<http://www.gettyimages.com/detail/news-photo/sophia-schliemann-wife-of-german-archaeologist-heinrich-news-photo/50695956>>.

¹⁵ Lord Elgin was able to take advantage of this general lack of interest in antiquities when he was granted a *firman* (a decree issued by the Ottoman Sultan or one of his high officials) allowing the removal of the Parthenon frieze in 1799 and its subsequent transport to the British Museum. The text of this *firman* is reproduced in *The International and National Protection of Movable Cultural Heritage* edited by Sharon Williams (New York: Oceania, 1978) at p 10. See also: Jeanette Greenfield, *The Return of Cultural Treasures* (Cambridge University Press, 1989) at pp 61–72.

¹⁶ David Lowenthal, *The Heritage Crusade and the Spoils of History* (Viking, UK, 1997) at pp 240–1.

of indigenes and later settlers forces us to reassess the terms of reference we apply to the cultural heritage in general.

This question of major museums such as the British Museum in London and the Louvre in Paris holding large collections of cultural objects (and even sculptural elements¹⁷) is a chapter unto itself, but it does point to some important tensions that underlie this area of law, in particular the question of ascribing a universal value to cultural heritage (as a ‘universal heritage of humanity’) as opposed to recognizing local and/or national claims to the heritage. In addition, the fact that much of the cultural heritage held in European and North American museums that is being claimed by other countries and/or peoples was removed from its original communities and location as part of the colonial experience (including the colonization of indigenous lands by European settlers).¹⁸ This tension will be discussed in more detail below.

International cultural heritage law from 1945

Although some attempts were made to regulate cultural heritage, in particular in the event of armed conflict¹⁹ and on the regional (American) level,²⁰ it is fair to say that modern international law relating to the protection of cultural heritage started in the period following the Second World War, the establishment of the United Nations (UN) and the UN Educational, Scientific and Cultural Organization (UNESCO) in 1945, and the adoption of the Universal Declaration on Human Rights (1948). It is no surprise, then, that the first international treaty in this area concerned the protection of cultural heritage in wartime,²¹ in view of the purpose of the UN stated in its Charter to foster the peaceful coexistence of States and of UNESCO (set out in its Constitution) to build peace in the minds of men (sic).²² The 1954 ‘Hague Convention’ sets out its purpose and underlying philosophy in the Preamble, recognizing that ‘cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in

¹⁷ Such as the Altar of Zeus constructed by Eumenes II from Pergamon (south-western Turkey) now held in the Pergamon Museum in Berlin.

¹⁸ The colonial despoliation of Africa is described in Folarin Shyllon, ‘The Right to a Cultural Past: African Viewpoints’, in *Cultural Rights and Wrongs* edited by Halina Niec (UNESCO Publishing and Institute of Art and Law, 1998) at pp 103–19.

¹⁹ Conventions No IV and IX adopted by the International Peace Conference of 1907 addressed issues relating to cultural property, in particular the Regulations appended to Convention No IV (Arts 23(g), 25, 28, and 47). See Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Dartmouth/UNESCO, 1996) at p 10.

²⁰ Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (‘Roerich Pact’) adopted by the Pan-American Union in 1935 [167 LNTS 289, entered into force 26 August 1935].

²¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954 [249 UNTS 240; First Hague Protocol 249 UNTS 358]. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, The Hague, 14 May 1954 [249 UNTS 358].

²² Preamble at para 1 reads: ‘since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed’.

the technique of warfare, it is in increasing danger of destruction' and 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'.

Two years later, UNESCO addressed archaeological excavation in a Recommendation²³ through a set of non-binding international principles to govern this activity. Again, this provides as the *raison d'être* for the protection of this aspect of cultural heritage the importance that the archaeological heritage holds for mankind and as a means of encouraging international cooperation in its protection, thus preventing international conflicts. Interestingly, this early statement of international policy acknowledges the universal-specific duality of cultural heritage in that it notes that while 'individual states are more directly concerned with the archaeological discoveries made on their territory, the international community is nevertheless the richer for such discoveries'. Further Recommendations addressed the safeguarding of the beauty of landscapes (1962) and the preservation of cultural property endangered by public works (1968).²⁴ The next cultural heritage treaty-making was seen with the adoption of the 1970 Convention for the prevention of the illicit trafficking and movement of cultural property (1970) and the Convention for the protection of the world cultural and natural heritage (1972).²⁵ The immaterial aspects of cultural heritage were first addressed in the UNESCO Recommendation on Traditional Culture and Folklore (1989) and more recent UNESCO treaties in this field are the 2001 Underwater Heritage Convention,²⁶ the 2003 Intangible Heritage Convention²⁷ and, the most recent, the 2005 Convention on the Diversity of Cultural Expressions.²⁸

Cultural heritage treaty-making on the international (global) level is therefore of relatively recent date and the field is still a young and evolving one with all the uncertainties that this entails. These treaties also tended to reflect current concerns at the time of their adoption and, thus, involve differing approaches and

²³ Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, New Delhi, 5 December 1956) accessed on 18 December 2014 at <http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

²⁴ Recommendation on Safeguarding the Beauty of Landscapes 1962, adopted by UNESCO on 11 December 1962, accessed on 13 February 2015 at <http://portal.unesco.org/en/ev.php-URL_ID=13067&URL_DO=DO_TOPIC&URL_SECTION=201.html>; and the Recommendation on the Preservation of Cultural Property Endangered by Public Works (1968) accessed on 13 February 2015 at <http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

²⁵ Convention on the Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970) [823 UNTS 231] and UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)].

²⁶ Convention on the Protection of the Underwater Cultural Heritage (UNESCO, Paris, 2 November 2001) [41 ILM 40], discussed further in Chapter 3.

²⁷ Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO, 17 November 2003) [2368 UNTS 3], discussed further in Chapter 5.

²⁸ Convention for the Protection of the Diversity of Cultural Contents and Artistic Expressions adopted by UNESCO on 20 October 2005 at the 33rd session of the General Conference, discussed further in Chapter 6.

even underlying philosophies. The 1954 Hague Convention, as we have seen, very much reflected a desire both to prevent the outbreak of future armed conflict and to minimize damage to cultural property in the event of such conflict. The 1970 Convention embodied what might be typified as a 'nationalist' view of cultural heritage, reflecting the concerns particularly of newly created post-colonial (developing) countries that had suffered great loss of cultural heritage during the colonial period and their wish to build national identities for which heritage would serve as a major constitutive element. The 1972 Convention, in contrast, showed a desire to characterize some outstanding examples of cultural heritage as a 'common heritage of mankind' and worthy of international protection as such and a growing concern with environmental protection²⁹—both of which may be seen as concerns of developed as opposed to developing States.

Some Terminological Questions

As noted above, this is a relatively youthful area of international law and, as such, the terminologies it employs are still being developed and their meanings are, at times, shifting and evolving. In this section, I briefly address a few of the most important terms of art of this field of law. Writing in 1989, Prott expressed this problem as follows: 'While cultural experts of various disciplines have a fairly clear conception of the subject matter of their study, the legal definition of the cultural heritage is one of the most difficult confronting legal scholars today.'³⁰ Today, this assessment would be less starkly expressed, but it is by no means fully resolved and still requires consideration by lawyers and others working in the field.³¹

Heritage or property?

As will be noted, the aforementioned treaties and other instruments employ the terms cultural heritage and cultural property in an apparently interchangeable manner and it is therefore important to examine if this is really the case or not. In some sense, this is a false question since legal texts can and, to some extent, do dictate the meaning of any given term for the purposes of the instrument itself.³² There are, however, certain specific characteristics of these terms that are generally understood and so should be explored here. Moreover, the aforementioned treaties do not explicitly define either cultural property or cultural heritage as such and this leaves their meaning open to interpretation. It is possible, for

²⁹ Declaration of the UN Conference on the Human Environment (Stockholm, 1972) was adopted at the 21st plenary meeting on 16 June 1972 in the same year this Convention was adopted by UNESCO [UN Doc A/Conf.48/14/Rev 1 (1973); 11 ILM 1416 (1972)].

³⁰ Lyndel V Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', *Recueils des Cours*, vol V (1989): pp 224–317 at p 224.

³¹ Eg, Janet Blake, 'On Defining the Cultural Heritage', *International and Comparative Law Quarterly*, vol 49 (2000): pp 61–85.

³² As noted by Prott and O'Keefe, *Law and the Cultural Heritage* (n 6).

example, to ascertain that cultural heritage is generally conceived of as a broader, all-encompassing term of which cultural property forms a (material) subsection but which is broader than simply movable items that may be subject to trade or trafficking. For example, the aforementioned 1968 Recommendation described cultural property as ‘the product and witness of the different traditions and of the spiritual achievements of the past... an essential element in the personality of the peoples of the world’.³³

Of course, before reaching a full understanding of either of these two terms it is helpful to address the meaning of ‘culture’ itself. Anthropological definitions of culture give an indication of the difficulties in providing a working definition of culture that can inform our understanding of how it applies in the phrases cultural property and cultural heritage. It has been described as a totalizing concept in which material culture, ritual culture, symbolic culture, social institutions, patterned behaviour, language-as-culture, values, beliefs, ideas, ideologies, meanings, etc are contained and whereby everything in society is supposed to have the same culture (as in the concept of shared values).³⁴ For the purposes of legal regulation of the trade in antiquities or even of monumental heritage, this would appear to be an extremely wide-ranging definition; interestingly, however, it is much closer to the way in which culture is understood with regard to intangible aspects of cultural heritage. Another anthropologist, Stavenhagen,³⁵ has proposed three main potential categories of ‘culture’ that can be helpful here. These are, first, the idea of ‘culture as capital’, or the accumulation of material heritage of humankind in its entirety. Second, he proposes ‘culture as creativity’ where culture is represented by scientific and artistic creations, and third, an all-encompassing ‘anthropological’ view of culture as ‘the sum total of all material and spiritual activities and products of a given social group that distinguishes it from other social groups’. In these categories, we can find elements that match to the different meanings of culture as employed in cultural heritage instruments which, in one way, suggests the complexity of the idea of culture as used in cultural heritage law. The idea of ‘heritage’ is an easier one to grasp and contains elements that are essential for understanding this field of law: it refers to an inheritance received from the past, to be held ‘in trust’ by the current generation (that may enjoy its value in the present) to be handed down in at least as good a state as it was received to the next generation.

Cultural property as a category was first established in the 1907 Convention No IV and then reiterated in the Roerich Pact (1935) and the Hague Convention (1954). It is a term that obviously contains the potential for damaging outcomes when applied to cultural expressions, manifestations, and even objects that are of special importance to a specific cultural community but who are not defined as their ‘owners’ under law. Rodota has sought to overcome this difficulty by suggesting that ‘property’ when applied to cultural items and expressions can

³³ Preamble. ³⁴ Raymond Williams, *Culture* (Glasgow: Fontana, 1981).

³⁵ Rodolfo Stavenhagen, ‘Cultural Rights: A Social Science Perspective’, in *Cultural Rights and Wrongs* edited by Halina Niec (UNESCO Publishing and Institute of Art and Law, 1998) pp 1–20.

constitute a ‘new form of ownership’ to avoid the notion of exclusive control usually implied by that legal terminology.³⁶

In the 1978 Recommendation on movable cultural property,³⁷ the following definition of that term is given: ‘movable cultural property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and are of archaeological, artistic, scientific or technical value or interest’. For an instrument whose primary objective is to control the movement of such cultural objects, the use of this term is relatively uncontroversial and the definition given here does clearly state the non-economic values attached to such items. However, it remains rather strange to employ a legal concept that usually relates to ownership rights and then to state that it is being used without implying such rights, when alternative terms exist that are free of this historical baggage. However, in view of the sense of discomfort felt by many commentators today, this term is much less widely used and the alternative cultural heritage is generally favoured.³⁸ In addition, now that our idea of what cultural heritage encompasses has greatly expanded not only to include aspects of natural heritage (or mixed cultural and natural ones) and non-material elements, ‘cultural property’ is far too limited a term: how well, for example, can it cover rock art, places associated with the development of certain technologies, natural features endowed with cultural significance, sacred and ritual sites, and even the rituals themselves?

There is, of course, a further sense included in the term cultural heritage that is also highly significant and is, possibly, the best argument for its use. As noted above, it encompasses the idea of an inheritance received in a certain condition from the previous generation(s) to be safeguarded by the current one and handed on to following generations in a condition at least as good as that in which it was received. This idea of cultural heritage as an inheritance is not new and was articulated in the UNESCO Constitution (1945) in the requirement of the Organization to ‘assure the conservation and protection of the world’s inheritance of works of art and monuments of history and science’.³⁹ However, the idea of an inheritance has gathered further meaning over the years, in particular with the adoption of the concept of sustainable development. It is important since it includes the central concept of inter-generational equity and the duty of the current generation to safeguard the cultural and natural wealth of this planet for the

³⁶ Stefano Rodota, ‘The Civil Law Aspects of the International Protection of Cultural Property’ in *International Legal Protection of Cultural Property: Proceedings of the Thirteenth Colloquy on European Law*, Delphi, 20–22 September 1983.

³⁷ Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) adopted by UNESCO at the twentieth session of General Conference held in Paris from 24 October to 28 November 1978, accessed on 12 December 2014 at <http://portal.unesco.org/en/ev.php-URL_ID=13137&URL_DO=DO_TOPIC&URL_SECTION=201.html> at Art 1.

³⁸ With regard to controlling international trade, the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Rome, 1995) [34 ILM 1322] which is discussed further in Chapter 2 uses the phrase ‘cultural objects’ in the place of ‘cultural property’.

³⁹ Article 1.

future.⁴⁰ It also includes a related idea that, since we do not know today what our future needs will be nor can we anticipate the ways in which existing knowledge (heritage) might be employed in the future, we should keep it against future needs.⁴¹ Given that, like natural resources, cultural heritage is a non-renewable resource, its use and enjoyment must be conducted in such a way as not to exhaust it.⁴² This notion of heritage is also one of the fundamental bases for a general duty to be placed on States to protect and safeguard cultural heritage.⁴³

Perhaps one of the most striking, and possibly problematic, aspects of cultural heritage today is its all-pervasive character. Leaving aside the notion of ‘heritage’ as a lifestyle accessory—heritage bathroom fittings, heritage restaurants—⁴⁴ there remain a large, and expanding, number of heritage sites, heritage ‘experiences’, and heritage museums worldwide.⁴⁵ For some reason, we have a greater social and emotional need in the contemporary world for the past (and its present purposes) in the face of rapid technological change, inter-connectivity, and globalized relations. This, of course, relates also to the role played by cultural heritage in the construction of local, national, regional, and even ‘human’ identities which are under pressure today in ways they were not previously. It is no accident that the cultural heritage law-making by UNESCO has gradually moved from issues of a predominantly national importance (protection of cultural property during armed conflict and against illicit movement and trade) to ones regarded as of a more universal interest (eg the world cultural and natural heritage) to those much more closely tied up with local and regional interests (intangible cultural heritage and diversity of cultural expressions).

⁴⁰ Article 4 of the 1972 World Heritage Convention places the duty on Parties of ‘ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage’.

⁴¹ This mirrors closely the classic statement of sustainable development as articulated by the ‘Brundtland’ Report of the World Commission on Sustainable Development in 1987 as: ‘Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’

⁴² This is summed up well in the submission made by the Czech Republic to the Helsinki Conference of Ministers of Culture of the Council of Europe in 1995, which refers to the ‘enlargement of the concept of cultural heritage to cultural aspects or cultural resources of the environment and of society—listed and unlisted, known and unknown, material or immaterial. They are similarly non-renewable and for human life, health and safety as necessary as natural resources of the environment’.

⁴³ Francesco Francioni, ‘A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage’, in *Standard-setting in UNESCO, volume I: Normative Action in Education, Science and Culture, Essays in Commemoration of the Sixtieth Anniversary of UNESCO* edited by Ahmed Yusuf Abdulqawi (UNESCO, 2007) at p 237 also suggests that the human rights dimension of cultural heritage is one of the factors behind the shift from cultural property to cultural heritage.

⁴⁴ Rodney Harrison, *Heritage: Critical Approaches* (Routledge, 2013) addresses the tendency towards a theme-park notion of ‘heritage’ at pp 1–12.

⁴⁵ According to David Lowenthal, *The Heritage Crusade and the Spoils of History* (n 16), 95 per cent of contemporary museums have appeared since the Second World War.

Tangible or intangible heritage?

The archaeological heritage is a good illustration of this dual nature of cultural heritage. As a subset of the overall category of cultural heritage, archaeological heritage is primarily viewed in terms of its material culture—sites, remains of buildings, human remains, and artefacts. However, the main significance of this material culture for the scientific discipline is the evidence it can provide of past societies, forms of human organization, and practices. As such, its intangible aspect which is the information that we can glean from the material culture is an essential part of the whole: it is this intangible element—the intellectual, human context in which the material culture was made or evolved—that gives the physical finds their *archaeological* significance. Hodder and Hutson express the special value of context for an archaeologist succinctly in the following passage:

Handed an object from an unknown culture, archaeologists will often have difficulties in providing an interpretation. But to look at objects by themselves is really not archaeology at all. Archaeology is concerned with finding objects in layers and other contexts (rooms, sites, pits, burials) so their date and meaning can be interpreted. As soon as the context of an object is known, it is no longer mute . . . Clearly we cannot claim that, even in context, objects tell us their cultural meaning, but on the other hand they are not totally mute. The interpretation of meaning is constrained by the interpretation of context.⁴⁶

This explanation of the role of context in archaeological interpretation of material culture can serve as a useful analogy for understanding the relationship that exists between ‘tangible’ and ‘intangible’ cultural heritage. It has to be accepted that the distinction that has developed in cultural heritage law-making, especially within UNESCO, between tangible and intangible cultural heritage is an artificial one that does not accord with the reality. In most cases, the two are inextricably linked and have such a close mutual relationship that to separate them is counter-intuitive.⁴⁷ Hence, the value and significance of a large proportion of cultural properties on the World Heritage List, for example, is related to their associated intangible cultural elements⁴⁸ while, at the same time, intangible forms of heritage are often actually perceived through the tangible elements (costumes, musical instruments, agricultural tools, etc) associated with them. It is more a function of legislative history and the relative importance ascribed to various aspects of heritage at different times and by different groupings of States that cultural heritage law has developed as it has. As a result, predominantly ‘tangible’ aspects were accorded protection directly from the 1954 Hague Convention up until the 2001 Underwater Heritage Convention, although the intangible aspects of this material heritage were often very prominent and alluded to in the treaty

⁴⁶ Ian Hodder and Scott Hutson, *Reading the Past—Current Approaches to Interpretation in Archaeology*, 3rd edn (Cambridge University Press, 2003) at p 4.

⁴⁷ See: Mounir Bouchenaki, ‘A Major Advance towards a Holistic Approach to Heritage Conservation: The 2003 Intangible Heritage Convention’, *International Journal of Intangible Heritage*, vol 2 (2007): p 106.

⁴⁸ Dawson Munjeri, ‘Tangible and Intangible Heritage: From Difference to Convergence’, *Museum International*, vol 221-2 (2004): pp 12–20.

texts and the implementation thereof.⁴⁹ Hence, for example, the 2001 Convention gives importance to the special link that some countries may have with a historic shipwreck; this link may often be expressed in terms of intangibles such as the importance of a battle in the country's history at which the ship sank. Similarly, the Operational Guidelines for the 1972 World Heritage Convention developed over the years to include a criterion for inscription of cultural properties that made direct reference to their 'associated intangible elements'. More recently, the definition of ICH given in the 2003 Convention refers to 'the instruments, objects, artefacts and cultural spaces associated' with the intangible heritage. The 2003 Convention was adopted in part in recognition of the fact that these intangible aspects of heritage had not been given sufficient prominence in the earlier treaties and, in particular, as a reflection of the different priorities of developing countries and countries of the South for whom intangible heritage is of special importance. 'Intangible cultural heritage' has now become the international legal term of art for this aspect of cultural heritage,⁵⁰ even if it is not an ideal one. It is difficult, for example, to find an exact equivalent in Spanish⁵¹ and the French term 'immatériel' carries a different set of connotations from the English 'intangible'. The arrangement finally settled upon for defining the term in the 2003 Convention involves defining 'intangible cultural heritage' for the purposes of the treaty⁵² and then setting out a non-exhaustive list of the five main domains in which it is found. This signals that it is a complex concept that cannot be rendered in a single, neat phraseology.

'Safeguarding' versus 'protection'

The rationale for choosing the term 'safeguarding' over the more common one of 'protection'⁵³ used in the cultural heritage field is worth examination. It makes sense first since this is the term employed in the 1989 Recommendation on traditional culture and folklore which was the precursor to this treaty and the only pre-existing instrument dealing with this particular aspect of cultural heritage. Since one of the underlying approaches of both the 1989 Recommendation and the 2003 Convention was to employ a broader, cultural, approach to protection than that offered by intellectual property law (in which 'protection' is the term of art), it makes sense on this ground too.⁵⁴ It is also a term that suggests a far broader

⁴⁹ As early as 1956, the Recommendation on International Principles Applicable to Archaeological Excavations (n 23) noted in the Preamble 'the feelings aroused by the contemplation and study of works of the past'; the 1998 and 2000 revisions of the *Operational Guidelines* to the 1972 World Heritage Convention allow for the intangible associations of cultural properties to be taken into account in applying the inscription criteria.

⁵⁰ Particularly with the adoption of the 2003 Intangible Heritage Convention.

⁵¹ A point noted by the Spanish delegate at intergovernmental negotiations on the 2003 Convention.

⁵² Article 2(1).

⁵³ Used in UNESCO's 1954, 1970, and 1972 Conventions cited at n 5.

⁵⁴ It is worth noting that out of Sections A to F of the Recommendation for the Safeguarding of Traditional Culture and Folklore (Paris, 1989), accessed on 10 November 2014 at

approach than that of protection, implying not only that the ICH is protected from direct threats to it but also that positive actions that contribute to its continued survival must be taken. Significantly, safeguarding is specifically defined in the 2003 Convention⁵⁵ and this definition bears a close relationship to the five main divisions of that 1989 Recommendation, namely identification, conservation (including documentation), preservation, dissemination, and protection.⁵⁶

As a consequence, safeguarding is seen as a comprehensive notion that not only includes classic 'protection' actions such as identification and inventorying of the ICH but also involves providing the conditions within which it can continue to be created, maintained, and transmitted. This, in turn, implies the continued capability of the cultural communities themselves to do this. Hence, the community is placed at the centre of this Convention as the vital context for the existence of ICH rather than the heritage itself. In this way, the safeguarding of ICH is a more context-dependent approach that takes account of the wider human, social, and cultural contexts in which the enactment of ICH occurs. Measures that should be taken by governments in order to achieve this include ensuring that the economic, social, and cultural rights of the communities (groups and individuals) that allow them to create, maintain, and transmit their ICH. From such a viewpoint, protection carries with it a more negative sense of 'protection against' while safeguarding implies taking positive actions to foster the heritage, its holders, and the context in which it is developed.

Universal, National, or Local Heritage?

A continuing challenge to international cultural heritage law is and has been whether to characterize the heritage that merits protection as a cultural heritage of humankind, a 'national treasure', or the source of value and identity to local and indigenous communities. As shall be demonstrated through this book, depending on various factors such as the prevailing politics, the type of heritage in question, and whether its preservation is regarded as a global value, a variety of approaches have been taken to this question. Thus there is a potential contradiction which lies at the heart of the construction of a global culture and, hence, of the notion of 'global heritage' or the 'universal heritage of mankind'. When examining this in relation to international cultural heritage law, the question encapsulates many of the competing interests at stake since it is in the nature of legal questions to be expressed in such a way. Writing about the cultural heritage in the legal and wider contexts, Lowenthal suggested that, '[t]oo much is now being asked of heritage. In the same breath we commend national patrimony, regional and ethnic legacies,

<<http://unesdoc.unesco.org/images/0013/001323/132327m.pdf>>, only Section F is entitled 'Protection' and this section deals with intellectual property aspects of protection.

⁵⁵ Article 2(3).

⁵⁶ The measures for safeguarding listed in Art 2(3) are: 'identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.'

and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible'. The idea of basing protection on the notion of a universal, global value, as a heritage of humankind,⁵⁷ has been predominant throughout international law-making since the second half of the twentieth century and has formed the justification for international cooperation in this field.⁵⁸

Both the 1970 UNESCO Convention on movable cultural property and the 1995 UNIDROIT Convention on the return of stolen and/or illegally exported cultural objects both characterize the importance of the objects in question as a universal one.⁵⁹ This is interesting and suggests that this is, in part, designed to render more acceptable to art market States treaties that are still fundamentally nationalist in their thrust since they reaffirm the idea that States of origin have preferential rights over cultural artefacts. A further tension with regard to the notion of a universal cultural heritage is in its contrast to the representative character of heritage, namely the way in which heritage is representative of specific cultural communities and their identity. Hence, implementation of the 1972 World Heritage Convention has, over the 40 years of its operation, slowly moved away from the notion of an 'iconic', 'wonders of the world' approach⁶⁰ towards the idea of exemplars of cultural heritage that are 'representative of the best' in a particular cultural area, region, theme, or historical period.⁶¹ In order to resolve the apparent tension between the universality and specificity of heritage under the Convention, the World Heritage Committee has started to emphasize the 'representative' character of heritage sites to allow the World Heritage List to represent the diversity of

⁵⁷ Not to be confused with the doctrine of the 'common heritage of mankind' developed by Ambassador Pardo with regard to deep seabed mineral deposits and that applies in international law to common space areas, such as the deep seabed and the moon. Claims have also been made for treating Antarctica as a common heritage of mankind and even certain iconic species, such as mountain gorillas. See: Christopher C Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind', *International and Comparative Law Quarterly*, vol 35 (1986): pp 190–9; and Ellen S Tenenbaum, 'A World Park in Antarctica: The Common Heritage of Mankind', Note in *Virginia Environmental Law Journal*, vol 10 (1991): p 109.

⁵⁸ It was used as far back as 1931 when the Secretary-General of the International Office of Museums wrote of 'la nouvelle conception qui se fait jour depuis quelque temps et qui tend à considérer certains monuments d'art comme appartenant au patrimoine commun de l'humanité', stating that, 'il semble qu'il y a là en formation un nouveau principe de droit international dans le domaine artistique', Euripide Foundoukidis, *Mouseion. Revue internationale de muséographie*, no 15 (1931): p 97. Cited in Noé Wagener, 'Les usages de la figure de "patrimoine commun"', Working Paper presented to a Research Workshop on *Dissemination et mimétisme en droit international: un regard anthropologique sur la formation des normes*, l'Institut de Hautes Etudes Internationales et du Développement, Geneva, 20 November 2014.

⁵⁹ In the Preamble, the 1970 Convention cites the 'importance of the protection of cultural heritage and cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation' (emphasis added).

⁶⁰ For a discussion of this 'iconic' approach, see: Christina Cameron, 'Evolution of the Application of "Outstanding Universal Value" for Cultural and Natural Heritage' at the Special Expert Meeting of the World Heritage Convention on *The Concept of Outstanding Universal Value*, held in Kazan, Republic of Tatarstan, Russian Federation 6–9 April 2005. UNESCO Doc WHC-05/29.COM/INF.9R, of 15 June 2005.

⁶¹ Yusuf A Abdulkawi, 'Article 1—Definition of Cultural Heritage', in *The 1972 World Heritage Convention—A Commentary* edited by Francesco Francioni (with the assistance of Federico Lenzerini) (Oxford University Press, 2006) pp 23–50.

all cultures around the world in their intellectual, aesthetic, religious, and socio-logical expressions.⁶² It is no accident that one of the ways in which the drafters of the 2003 Intangible Cultural Heritage Convention sought to distinguish it from the 1972 Convention (on which it was loosely modelled) was to name its main international list, the Representative List of Intangible Heritage of Humanity. By using the term ‘Representative’ in its title, this was intended to signal the idea that the list was not celebrating ‘unique’ or ‘outstanding’ elements of heritage, but rather that the inscribed elements were representative of the mass of intangible cultural heritage in the world and, importantly, its global diversity.⁶³

Cultural heritage as universal heritage

All the post-War cultural heritage treaties express this notion, either explicitly or implicitly, as the basis for international cooperation over its protection. The 1954 ‘Hague’ Convention on the protection of cultural property in armed conflict,⁶⁴ the first of these treaties, notes that ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind’,⁶⁵ thus suggesting a general duty on all States to ensure its protection in wartime. More notable given its highly ‘nationalist’ position towards the right of States to retain (and have returned) their cultural heritage, the 1970 UNESCO Convention on the illicit import, export, and transfer of cultural property⁶⁶ implicitly refers to the idea that its subject matter has a value that goes beyond that of national heritage alone, stating that, ‘cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting’.⁶⁷ The UNESCO treaty that most clearly reflects this view of cultural heritage is the 1972 UNESCO World Heritage Convention⁶⁸ which asserts that, ‘[p]arts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole’. This is not surprising since it deals with the cultural and natural heritage together and the notion of a global heritage is now well-established in that field of law: ‘[t]hat the natural heritage is global is now beyond dispute. Fresh water and

⁶² According to Francesco Francioni, ‘Preamble’, in *The 1972 World Heritage Convention—A Commentary* edited by Francesco Francioni (with the assistance of Federico Lenzerini) (Oxford University Press, 2006) pp 11–21 at p 20, the *Global Strategy* of the 1990s led to a dynamic interpretation of ‘universality’ and contains an evident anthropological dimension of cultural heritage, as opposed to a purely aesthetic and monumental art history approach.

⁶³ Janet Blake, *Commentary on the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage* (UK: Institute of Art and Law, 2006) at p 20.

⁶⁴ The 1954 ‘Hague’ Convention on the protection of cultural property in the event of armed conflict (n 20).

⁶⁵ Preamble, para 2.

⁶⁶ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (n 24), discussed in more detail in Chapter 2.

⁶⁷ Preamble, para 3.

⁶⁸ 1972 World Heritage Convention (UNESCO, 1972), discussed in more detail in Chapter 4.

fossil fuels, rain forests and gene pools are legacies common to us all and need all our care. Cultural resources likewise form part of the universal human heritage.⁶⁹

The 1972 Convention clearly takes as its starting point the idea that some aspects of the cultural heritage are of such outstanding importance that they should be preserved for the benefit and enjoyment of all mankind,⁷⁰ an out-and-out assertion of the global heritage position.⁷¹ The listing of cultural properties under the 1972 Convention has helped to save the temples at Angkor Wat in war-torn Cambodia from destruction through an international conservation effort, saved the historic city of Dubrovnik from further destruction during bombardment in the early stages of the war in ex-Yugoslavia, and led to an international outcry when dam-building threatened ice-age rock art in the Coa valley in Portugal. Thus the application of the concept of a global heritage through the mechanism of the 1972 Convention, for example, can have important positive outcomes for safeguarding sites whether faced with extreme threats such as war damage or submersion as a result of dam-building projects or simply from deterioration due to government neglect.⁷² By placing a duty of protection on the State on whose territory the listed monument or site is located, acting as a trustee of the heritage on behalf of mankind, this treaty attempts to reconcile the tension that exists between State ownership of the sites and the interests of humankind (the global interest). In the 1972 Convention we find the idea that such outstanding heritage is a non-renewable resource with significance for all peoples and cultures and must therefore be safeguarded for future generations as their inheritance. On the surface, this is an attractive approach and appears uncontroversial and we can accept certain archetypal national icons may also be global legacies, such as: Stonehenge, the Egyptian Sphinx, the Parthenon, and Angkor Wat.

Despite these positives, there remains an unavoidable tension between the global and culture-specific approaches towards cultural heritage that is linked to the (potentially) conflicting interests of many different groups with claims to 'their' cultural heritage. Whilst with regard to natural heritage, 'a universal standard of excellence is conceivable, because the geological, biological, or physical value of a natural site can be appreciated in light of objective, scientific standards', in the field of cultural heritage what is very special and thus 'outstanding' normally relates to the distinctive qualities of a particular culture and social environment, the very antithesis of what is 'universal'. This can be illustrated by an example such as the Great Wall of China

⁶⁹ Lowenthal, *The Heritage Crusade* (n 16) at p 228.

⁷⁰ It states that cultural and natural heritage properties 'constitute an essential feature of mankind's heritage and a source of enrichment and harmonious development for present and future generations'.

⁷¹ This idea is analysed as follows by Francioni, 'Preamble' (n 61) at p 19: 'And yet they are universal in the sense of their universal appeal, in the resonance of their exceptional qualities everywhere and with everyone in the world, as is demonstrated by the constant flow of visitors from all over the world to the two sites. So, at a textual level, the term "universal" as applied to cultural heritage can be understood as defining the quality of a site of being able to exercise a universal attraction for all humanity and exhibit importance for the present and future generations'.

⁷² However, it is important to note also that this can have negative consequences, such as damage resulting from too high visitor numbers or the exclusion of local people from the site.

which is ‘universal’ in the sense of having a universal appeal for everyone around the world but does not exist everywhere and involve everyone.⁷³ Of course, it can be argued that each of these Conventions was designed to confront a particular threat to a specific class of elements of the cultural heritage and that the differences of philosophy underlying each instrument simply reflect that fact. However, because of this fact, it is important to consider more closely what the potential negative outcomes of such a contradiction in these legal approaches may be. As an example of this, the 1982 UN Law of the Sea Convention⁷⁴ includes an article dealing with the treatment of archaeological and historical artefacts located in the deep seabed area in which the directly contradictory global and Statist approaches are employed in a manner which has potentially absurd consequences.⁷⁵ First, it calls for archaeological and historical objects to be disposed of ‘for the benefit of mankind’ (a globalist position) while recognizing, at the same time, the ‘preferential rights of the state or country of origin, or the state of cultural origin, or the state of historical and archaeological origin’ (clearly a Statist position). One cannot, of course, expect the drafters of an instrument designed for the codification and progressive development of the laws of the sea to have a very sophisticated understanding of the philosophies behind cultural heritage protection. However, it is telling that the drafters of this article imported these two potentially contradictory views of the cultural heritage which are expressed in UNESCO texts⁷⁶ and, by placing them side-by-side in the same article, showed clearly their incompatibility.

Cultural heritage as national heritage

As is discussed in detail in Chapter 8 (on human rights and cultural heritage), heritage plays a pivotal and often constitutive role in the creation of national heritage. It is for this reason that many countries have taken strong measures to prevent the export of cultural objects they view as ‘theirs’ and some artefact-rich States have enacted legislation to assert a blanket claim of ownership over all cultural heritage found in their territory. The 1970 Convention, while giving lip-service to the idea that all the peoples of the world should enjoy the world’s cultural property, is strongly ‘Statist’ in its espousal of the rights of the State of origin to retain and control its cultural property and to have stolen or illegally exported items restored to it. M’Bow, then the Director-General of UNESCO, expressed this in a manner which clearly recognized the contradiction between nationalist views of heritage and the universalist position espoused officially by UNESCO:

The men and women of these [despoiled] countries have the right to recover these cultural assets which are part of their being. They know, of course, that art is for the world and

⁷³ Francioni, ‘Preamble’ (n 61) at pp 18–19.

⁷⁴ UN Convention on the Law of the Sea (Montego Bay, 1982) [1833 UNTS 3/[1994] ATS 31/21 ILM 1261 (1982)].

⁷⁵ Article 149.

⁷⁶ Especially the 1970 and 1972 Conventions that were adopted during the UNCLOS III conference at which the final version of the 1982 LOSC was negotiated.

they are aware of the fact that this art, which tells the story of their past and shows what they really are, does not speak to them alone. . . . These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which represent their culture. . . .

In this way he attempts to assert the special relationship that exists between a people and the artworks created by themselves and their ancestors while trying also to allow for their character as the cultural heritage of humankind.

Claims made by States for the return or restitution of cultural treasures which they regard as having been stolen and/or illegally exported illustrates the confusions and potential contradictions between the two positions as well as the competing interest involved. The dispute between Turkey, Germany, and the Russian Federation over the ownership of the treasure found by Schliemann at ancient Troy (in western Turkey) known as 'Priam's Gold' is a good illustrative case.⁷⁷ This hoard was excavated by Schliemann at Troy in 1873 while working under a permit from the Ottoman authorities allowing him to keep half of his finds. He secreted this find and smuggled it all out of Turkey to Athens where the Ottomans initiated a legal suit for the restitution of their half of the treasure. In April 1875, an agreement was reached whereby Schliemann kept the whole of the find in return for compensation. He then gifted the collection to the German people in 1877 and it was placed on museum display in Berlin. After the Red Army occupied Berlin in 1945, three crates of the Trojan Treasure disappeared. In the late 1980s, documents revealed that a crate containing the gold items and four silver vessels from Troy had been placed in the Pushkin Museum in July 1945.⁷⁸ In 1990, a German-Russian treaty was signed that included the mutual exchange of cultural property removed during the war and, in 1993, an Intergovernmental Commission was set up to oversee this. The Turkish Government then claimed the treasure on the basis that, whatever agreement had been reached with Schliemann in 1875, his export of the items was illegal under the Ottoman legislation existing at the time. Thus it is a hugely complex situation in which three States have put forward competing claims, with the status of the treasure as a part of the 'common heritage of humankind' as a unique collection also a significant factor.⁷⁹

This nationalist position tends towards a 'retentionist' attitude⁸⁰ by artefact-rich States such as Turkey and Mexico which apply very tight export regimes (often

⁷⁷ DA Traill, 'Schliemann's Mendacity: A Question of Methodology', *Anatolian Studies*, vol XXXVI (1986): pp 91–8.

⁷⁸ When the Red Army removed artworks in 1945, they were acting under the terms of the Allied Policy of 'Restitution in Kind' in exchange for those items looted and/or destroyed by the German army.

⁷⁹ Turkey has made the somewhat disingenuous suggestion that a 'Monument to Mankind' should be established at the Troad (the site of Troy in northwest Turkey) under international control, with an international museum in the National Park at the Troad for all Trojan artefacts. This neatly conflates both the universalist and nationalist positions.

⁸⁰ As typified by John Henry Merryman in 'The Nation and the Object', *International Journal of Cultural Property*, vol 3, no 1 (1994): pp 61–76.

total prohibitions) allied with attempts to secure the repatriation of items illegally removed from their countries. The issue of the return of items removed in historical times (often in the late eighteenth and nineteenth centuries) which are of great significance to a particular country and or people, is a very complex and difficult one. It generally concerns removal under very different political realities (often within a colonial context) and so concerns political and cultural sensitivities—often a sense of national identity—due to the symbolic nature of the often monumental items. The removal of the ritually significant royal bronzes removed from Benin by the British colonial powers in that country in the nineteenth century⁸¹ is a good example of such cases: they have a unique character and can be conceived of as ‘universal heritage of humankind’ while enjoying, at the same time, a special significance as a symbol of modern national identity.

Attempts to secure the restitution of antiquities exported in more recent times in contravention of export regulations—often the result of illicit excavation causing destruction of the archaeological record of a country—would appear to be relatively simple and uncontroversial. They are not, however, free of controversy given the conflict of interests between those States which espouse a liberal, free-market view that encourages a licit trade in antiquities (generally, of course, the market States such as the US, UK, Japan, and Germany) and States which take a nationalist, ‘retentionist’ position towards preserving their cultural artefacts (majority of source States).⁸² The free-market view proposes that no single State or group of people should have a special right to the ownership or control over items of the cultural heritage but that their movement should be governed by market forces. It contends that by opening up the market to a sufficient number of licit antiquities to satisfy bona fide collectors, the demand for illicit ones will be lessened.⁸³ This is, effectively, a universalist approach in so far as it challenges a nationalist view of the cultural heritage, arguing that the cultural heritage should be available to all who can afford to pay for it. It also reflects the global capitalist view that the market should be left to regulate itself, even in areas such as environmental pollution, and that state intervention should be kept to a minimum. On a purely practical level, this argument is highly problematic in that it would require access to a sufficient number of ‘surplus’ antiquities which source States are prepared to allow onto the market (unlikely in itself) to satisfy the market.⁸⁴ A more philosophical difficulty would be that it implies the commodification of cultural artefacts by viewing some as more ‘valuable’ than others.

⁸¹ Shyllon, ‘The Right to a Cultural Past: African Viewpoints’ (n 18).

⁸² John Henry Merryman, ‘A Licit International Trade in Cultural Objects’, *International Journal of Cultural Property*, vol 4, no 1 (1995): pp 13–60.

⁸³ As expressed by Merryman, ‘A Licit International Trade’ at p 14: ‘An expanded, licit international trade in art is more likely to advance general interest in the cultural heritage of mankind.’

⁸⁴ It is equally unlikely that collectors who tend to want unique and special items would be interested in items such as Roman glassware of which there are several hundred identical exemplars rather than a unique item of outstanding beauty.

Globalization and heritage

Much has been written on the effects of globalization⁸⁵ and these are as relevant to cultural heritage as to many other aspects of life. Since globalization impacts on almost all areas of cultural development, it can threaten the continued practice of traditional arts and handicrafts by turning youth away from these traditional forms of cultural expression towards a unified 'global' culture while. At the same time, while the global marketplace can be exploited to disseminate traditional cultures to a wider (even global) audience, it also creates a situation in which local products are squeezed out by cheaper imported goods. Globalization forces us to redefine the role of States in the cultural arena as well as the relationship of private individuals and independent organizations to government, while highlighting the 'universalist' role of international standard-setting instruments as a means of countering the effects of economic and cultural globalization. Some commentators have identified an apparent contradiction between the universalist nature of the standard-setting instruments of UNESCO and the importance of respecting cultural diversity. It has also been criticized as expressing a 'Western' (and even colonialist) view of the 'global' cultural heritage which does not value other cultural traditions sufficiently.⁸⁶ More recently, however, UNESCO programmes have increasingly acknowledged non-Western views of heritage with the recognition of the importance of intangible heritage which may be the predominant form of cultural heritage in some societies. As globalization may reduce the role of States by by-passing borders in many areas of economic and cultural activity, it also increases the importance of local expressions of cultural identity in response to global pressures.⁸⁷ This last point may prove significant, for example, when 'selling' a policy of valuing and safeguarding intangible cultural heritage to States because of its very 'local' nature and since by safeguarding this heritage that is rooted in the local cultural community may provide a new means for States to legitimate their role in cultural terms.⁸⁸ Hence, in the face of the challenge of globalization, they can be seen as safeguarding a sense of local cultural identity within the framework of the State while protecting the traditional cultural expressions from exploitation. Of course, some indigenous peoples and other cultural minorities seek to challenge the State by asserting claims for self-determination or greater local autonomy, it is generally true that accepting and increasing the profile of local cultural traditions within the official framework is more positive

⁸⁵ See, eg: M Featherstone (ed), *Global Culture: Nationalism, Globalization and Modernity* (Sage, London, 1990); and J Friedman, *Cultural Identity and Global Process* (London: Sage, 1995).

⁸⁶ William S Logan, 'Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-based Cultural Practice', *International Journal of Heritage Studies—Special Issue on World Heritage and Human Rights: Preserving our Common Dignity through Rights Based Approaches*, vol 18, no 3 (2012): pp 231–44.

⁸⁷ Lynn Meskell, 'Introduction: Archaeology Matters', in *Archaeology Under Fire* edited by Lynn Meskell (London: Routledge, 1998) pp 1–12 at p 8 notes 'the contradictory tendencies of globalisation and localisation existing side by side'.

⁸⁸ Much of the monumental cultural and archaeological heritage has traditionally been employed by States to foster a sense of national cultural identity that legitimizes the State itself.

for a State than not. Since international instruments are elaborated by States (or their representatives at intergovernmental level), this reassessment of their role is not without importance in the context of this study.

The situation of indigenous heritage

Claims of priority made by indigenous and tribal peoples to their cultural heritage is one which also runs wholly counter to the concept of a global cultural heritage. It also raises very important questions about ownership of the cultural heritage which is, in itself, a hugely complex one.⁸⁹ There are innumerable examples of competing claims to the cultural heritage between indigenous peoples and later settlers in North America, Australasia, northern Europe, Latin America, and south-east Asia and this has become an important issue for archaeologists working in regions where remains relating to indigenous groups are to be found. In Australia, for example, there has been much controversy over the issue of aboriginal land rights which is also intimately connected to claims to the cultural heritage,⁹⁰ while cases relating to indigenous cultural rights have been heard by the European Court of Human Rights and the Inter-American Human Rights Commission.⁹¹ In the US, federal legislation has been passed to address Native American claims for reburial rights over skeletal remains of their ancestors.⁹²

Consideration of the rights of indigenous peoples to their cultural heritage can be seen as subversive of the two leading (and internally contradictory) approaches put forward for the protection of cultural heritage: first, that of State ownership (a 'statist' or 'nationalist' approach) and, second, that of international trusteeship (a 'universalist' approach). The claims made by indigenous and tribal people to their cultural heritage not only challenges the State's right to own and control sacred sites, skeletal and other remains, but it also questions the basis of the idea of a global, universal cultural heritage: it suggests that this notion primarily expresses a Eurocentric worldview that does not take into account the understanding indigenous peoples have of the nature (or importance) of their cultural heritage.⁹³ For example, the development of a 'world' approach to archaeology as a discipline reveals the degree to which it has developed out of and been

⁸⁹ As a consequence, many commentators in the cultural heritage law field prefer to avoid applying the notion of ownership in its classical sense to heritage.

⁹⁰ Elizabeth Evatt, 'Enforcing Indigenous Cultural Rights: Australia as a Case Study', in *Cultural Rights and Wrongs* edited by Halina Niec (UNESCO Publishing and Institute of Art and Law, 1998) at pp 57–80.

⁹¹ The 'Case of the Miskitos' of Nicaragua was the case in which the Inter-American Human Rights Commission came out in the most comprehensive defence of the collective rights of indigenous peoples. Case cited at: IACHR 'Report on the situation of human rights of a sector of the Nicaraguan population of Miskito origin', OAS/Ser.L/V/II.62.doc 10 rev.3 and doc 26, Washington, DC, 1984, p 12.

⁹² The Native American Graves and Repatriation Act (1991) in the United States is one of the most far-reaching of this type of legislation, incorporating as it does indigenous values. After its adoption, control over a large number of ritual and cultural objects and grave sites has been handed over from US museums to Indian tribes.

⁹³ This is discussed in more detail in Chapter 8.

heavily influenced by a western intellectual tradition. An example of this is the gap between the attitude of western archaeologists and Australian Aborigines towards Aboriginal rock art where the 'contextless' nature of Western concepts of art and archaeology was in direct conflict with the views of the local indigenous community; this led to young Aborigines touching up the fading rock art, much to the horror of the archaeologists.⁹⁴ In the context of New Zealand, there has been a resurgence of the importance placed on Maori cultural identity accompanied by growing demands that Maoris should define and interpret their own culture which has directly affected archaeologists, curators, ethnographers, and others working professionally with Maori culture and cultural remains.⁹⁵ There is a growing acceptance that Maoris are the primary owners of this heritage and Maoris are becoming increasingly uncomfortable with the idea of their cultural heritage forming part of a 'universal' cultural heritage held in common with all New Zealanders which could lead to white control of that heritage. This rejection of outside control extends to the publication in academic journals of views of their heritage which they find unacceptable: white scholars are viewed as 'cultural looters' and of encroaching on the Maoris' sense of continuity with the past. This is interesting since it takes the debate beyond the question of giving (or denying) consent for interference with sites of cultural importance to indigenous peoples to that of the control over understanding and interpreting this heritage.⁹⁶ What lies at the heart of this and other disputes is the question of who has the right to claim ownership and control of the past (and the material evidence thereof) and the underlying issue of whether such a thing as a single past exists.

In conclusion, it can be stated that the actors with an interest in the protection and safeguarding of cultural heritage are many and hold diverse interests and objectives in this process that, at times, collide. It is therefore not an easy question to assign rights and concomitant duties with regard to cultural heritage under international law and, as we shall see, depending on the aspect of heritage and the context within which safeguarding takes place, the nature of the rights and duties and even of the right- and duty-holders themselves and their mutual interactions will change. In sum, it is not possible to state one single approach to the protection of cultural heritage under international law: as we have seen and shall see

⁹⁴ Described in *The Politics of the Past* edited by Peter Gathercole and David Lowenthal (Routledge, 1994) at pp 7–10.

⁹⁵ Ilana Gershon, 'Being Explicit about Culture: Maori, Neoliberalism, and the New Zealand Parliament', *American Anthropologist*, vol 110, no 4 (2008): pp 422–31 examines the hazards of making Maori indigenous identity an explicit basis for legislation by looking at debates in the New Zealand Parliament on this issue.

⁹⁶ As described in Laurajane Smith, Anna Morgan, and Anita van der Meer, 'Community-driven Research in Cultural Heritage Management: The Waanyi Women's History Project', *International Journal of Heritage Studies*, vol 9, no 1 (2003): pp 65–80. With regard to this project, Smith notes elsewhere that in this project, 'basic assumptions about the physicality of heritage and its management were challenged, as the passing on of stories and cultural knowledge about sites and places to the appropriate people was identified as heritage "management"—a process of conserving the meaning and value of heritage places'. See: Laurajane Smith, 'Gender, Heritage and Identity', in *The Ashgate Research Companion to Heritage and Identity* edited by Brian Graham and Peter Howard (Ashgate Publishing, 2007) pp 159–80 at p 160.

further illustrated in the following chapters, cultural heritage means many things to many people (and groups of people) and the challenge facing international law in this field is to try to satisfy as many of the legitimate interests in heritage as possible while, at the same time, operating within a system primarily established by and for sovereign and equal States.