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Exploring the Borderlands:

The Role of Private Actors in International Cultural Law

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Valentina Vadi[1]

Introduction

Non-state actors lie at the heart of international cultural law. While states have been traditionally considered to be the subject of international cultural law, non-state actors—including non-governmental organisations (NGOs), multinational corporations, minorities, indigenous groups and local communities, armed groups and even individuals— have increasingly expanded their role.[2] Indeed, according to some scholars, 'human beings are becoming the primary international legal persons.'[3]

Private actors have essentially played a dual role in international cultural law: on the one hand, they can (and have) contribute(d) to the development of international cultural law, influencing its creation, implementation and enforcement.[4] At the same time, however, non-state actors can also negatively affect the protection of cultural heritage, for example by damaging or destroying monuments and sites. Therefore, the actions of non-state actors can both elicit the goals and strengths of international cultural law, and embody the borders and limits of the field.

When considering the positive contribution of non-state actors to international cultural law, it is clear that far from being mere addressees of international cultural law, private actors can (and have) enhance(d) the protection of cultural heritage through investing in its recovery and exhibition. Furthermore, non-state actors have

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[2] Philip R. Trimble, 'Globalization, International Institutions and the Erosion of National Sovereignty and Democracy' (1997) 95 *Michigan Law Review* 1944, 1946 (noting that 'In the past, international law concerned itself mostly with states … Now it increasingly concerns itself with private person[s], including multinational corporations … and it deals with subjects that traditionally were treated as purely domestic matters'.)

[3] *See generally* Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016).

[4] Duncan B. Hollis, 'Private Actors in Public International Law: *Amicus Curiae* and the Case for the Retention of State Sovereignty' (2002) 25 *Boston College International & Comparative Law Review* 235, 236 (highlighting that private actors 'exercise increasing influence in the creation, implementation, and enforcement of international norms').

enacted elements of cultural law and/or contributed to their adoption. For example, the International Council on Monuments and Sites (ICOMOS) and other NGOs have adopted a number of instruments concerning the protection of monuments.

If adjudication is considered to be a mode of governance, the expanding role of private actors in cultural heritage-related disputes has significantly contributed to the development of international cultural law. Private actors often file claims against states for the recovery of cultural property looted in times of war or for the violation of cultural entitlements before human rights courts and tribunals. In addition, private actors have filed admiralty claims to establish titles to sunken vessels, upon which, states have in turn asserted public-property and sovereign-immunity defenses. Foreign investors may also file claims against the host state alleging that the state's cultural policies amount to disguised discrimination or an indirect expropriation of an investment. Such disputes present a mixture of private and public interests, which at times coincide (*i.e.*, the mutual protection of a cultural item), and at times conflict (*i.e.*, the clash of private economic or cultural interests with collective cultural or economic entitlements).[5]

Beyond their positive contributions, the role of non-state actors in international cultural law also highlights the borders and limits of the field. Non-state actors formally remain a peripheral subject of international cultural law, while states remain at its epicentre.[6] Although the protection of cultural heritage can benefit individuals, local communities, and the international community as a whole, in certain cases, an excessive protection of cultural heritage can lead to scarce consideration (if any) of local communities' needs. Anthropologists argue that the traditional notion of conservation privileges the physical protection of cultural heritage, separating cultural heritage from its everyday context and its interaction with local communities. Anthropologists have referred to this decontextualization and dehumanisation of cultural heritage as 'heritagisation of culture'.[7] Moreover, non-state actors often do not consider themselves bound by international law. Their expanding role in the damage and destruction of cultural heritage challenges the traditional way in which state-centric organisations such as the United Nations have responded to international crises, and call for new and more effective approaches. For example, international cultural law often lacks dedicated dispute settlement and effective enforcement mechanisms, and the violations of cultural rights often do not receive the same condemnation as do those of other human rights.

This chapter explores the expanding role of non-state actors in the evolution of international cultural law, examining and critically assessing the challenges and opportunities offered by the participation of such actors. The chapter posits that non-state actors play a dual role in the development of international cultural law. On the one hand, non-state actors can be a force for good, fostering the evolution and strength of international cultural law. On the other hand, they can negatively affect the protection of cultural heritage, unless dedicated steps are taken to minimise such risks.

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[5] Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999) 197–98.

[6] Hollis, 'Private Actors in Public International Law', 237 (noting that 'states remain at the epicenter of international law').

[7] Chiara de Cesari, 'World Heritage and Mosaic Universalism' (2010) 10 *Journal of Social Archaeology* 307.

The chapter proceeds as follows. First, it outlines the main features of international cultural law. Second, it examines the expanding role of private actors in the making and evolution of international cultural law, particularly addressing the question of whether non-state actors can be a force for good. Third, the chapter lists the specific risks that non-state actors can pose to the protection of cultural heritage. It then discusses the sociology of international cultural law, and subsequently scrutinises certain critical areas of international law in which the interaction between states and non-state actors results in clashes. Finally, the chapter concludes with suggestions of how to gradually rethink the field.

1. Global Cultural Governance

Cultural governance has come of age. Once the domain of elitist scholars and practitioners, cultural governance—defined as the multi-level, multi-polar and polyphonic regulation of cultural heritage—has emerged as a new frontier of study and has come to the forefront of legal debate.[8] This section examines the features of global cultural governance, with a particular focus on its rule-making and enforcement processes.

Cultural governance is both vertically and horizontally fragmented. Cultural governance is vertically multi-level in nature, as different layers of regulations enacted at different levels—international, regional and national—can conflict and/or overlap.[9] It is also multi-polar, as a number of different bodies—ranging from international administrative bodies to private actors—govern cultural heritage. Moreover, cultural governance is also horizontally fragmented, as these regulations often have different legal objects of protection, such as world heritage, intangible cultural heritage or cultural diversity, among others. The lack of *a priori* coordination can therefore result in gaps in the overall protection of cultural heritage.

A leading role in cultural governance has been played by the United Nations Educational, Scientific and Cultural Organization (UNESCO).[10] UNESCO was formed in the aftermath of WWII due to the rising awareness 'that a peace based exclusively upon the political and economic arrangements of governments' would not long endure.[11] Therefore, the organisation's mandate is 'to build peace in the minds of men' through the wide diffusion of culture and education.[12] To do so, UNESCO has elaborated a critical mass of cultural law instruments, including conventions, non-binding but influential declarations, and guidelines, which have gradually extended the scope of cultural heritage law. UNESCO's law-making has

[8] See, *e.g.*, Barbara T. Hoffmann (ed.), *Art and Cultural Heritage – Law, Policy and Practice* (CUP 2006); James A.R. and Ann M. Nicgorski (eds.) *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce* (Martinus Nijhoff 2009).

[9] See Jean-Baptiste Harelimana, *La defragmentation du droit international de la culture: Vers une Cohérence des norms internationals* (L'Harmattan 2016) (proposing methods for defragmenting international cultural law).

[10] UNESCO Constitution, London, 16 November 1945, in force on 4 November 1946. 4 UNTS 275 (1945).

[11] UNESCO Constitution, preamble.

[12] *Ibid.*

raised awareness of the importance of heritage protection and spurred the development of regional and domestic cultural policies.[13]

UNESCO rule-making is characterised by its interdisciplinary perspective. Not only lawyers and/or political scientists have contributed to the drafting of the *travaux préparatoires* of UNESCO instruments; rather, archaeologists, architects and engineers have participated as well. Furthermore, even the academic literature investigating cultural governance is interdisciplinary, often representing diverse professional expertise, even within the legal field. It is not uncommon for cultural heritage law scholars to practice different areas of law, such as private law, commercial law, intellectual property law, international law and EU law.

As rule-making in the cultural field 'has not been matched by a corresponding development of enforcement procedures and mechanisms',[14] many cultural heritage-related disputes have been adjudicated by *borrowed* fora, *i.e.*, courts or tribunals established within other branches of law. In fact, 'no general court exists or is being considered in the field of cultural heritage'.[15] Therefore, cultural heritage disputes have been adjudicated through a variety of mechanisms, including diplomatic efforts, negotiations, mediation, conciliation, arbitration, and judicial proceedings. Given the structural imbalance between the vague and nonbinding dispute settlement mechanisms provided by international cultural law instruments and the highly effective and sophisticated dispute settlement mechanisms available under other branches of international law, cultural heritage disputes have often been brought before various fora.[16] A number of courts and tribunals have adjudicated heritage-related disputes, such as national courts, human rights courts, regional and international economic courts and the traditional state-to-state fora such as the International Court of Justice or inter-state arbitration. The existence of highly sophisticated dispute settlement mechanisms in other areas of international law, however, risks eclipsing the value of international cultural law, which lacks a comparable mechanism.

2. The Role of Non-state Actors

Private actors play a dual role in international cultural law.[17] That is, they can be both a positive or negative force affecting the protection of cultural heritage. This section

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[13] *See generally* Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO, Normative Action in Education, Science and Culture* (vol. I) (UNESCO 2007).

[14] Francesco Francioni and James Gordley, 'Introduction', in Francesco Francioni and James Gordley (eds.) *Enforcing International Cultural Heritage Law* (OUP 2013) 1–5, 1–2 (providing 'a multi-level analysis of the possible approaches to the enforcement of international cultural heritage law.').

[15] Id. 2.

[16] See Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014) 129–134 (considering the role of international investment law as a tool for the enforcement of cultural heritage law); Federico Lenzerini, 'The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage', in Francioni and Gordley (eds.) *Enforcing International Cultural Heritage Law*, 40–64 (considering international criminal law as a tool for the enforcement of cultural heritage law).

[17] Alessandro Chechi, 'Non-State Actors and Cultural Heritage: Friends or Foes?' in Elena Rodríguez Pineau and Soledad Torrecuadrada García–Lozano (eds.) *Bienes Culturales y Derecho* (Universidad Autónoma de Madrid 2015) 457–479, 460 (arguing that non-state actors 'can be regarded, at the same time, as "defenders" and "enemies" of cultural heritage.')

illuminates the opposing roles that non-state actors play with regard to the protection of cultural heritage.

A. Risks: Various Types of Iconoclasm

As previously stated, non-state actors can affect the protection of cultural heritage by damaging or destroying monuments and sites. This sub-section examines the destructive force of certain types of non-state actors. In particular, it uses the notion of iconoclasm as a useful conceptual tool encompassing a broad range of actions, including damage and destruction.[18] Three types of iconoclasm can be identified – religious iconoclasm, political iconoclasm and economic iconoclasm – depending on the prevailing motives driving the iconoclasts.[19] Although the boundaries between these three types are rather fluid, the notion of iconoclasm is a useful working tool or heuristic device for legal analysis.

Religious iconoclasm is driven by religious considerations. Religion-related arguments against images and works of arts include the notion that the divine cannot be confined, nor can it be represented in material form; and that devotion to images can prevent or divert real devotion to the sacred through venerating the image itself, rather than what it represented. Aniconism—the absence of figurative elements in art—characterises several religions.[20] In addition, prudish iconoclasm—destruction or material transformations of artworks due to prudery—has not been uncommon throughout history.[21] Examples of religious iconoclasm to date include the 16th century Reformers such as Huldrych Zwingli (1484–1531) and John Calvin (1509–1564), who considered religious images as forms of idolatry.[22] During this period, the Iconoclastic Fury ravaged Europe, destroying religious icons, monuments and paintings.[23] More recently, in 2001, the Taliban destroyed two massive Buddha statues in Afghanistan's Bamiyan Valley, considering non-Islamic art a symbol of idolatry.[24] This type of iconoclasm has recently resurfaced in the Middle East and North Africa as armed groups have damaged and or destroyed shrines, ancient manuscripts and archaeological sites in addition to engaging in a parallel illicit trade

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[18] See Stacy Boldrick, 'Introduction: Breaking Images', in Stacy Boldrick, Leslie Brubaker, Richard S. Clay (eds.), *Striking Images, Iconoclasms Past and Present* (Asghate 2013) 1, 2.

[19] See Jens Braarvig, 'Iconoclasm: Three Modern Cases', in Kristine Kolroud, and Marina Prusac (eds.) *Iconoclasm from Antiquity to Modernity* (Ashgate 2014), 153–170 (distinguishing three types of iconoclasm: 1) religious iconoclasm; 2) ideological iconoclasm; and 3) economic iconoclasm).

[20] See James Noyes, *The Politics of Iconoclasm: Religion, Violence and Culture* (I.B. Tauris, 2013) (noting that iconoclasm has been a formative feature of both Christian and Islamic history, crossing the boundaries of religion, culture and politics'). On aniconism in Islamic art, see Oleg Graba, 'From the Icon to Aniconism: Islam and the Image' (2003) 55 *Museum* 46–53 (noting that Islamic art discourages figurative art but that some images have found their way in the same). See also *Proceedings of the Doha Conference of 'Ulama on Islam and Cultural Heritage December 30–31, 2001* (UNESCO 2005) 19–20 (addressing the question as to whether non-islamic heritage is entitled to preservation in Islamic cultures and answering in the positive).

[21] See Louis Réau, *Histoire du Vandalisme: Les monuments détruits de l'art français, Tome I, Du haut moyen âge au dix-neuvième siècle* (Hachette, 1959), at 21, quoted by Lauren Dudley, 'A Timeless Grammar of Iconoclasm?' (2014) *Journal of Art Historiography* 1, 5.

[22] See Carlos M.N. Eire, *War against the Idols: The Reformation of Worship from Erasmus to Calvin* (CUP, 1989) (noting that the Reformed tradition excluded images from churches considering them idolatrous and stressed the inability of the material world to represent the spiritual world.)

[23] See e.g. David Freedberg, *Iconoclasm and Painting in the Revolt of the Netherlands, 1566–1609* (Garland, l988).

[24] R. Bernbeck, 'Heritage Void and the Void as Heritage' (2013) *Archaeologies* 526, 529–532 (arguing that the destruction of the Buddhas was due to *Kulturpolitik* rather than religious reasons).

in antiquities.[25] While the UNESCO Director General described such destruction as a 'crime against culture',[26] the response of international law to acts of deliberate destruction of cultural heritage remains unsettled.

Political iconoclasm is ideologically motivated and constitutes a dimension of broader political violence.[27] Modern examples of political iconoclasm include the destruction of religious images during the French Revolution, and the destruction of cultural artifacts in China and Tibet as part of the Cultural Revolution.[28] Some iconoclastic acts can exist between political and religious iconoclasm and express both types of violence. For example, some scholars have interpreted Taliban iconoclasm as a political act, despite the religious arguments formally adduced for the destruction of the Buddhas.[29]

Today, an additional and significant form of iconoclasm exists: economic iconoclasm, which is the inexorable destruction of cultural sites as a result of yielding to economic development needs.[30] Economic iconoclasm is driven by economic motivations, emphasising economic values over cultural values.[31] While economic interests have often prevailed over cultural concerns, the destruction of cultural objects for accumulating wealth has reached an unprecedented scale in recent years. Landscape is increasingly restructured along neoliberal visions.[32] Furthermore, urban development, foreign investments, and economic globalisation undeniably transform societies and landscapes.[33] The more economically valuable the site, the greater the political pressure against protecting it.[34] Cultural sites, therefore, can and have become a battlefield between conservationists and developers.[35]

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[25] Marina Lostal and Guilherme Vasconcelos Vilaça, 'The Bamiyazation of Cultural Heritage and the Silk Road Economic Belt: Challenges and Opportunities for China', (2015) 3 *Chinese Journal of Comparative Law* 329 , 334 (reporting the destruction of ancient manuscripts in Mali and the devastation of the heritage belonging to the Sufi religious minority in Libya); Id. 336 (reporting the destructions of archaeological sites of Nimrud and Hatra in Iraq and Palmyra in Syria and the parallel illicit trade in antiquities.)

[26] Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14 EJIL 619, 621.

[27] *See generally* Andrew Herscher, *Violence Taking Place – The Architecture of the Kosovo Conflict* (Stanford University Press 2010) (discussing the deliberate destruction of cultural heritage during the conflict in Kosovo).

[28] Rodney Harrison, *Heritage: Critical Approaches* (Routledge 2003) 177; Braarvig, 'Iconoclasm – Three Modern Cases', 166 (discussing the destruction of Tibetan heritage).

[29] Finbarr Barry Flood, 'Between Cult and Culture: Bamiyan, Islamic Iconoclasm, and the Museum' (2002) 84 *The Art Bulletin* 641, 653 (interpreting Islamic iconoclasm as 'a form of protest against exclusion from an international community').

[30] Braarvig, 'Iconoclasm: Three Modern Cases', at 153. See James Noyes, 'Iconoclasm in the Twentieth century: Machines, Mass Destruction and Two World Wars', in Stacy Boldrick, Leslie Brubaker and Richard Clay (eds) *Striking Images, Iconoclasms Past and Present* (Ashgate 2013) (calling economic iconoclasm 'industrialized iconoclasm' and discussing the relationship between industrial progress and iconoclasm).

[31] Braarvig, 'Iconoclasm: Three Modern Cases', at 153–154.

[32] Liew Kai Khiun and Natalie Pang, 'Neoliberal Visions, Post-capitalist Memories: Heritage Politics and the Counter-Mapping of Singapore's Cityscape' (2015) 16 *Ethnography* 331, 332.

[33] Id. at 334.

[34] Susan Marsden, 'Heritage as Politics' (2011) 3 *Flinders Journal of History and Politics* (discussing the Southern Australian experience).

[35] Id. at 3 (reporting this criticism and noting developers have compared conservationists, historians and heritage experts to 'extremists').

Despite their varying driving motives, the different types of iconoclast acts share a common denominator: the struggle for power. Iconoclasm is deeply linked to cultural politics, which can be defined as the relationship between culture and power.[36] Heritage, for example, is a matter of political choices about what communities choose to remember.[37] The presence of cultural and religious minorities can complicate local heritage politics.[38] There is a risk that the majoritarian rule disproportionately affects the heritage of cultural and religious minorities, thus potentially affecting their cultural entitlements. Moreover, iconoclasm arguably epitomises the clash of civilisations, which is the hypothesis that people's cultural and religious identities will be the primary source of conflict in the post-Cold War world.[39] In short, iconoclasm is ultimately led by a combination of religious, political and economic interests.[40]

B. Opportunities: Non-State Actors as a Force for Good

Private funding is necessary to recover and protect cultural heritage. The fact that some aspects of cultural heritage governance have been privatised has arisen as a subject of fierce criticism by art historians, who warn again overemphasising the economic dimension of heritage.[41] Nevertheless, the need for cooperation between the private and public sectors is particularly evident in times of economic crisis.[42] Private companies can sponsor the protection of cultural heritage and/or provide funding for conservation and protection. Indeed, private museums, dealers and auction houses are the 'driving force of international art trade'.[43]

Private actors have increasingly contributed to the making, monitoring and implementation of international cultural law. For example, the International Council of Museums (ICOM) has produced self-regulatory instruments, guidelines and codes providing guidance to the relevant members—texts that are of crucial importance in the sector.[44] ICOM has also established an International Observatory on Illicit Traffic in Cultural Goods, to 'serve as a permanent international cooperative platform and network between international organisations, law enforcement

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[36] Daniel Chandler and Rod Munday, 'Cultural Politics', *A Dictionary of Media and Communication* (Oxford University Press 2011) (Defining cultural politics as 'the issue, and study, of relationships between culture, subjectivity, ideology, and power: including issues of race, class, and gender.').

[37] Rodney Harrison (ed.) *Understanding the Politics of Heritage* (Manchester University Press, 2010) (discussing the political roles of heritage).

[38] For discussion, see *e.g.* Masha Halevi, 'Contested Heritage: Multilayered Politics and the Formation of the Sacred Space — The Church of Gethsemane as a Case Study' (2015) 58 *The Historical Journal* 1031–1058 (discussing the political conflicts and national needs and interests which influenced the rebuilding of a sanctuary in Jerusalem).

[39] On the alleged clash of civilizations, see Samuel P. Huntington, *The Clash of Civilizations?* (Simon & Schuster 1996).

[40] Braarvig, 'Iconoclasm: Three Modern Cases', at 154 (noting that although religious, political and cultural iconoclasm constitute useful 'heuristic devices', in practice each of the three types of iconoclasm 'is linked to the other two.')

[41] See Salvatore Settis, *Italia S.p.A* (Einaudi 2002).

[42] See 'Italy PM calls on Businesses to Fund Pompeii Repairs', *BBC News*, 4 March 2014.

[43] Chechi, 'Non-State Actors and Cultural Heritage: Friends or Foes?', 460.

[44] See ICOM Code of Ethics for Museums, adopted in 1986 and revised in 2004, available at http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf (last visited on 11 October 2016) (setting minimum standards of professional practice and performance for museums and their staff.)

agencies, research institutions and other external expert stakeholders'.[45] In 2011, ICOM and the Arbitration and Mediation Center of the World Intellectual Property Organization developed a special mediation process for art and cultural heritage disputes. The International Council on Monuments and Sites (ICOMOS) has also contributed to the making, monitoring and implementation of international cultural instruments.[46] ICOMOS has adopted many instruments on the protection of monuments.[47] In parallel, as one of the advisory bodies to the World Heritage Committee—the committee responsible for the implementation of the World Heritage Convention—ICOMOS also evaluates the cultural and mixed properties proposed for listing and prepares reports on their state of conservation.[48]

Private actors have also contributed to the implementation and enforcement of international cultural law. Private actors often file claims against state organs for the recovery of cultural property looted in times of war, or for the violation of their cultural entitlements. In doing so, non-state actors have played an important role in the emergence of the *lex culturalis*, a collection of rules and principles requiring the return of stolen cultural goods.[49] For example, in the *Altmann* case, the Supreme Court of the United States held that the government of Austria could not enjoy sovereign immunity in relation to a civil action brought by Maria Altmann before US Courts for the return of Klimt's paintings, which Austria had obtained as a consequence of Nazi persecution of Austrian Jews.[50] Maria Altmann was the niece of Adele Bloch-Bauer, a wealthy Jewish patron of the arts, who served as the model for some of Klimt's best-known paintings, and who hosted a renowned Viennese salon that regularly attracted the most prominent artists of the day. The parties in this case agreed to arbitrate their dispute, and the award resulting from the arbitration required Austria to return the paintings to the claimant. Altmann subsequently consigned the Klimt paintings to Christie's auction house to be sold on behalf of her family. The painting '*Portrait of Adele Bloch-Bauer I*' (1907) was sold to a private collector, Ronald Lauder, and since its sale has been on public display in the Neue Galerie in New York City. This is only one example of the many cases which have centered on the return of cultural goods.

Private actors may also influence the arena of international cultural law by helping to locate and recover underwater cultural heritage. In recent years, the advancement of technology has made it possible to find, visit and remove artefacts from shipwrecks that have been remained untouched in the abyss for centuries. The increasing capability to reach these archaeological treasures has intensified the debate on management issues. Non-state actors file admiralty claims for establishing their title to sunken vessels, on which in turn, states may claim public property and sovereign

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[45] ICOM, ICOM's International Observatory on Illicit Traffic in Cultural Goods, available at http://icom.museum/programmes/fighting-illicit-traffic/icoms-international-observatory-on-illicit-traffic-in-cultural-goods/ (last visited on 11 October 2016).

[46] ICOMOS is a non-governmental international organization dedicated to the conservation of the world's monuments and sites. Based in Paris, it was founded in 1965.

[47] See *e.g.* the Florence Charter 1981 on Historic Gardens, adopted by ICOMOS as an addendum to the Venice Charter in December 1982, available at http://www.international.icomos.org/charters/gardens_e.pdf (Accessed 11 October 2016).

[48] Operational Guidelines for the Implementation of the World Heritage Convention, WHC 13/01, 2013, paras. 30–1, 34–5, 143–151.

[49] *See generally* Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (OUP 2014).

[50] *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S. 677 (U.S. 2004). Opinion of the Court and Dissident Opinions.

immunity.[51] While private actors have claimed possession rights under the law of salvage and sold the artefacts, the scientific community and the public at large are often interested in and demand the preservation of such cultural heritage. At the same time, states lack the resources to locate and recover this type of heritage, and the contribution of non-state actors is likely necessary to find these kinds of artefacts in the first place.

When non-state actors file claims against states or submit friend-of-the-court briefs before domestic, regional and international jurisdictions,[52] the cultural interests at stake may present a complexity that is distinct among other areas of the law. Such cases engage a mixture of private and public interests, which at times coincide (*e.g.,* when both require the protection of the cultural item), and at other times conflict (*i.e.*, when the private economic or cultural interests clash with collective cultural or economic entitlements).

3. Exploring the Borderlands of International Cultural Law

Non-state actors clearly play an increasingly important role in the creation, implementation, and enforcement of international cultural law, which can present both a destructive or positive force. It is therefore critical to consider the many implications of the expanding role of non-state actors in international cultural law. This section addresses this high-level question in relation to five key areas of global cultural governance: 1) democracy; 2) effectiveness; 3) humanisation; 4) risk of politicisation; and 5) the linkage issue.

First, the contribution of non-state actors to the making of international cultural law raises questions as to the representativeness of the law. It remains unclear whether international cultural law is truly a democratic system expressing the voices of multiple constituencies, including both states and non-state actors. For example, global cultural governance tends to favour experts over non-experts; the relevant epistemic communities and networks largely consist of technocrats, professionals, and specialists. Under global cultural governance, decision-making processes therefore tend to be elitist and opaque, and express top-down approaches. Such approaches may not necessarily be responsive to local needs. However, this is not to say that international cultural law is an undemocratic system or that it is not becoming more and more polyphonic. On the one hand, the firm state-centric nature of international cultural law would maintain its relative conformity with other branches of international law. On the other hand, UNESCO law can be seen as an expression of indirect democracy. Populations select their governments, which then represent their respective states' interests before international *fora.* Moreover, as previously noted, non-state actors have increasingly enacted soft law instruments and/or participated in the making of international cultural law.

Second, the contribution of non-state actors to the implementation and enforcement of international cultural law raises questions about the effectiveness of the latter. Most international cultural law instruments have a 'soft' character and are not

[51] See *e.g.* Valentina Vadi, 'Underwater Cultural Heritage and the Market: The Uncertain Fate of Historic Sunken Warships under International Law', in Valentina Vadi and Hildegard Schneider (eds.) *Art, Cultural Heritage and the Market: Ethical and Legal Issues* (Springer, 2014) 221–256.
[52] Chechi, 'Non-State Actors and Cultural Heritage: Friends or Foes?', 461.

binding. Even those international cultural law instruments that have a binding character often explicitly lack supremacy vis-à-vis other international treaties. They often include obligations of means rather than results. Therefore, states have a wide margin regarding how to implement their obligations under these instruments. This flexibility can be a positive aspect of global cultural governance, as it enables states to strike the appropriate balance between different interests.

Third, an excessive emphasis on the protection of cultural heritage without sufficient input of the relevant stakeholders risks overprotecting heritage vis-à-vis other fundamental human needs and values.[53] Anthropologists have discussed the risks of heritagisation processes, whereby items of heritage are overprotected irrespective of the impact of such overprotection on local communities' needs. While respect of human rights is built into UNESCO treaties in theory, in practice there has been scarce community engagement, which has produced significant repercussions in the implementation of international cultural law.

In Egypt, the vernacular architecture of the village of Gurna has been destroyed for 'preserving the authorized, more highly valued heritage' in Luxor.[54] In Kenya, indigenous communities have been evicted from their ancestral land, because the state prioritized protecting a world heritage site.[55] In Tanzania, the reported failure to involve local ethnic groups and to support their religious and spiritual connection with the Mongomi Wa Kolo Rock Paintings World Heritage Site has caused their exclusion from the management of the site.[56] In China, more than 20,000 residents of Pingyao, an exceptionally well-preserved ancient city and a World Heritage Site, were relocated in order to purportedly protect the cultural site.[57] Once transformed into a World Heritage Site, the town has been 'frozen in time, and the daily lives of [its] local residents were forever changed.'[58] Meanwhile, in Angkor, Cambodia, another World Heritage Site, 'local villagers have been excluded from the site or marginalized by various authorities in the name of conservation and tourism promotion'.[59] In short, top-down approaches in policy-making risk overprotecting heritage vis-à-vis other human needs.

It is important to consider why international law protects heritage, whether it is because of its historical nature, or because of its importance to humankind. In other words, international law can conserve heritage as a 'frozen idealized past', or

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[53] See generally Mathew Humphrey, *Preservation Versus the People? Nature, Humanity, and Political Philosophy* (OUP 2002).

[54] Jonathan S. Bell, 'The Politics of Preservation: Privileging One Heritage over Another', (2013) 20 *International Journal of Cultural Property* 431, 440–441.

[55] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (*Endorois Decision*), African Commission on Human and Peoples' Rights, Decision on Communication 27/6/2003, adopted at the 46th Ordinary Session held from 11–25 November 2009 in Banjul, The Gambia.

[56] Emmanuel J. Bwasiri, 'The Implications of the Management of Indigenous Living Heritage: The Case Study of the Mongomi Wa Kolo Rock Paintings World Heritage Site, Central Tanzania' (2011) 66 *South African Archaeological Bulletin* 60, 62.

[57] Don Mills, 'Residents Evicted From Ancient City: Pingyao Heritage Site', *National Post*, 4 September 2002, A12.

[58] Shu-Yi Wang, 'From a Living City to a World Heritage City: Authorized Heritage Conservation and Development and Its Impact on the Local Community' (2012) 34 *International Development Planning Review* 1–17, 5.

[59] Keiko Miura, 'Conservation of a Living Heritage Site: A Contradiction in Terms?', (2005) 7 *Conservation and Management of Archaeological Sites* 3–18.

conserve it 'for the people'.[60] Cultural heritage 'is inextricably intertwined with its … social, cultural and economic context'.[61] Therefore, not only the tangible aspects of heritage, but also its intangible values should be considered in the conservation of cultural heritage.[62] Acknowledging 'the social dynamics of heritage' and 'the interaction between people and their heritage' enables 'synergies between modern science and local knowledge', between tangible and intangible heritage and between local and universal values in the conservation of cultural heritage.[63] It is on the basis of these principles that human rights bodies have condemned the forced eviction of local communities from heritage sites and emphasised the need to humanise cultural heritage law.

Fourth, politics lies at the heart of any heritage policy. The interest of locals and that of the international community often coincide, as both local and international communities have an interest in the conservation of cultural heritage sites. However, when interests collide, national authorities (and adjudicators) face the dilemma of whether to comply with international cultural law or to fulfil their mandate according to the preferences of their constituencies. For example, the Elbe Valley—a former world heritage site located in Germany—was removed from the World Heritage List after local authorities decided to approve a project to build a four-lane bridge. In other cases, the reaction of UNESCO has been milder, even in the presence of larger-scale damage and destruction. For example, the Bamiyan Valley was inscribed on the World Heritage List after the destruction of the Buddhas by the Taliban.

Finally, the lack of dedicated courts and tribunals can be problematic for international cultural law. As cultural heritage-related disputes often lie at the heart of state sovereignty, states have not been able to agree on establishing dedicated international courts and tribunals. This gap results in a form of 'diaspora' of cultural heritage-related disputes before alternative courts and tribunals, which may lack the mandate to adjudicate on the violation of cultural heritage law. The magnetism of other *fora* prompts the question of whether cultural heritage can receive adequate consideration in adjudication before fora that are not designed for such disputes. While some overlapping is inevitable among various areas of international law, it is important to examine and identify what steps should be taken to ensure mutual supportiveness between different treaty regimes. With the notable exception of the International Criminal Court (ICC), which has the mandate to adjudicate on the damages and/or destruction of cultural sites under Article 8(2)(e)(iv) of the ICC Statute, other courts and tribunals do not have the mandate to adjudicate on the eventual violation of cultural heritage law, which has led to the emergence of interesting cases in which important cultural issues were mentioned in passing and/or given various weights.[64]

[60] Id. at 5.
[61] Bell, 'The Politics of Preservation', 434.
[62] Id. 433.
[63] Miura, 'Conservation of a Living Heritage Site', 5.
[64] Valentina Vadi, 'Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage' (2015) 18 JIEL 51–77.

4. Rethinking Cultural Governance

The emerging debate surrounding the role of non-state actors in international cultural law has certainly 'shed new light on the dynamics of international law-making and international law enforcement, which have long been underestimated in a state-centric normative system.'[65] Not only can non-state actors participate in the production of international law instruments and soft law standards, but they also play a central role in the monitoring and enforcement of international cultural law.[66] At the same time, the expanding role of non-state actors also suggests a need to significantly rethink the enforcement mechanisms of international cultural law.

First, the importance of the protection of cultural heritage to individuals, communities, nations and the international community as a whole suggests that policy makers should consider introducing *ad hoc* provisions even in non-cultural international instruments. This would help in defragmenting international law, and in overcoming the risk that international cultural law could be perceived as a self-contained regime. Even in the absence of such ad hoc provisions, *de lege lata*, international cultural law is a part of international law to be construed in accordance with the ordinary rules of treaty interpretation as indicated in articles 31 and 32 of the VCLT.

Second, the *democratisation* of international cultural law is bringing certain non-state actors' claims from the former 'periphery' to the centre of the legal debate.[67] Non-state entities, such as individuals and groups (e.g., indigenous peoples, NGOs) used to be mere 'objects' of international law 'on the periphery of the international legal order', but are now increasingly playing an active role in international relations.[68]

Third, the debate on the role of non-state actors contributes to the *humanisation* of international law, making it more porous to other interests and needs which go beyond the reason of state (*raison d'état*) and acknowledge the respect for human dignity and fundamental human rights. Cultural heritage objects are not just objects. They can tell us different narratives depending on the perspective one adopts; they embody different meanings to different audiences. Policy makers and adjudicators should capture these different values.

Fourth, the debate regarding non-state actors contributes to counteracting *heritigisation* processes within international cultural law, which emphasise the protection of heritage because of its intrinsic features ('heritage is heritage'). The discussion of the expanding role of non-state actors contextualises heritage within a broader framework—that of the local and international communities. In other words, cultural objects are viewed against the background of human history. Heritage is not an abstract value; rather, it matters to a variety of actors who attach different narratives to the same objects. In short, the debate on the role of non-state actors ultimately highlights the human dimension of international cultural law.[69]

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[65] Jean D'Aspremont 'Introduction: Non-state Actors in International Law: Oscillating Between Concepts and Dynamics', in Jean D'Aspremont (ed.), *Participants in the International Legal System* (Routledge 2011) 1–21, at 1.

[66] Chechi, 'Non-State Actors and Cultural Heritage: Friends or Foes?', 460–1.

[67] Vadi and Schneider, 'Art, Cultural Heritage and the Market: Legal and Ethical Issues', 1, 16.

[68] Id.

[69] Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: an Introduction' (2011) 22 EJIL 688.

Fifth, the debate about the role of individuals in international cultural law contributes to the consolidation of cultural rights in the human rights pantheon. While cultural rights have been marginalised historically vis-à-vis civil and political rights, they have recently undergone a renaissance—as shown by the vast number of related studies published in the past decade. Access to cultural heritage can be instrumental to the enjoyment of cultural rights. Although a right to cultural heritage does not yet exist in the human rights pantheon, rights relating to cultural heritage are arguably inherent in cultural rights. For example, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) recognises that 'every person has a right to engage [in] the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right to participate freely in cultural life'.[70] The protection of cultural heritage is clearly connected to other human rights, including self-determination, freedom of expression and religious freedoms, among others. A human rights-based approach to cultural heritage centres on the human dimension of heritage discourse, expressing 'the need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage'.[71] As the UN Independent Expert on Cultural Rights, Farida Shaheed, articulated,

> 'Beyond preserving/safeguarding an object . . . in itself, [such an approach] obliges one to take into account the rights of individuals and communities in relation to such objects . . . and, in particular, to connect cultural heritage with its source of production. Cultural heritage is linked to human dignity and identity. Accessing and enjoying cultural heritage is an important feature of being a member of the human society'.[72]

Finally, the debate on the expanding role of non-state actors in international cultural law allows for reflection on the meaning of justice and whether the existing legal framework enables access to justice and to effective remedies. The Vienna Convention on the Law of Treaties (VCLT)[73] requires adjudicators to settle disputes in conformity with the principles of justice and international law'.[74] This will have to be a case-by-case assessment.

Conclusion

Non-state actors are in many ways the core of international cultural law. Their actions can elicit the goals and strengths of international cultural law, but can also reveal and confront the limits of the field. It is critical to dissect and understand the

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[70] Council of Europe Framework Convention on the Value of Cultural Heritage for Society, preamble, 27 October 2005, CETS No. 199 (Faro Convention).
[71] Faro Convention, preamble.
[72] UN GA, HRC, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed,21 March 2011, UN Doc.A/HRC/17/38, para. 2, available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Report%20of%20Farida%20Shaheed.pdf (last visited on 13 October 2016).
[73] Vienna Convention on the Law of Treaties (VCLT). Vienna, 23 May 1969, in force 27 January 1980, UNTS vol. 1155, p. 331.
[74] VCLT, preamble (affirming that 'disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law').

expanding role of non-state actors in order to determine the appropriate response by international cultural law.

On the one hand, the participation of private actors can spur the evolution and progress of international cultural law in conformity with public international law. Such actors can play a positive role in the development of international cultural law, contributing to rule-making and to the conservation and safeguarding of heritage. On the other hand, there is a 'hegemonic discourse about heritage' that 'undermines alternative … ideas about heritage'.[75] The discourse about and management of heritage has become the 'near-exclusive domain of experts', separated from the traditional heritage holders.[76] At the same time, political, religious and economic iconoclasm by non-state actors can provoke the damage to or destruction of valuable cultural heritage. Such actions highlight the urgent need to rethink the field and build bridges across different fields of international law. The emerging role of non-state actors requires particular reconsideration of the available dispute settlement and enforcement mechanisms, as well as the linkage issue.

[75] Laurajane Smith, *Uses of Heritage* (Routledge 2006) 11.

[76] Lucas Lixinski, 'International Cultural Heritage Regimes, International Law, and the Politics of Expertise', (2013) 20 *International Journal of Cultural Property* 407, 410.