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A Third Way of Thinking about Cultural Property

Lucas Lixinski

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A THIRD WAY OF THINKING ABOUT CULTURAL PROPERTY

*Lucas Lixinski**

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INTRODUCTION

In 1986, the late John Merryman published a famous article titled “Two Ways of Thinking about Cultural Property.”¹ In brief, this article posited that, when thinking about the legal protection of cultural property, which is largely understood to

* Associate Professor, Faculty of Law, UNSW Sydney. This piece is based largely on a talk given at Brooklyn Law School in October 2017, titled “A Third Way of Thinking about Cultural Property: Community-Centric Heritage in International Law.” I am very thankful to Julian Arato and the BLS International Law Society for the invitation. This article also benefitted from a visiting fellowship at Sidney Sussex College (Cambridge) during January-March 2018, and from the input of audiences at Cambridge and Durham. I am also thankful to Matthew Kingsland for the research assistance. All errors remain my own.

1. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831 (1986) [hereinafter Merryman, *Two Ways of Thinking About Cultural Property*].

include objects, monuments, sites, and cultural practices of significance,² there were two competing narratives. One focuses on national sentiment attached to heritage, and the other sees heritage as a piece in a larger internationalist puzzle.³ Merryman supported the latter version and denounced the former's legal and political shortcomings. Since publication, Merryman's article has been referred to as "seminal,"⁴ and it has been a defining moment in thinking about cultural property or heritage⁵ in international legal scholarship. At the same time, Merryman's piece has created an ultimately dangerous dichotomy in the field.

This article argues that this dichotomy, while it admittedly played a role in the making of this field of international law, has long outlived its utility. Further, and more importantly, it argues that the dichotomy has had the unintended consequence of excluding key actors from international decision-making about heritage (particularly communities, broadly defined for the purposes of this article as the groups that live in, with, or around heritage), with the ultimate effect that it creates the preconditions for heritage to disappear by removing incentives for its

2. On the range of things that fall under the concept, see Janet Blake, *On Defining the Cultural Heritage*, 49 INT'L & COMP. L.Q. 61 (2000) [hereinafter Blake, *On Defining the Cultural Heritage*].

3. Merryman, *Two Ways of Thinking About Cultural Property*, *supra* note 1, at 831–32.

4. See, e.g., Joseph P. Fishman, *Locating the International Interest in Intransitional Cultural Property Disputes*, 35 YALE J. INT'L L. 347, 359 (2010) (referring to the article as "seminal"). These claims, and further scholarly engagement with Merryman's argument, will be further discussed below.

5. There is a fair amount of discussion on the issue of terminology, suggesting that the term "cultural property," the term in older treaties, refers to culture in a way that is less morality-laden, whereas "cultural heritage" better encapsulates cosmopolitan values around heritage (while unintentionally excluding economics from heritage). Even if "cultural heritage" is the current term of art in most non-US legal circles, however, this author has come to advocate for a return of the term "cultural property," at least inasmuch as it better bridges the gap between domestic and international, and therefore provides clearer avenues for the exercise of community agency and control over heritage, as discussed below. For the discussion of this shift from "property" to "heritage", see Francesco Francioni, *A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage*, in STANDARD-SETTING IN UNESCO VOLUME 1: NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE 237 (Abdulqawi A. Yusuf ed., 2007) [hereinafter Francioni, *A Dynamic Evolution of Concept and Scope*]; and Lyndel V. Prott & Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, 1 INT'L J. CULTURAL PROP. 307 (1992).

safeguarding on the ground. In other words, a system created to safeguard heritage, by excluding communities, in effect endangers it.

Thus, a third way of thinking is not one that adds just another actor through whose prism to frame the law and its effects; rather, it is a way of pluralizing access to law- and decision-making. By including communities, it is possible to challenge the notion of cultural property as belonging to states and national projects (a narrative that is deeply enshrined into existing international law in the area, as discussed below) to the detriment of other polities. Further, it is a step in overcoming dualistic thinking in international law that reifies the state and “the international” at the expense of other forms of thinking about global legal governance. Finally, it is a way of framing subalternity in international law in a way that does not allow it to be co-opted by other more established actors, but instead creates necessary spaces for intervention by these actors without the filtering of the state, international bureaucracies, or both.

Beyond heritage, the implications for the dichotomy between national and international are pervasive in how we narrate international law. To be sure, the distinction is important, and cannot be done away with; nor does this article argue for that impossibility. Rather, what it suggests is that there are more pluralistic ways of thinking about actors in international law that do not organize the field in what pragmatists would call “dangerous dichotomies.”⁶ Therefore, the stakes of this argument also go beyond heritage and affect at least other forms of resource management in international law. Changing the way these resources are governed can lead to better distributive outcomes, and more sustainable engagement in the long-term. It also allows individuals to more pragmatically discuss possibilities that the current duality deems unthinkable within these governance regimes—for instance, that the use of these resources in ways that diminish them may not be acceptable in light of competing priorities.

This article’s intervention is both normative and doctrinal. There is an important normative case here for reform (that is, bringing communities to the table), but this reform can happen

6. Russell L. Ackoff, *Dangerous Dichotomies*, 2 *SYS. PRAC.* 155 (1989) (in the context of psychology, where Dewey’s work often intervened, alongside education, beyond pure philosophy).

either from within (through changes to current practices in relevant international institutions) or without (the creation of new, specialized fora). Pragmatically, the former is preferable, but there are significant obstacles to changing the way international cultural property law⁷ thinks of itself and the place of communities within the field. On the other hand, it would be very costly and difficult to design new institutions, as the example of a failed attempt to include indigenous communities in the World Heritage Convention⁸ processes has shown.⁹

This intervention happens in two ways. First, and primarily, this article intervenes in international law around cultural property. Secondly, and somewhat incidentally, it also intervenes in broader debates about the governance of other types of resources in international law. Cultural heritage is a good case study because there is a significant body of critical work in the field of heritage studies that engages already with the role of communities. Further, it is a fairly contained field of international law, and is largely (even if wrongly) considered less political than regimes involving mineral resources, for instance. Lastly, cultural and natural resources have historically been equaled in debates about decolonization, so there is something to be said about the relationship between nature and culture as resources.¹⁰ This article pursues a dual intervention, in part, by reorganizing a doctrinal field, but primarily by bringing insights from other fields which are more apt to measure and discuss the impact of existing law on the ground.

International heritage law should be geared primarily at protecting the interests of heritage holders, particularly communities. International law, however, in its current configuration, has a number of blind spots, which this article will uncover as a

7. Or international property law, for that matter, even if there is arguably no such field. Cf. JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* (2014).

8. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force Dec. 15, 1975) [hereinafter World Heritage Convention or WHC].

9. Lynn Meskell, *UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)*, 20 INT'L J. CULTURAL PROP. 155 (2013).

10. A notable context is that of the decolonization of the Congo, in which minerals and cultural artefacts were discussed, often in the same breath, as resources that should be returned to the control of the new nation. See Sarah Van Beurden, *The Art of (Re)Possession: Heritage and the Cultural Politics of Congo's Decolonization*, 56 J. AFR. HIST. 143 (2015).

means of underscoring the unintended consequences of the dichotomization of the field. An important caveat is that this article treats international heritage law for the purposes of this argument as being part of a discursive continuum, and it is not concerned with the formalistic precisions of when instruments were adopted or came into force in general or for specific states.

Another important caveat is worth mentioning: in a discussion of communities in relation to culture, a natural connection is to indigenous communities. While this article recognizes the importance and sensitivity of debates regarding indigenous people's control over their cultural and natural resources, the intervention made in this piece is broader, and includes both indigenous and non-indigenous communities. There are a number of reasons for this methodological choice, but a strategic choice is worth highlighting: this article seeks to avoid an "othering" of community governance over resources that makes the community easy to compartmentalize (and discard). There is a tendency to ground indigenous peoples' control over resources on culture, with serious unintended consequences.¹¹ The point is that those interested in community-centric resource governance are not only indigenous communities, even if they are certainly a particularly visible proportion of those involved in the debate.

The article proceeds as follows: Part I of this article reintroduces the Merryman dichotomy, its reception, and its effects. In particular, it will refer to the pragmatist philosophy of John Dewey¹² as a means to mount an attack on the epistemology underlying this dichotomy. Part II introduces what is referred to as the "third way," in particular outlining the silhouette of the elusive "community" for the purposes of heritage safeguarding. It will also engage in more depth with some specific areas of international heritage law where the effects on communities are felt. After that, Part III will briefly outline some ways in which this third way can apply in other fields of international law. Finally, in the conclusion, this article revisits the central thesis and articulates the importance of a third way of thinking about cultural property and international law more broadly.

11. For a discussion of those consequences, see generally KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* (2010).

12. John Dewey, *Duality and Dualism*, 14 *J PHIL., PSYCHOL. & SCI. METHODS* 491 (1917). This piece and other of Dewey's work, as well as its reception, is discussed below.

I. THE DICHOTOMY IN ACTION

John Merryman wrote extensively in the field of international cultural property law. It is beyond the objectives of this article to engage with all of his writing, so it will focus on the 1986 piece (“Two Ways of Thinking About Cultural Property”) indicated in the introduction, as well as a 2005 article (“Cultural Property Internationalism”) which is framed as a revisiting of the 1986 one.¹³

In his 1986 article, Merryman asserts that there are two ways of thinking about cultural property. First, as “components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”¹⁴ Another way is “as part of a national cultural heritage.”¹⁵ The former way is internationalism, embodied in the 1954 Hague Convention;¹⁶ the latter is nationalism, embodied in the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention.¹⁷ Thus, even though both approaches are framed by international treaties, they have “fundamental” differences.¹⁸

13. John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11 (2005) [hereinafter Merryman, *Cultural Property Internationalism*].

14. Merryman, *Two Ways of Thinking About Cultural Property*, *supra* note 1, at 831.

15. *Id.* at 832.

16. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 240 (entered into force Aug. 7, 1956) [hereinafter 1954 Hague Convention]. This treaty was the first one implementing UNESCO's culture mandate, and therefore, is of great importance in framing the conversation about cultural property in international law in the United Nations era. It was aimed primarily at preventing a repeat of the widespread destruction of heritage that accompanied World War II, and it was thus somewhat limited in its mandate. It did, however, embody the lofty internationalist language of enthusiasm for the early UNESCO. For commentary, see ROGER O'KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* (2006).

17. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (entered into force Apr. 24, 1972) [hereinafter 1970 Convention].

18. Merryman, *Two Ways of Thinking About Cultural Property*, *supra* note 1, at 833.

Internationalism, as embodied in the rules on the protection of cultural property in wartime, has a number of features: a “cosmopolitan notion of a general interest in cultural property [. . .], apart from any national interest;”¹⁹ the “special importance” of cultural property;²⁰ individual criminal responsibility for crimes against it; and jurisdiction to try offenses that is “not limited to the government of the offender.”²¹ The first two characteristics, Merryman concedes, are common to both the nationalist and internationalist approaches, but the latter two are particularly relevant to internationalism. International (criminal) enforcement, therefore, is a key characteristic of cultural property internationalism.

The nationalist view, on the other hand, is described by Merryman as being mostly about the retention of cultural artefacts within national boundaries, in the name of its protection.²² He doubts that retention equals protection, alleging that many countries of origin of cultural artefacts lack the means to adequately protect or care for the artefacts, not to mention that retentionist policies prevent access to cultural property that should form a shared narrative about history.²³ This triad—“preservation, integrity, and distribution/access”²⁴—becomes central for the internationalist case that Merryman has put forth in other contexts, perhaps most famously in his previous defense of the British Museum’s retention of the Parthenon Marbles.²⁵

19. *Id.* at 841.

20. *Id.*

21. *Id.* at 842.

22. *Id.* at 844.

23. *Id.* at 846.

24. *Id.* at 853.

25. John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1984–1985). The Parthenon Marbles, dating to the fifth century BCE, were once part of the Acropolis complex in Athens, and part of the temple of Athena. They remain in contention today. In the process of Greece’s regaining independence from the Ottoman Empire, and creating a national identity grounded on the connection to Ancient Greece as the cradle of western civilization, the Marbles became an important part of forging Greek national identity against external forces. Even as the Greek economy collapsed in 2008, the Marbles were again used to galvanize Greek national identity and to keep the populace united, by identifying an external culprit against whom to direct dissatisfaction. At that time, Greece considered bringing the Parthenon Marbles dispute before the International Court of Justice, but did not follow through.

Merryman acknowledges that in "some cases the two approaches reinforce each other, but they may also lead in different and inconsistent directions."²⁶ More specifically, he argues that the best interest of the cultural artefact should come first, even if it means its movement across national borders and loss of cultural context.²⁷ Further, he advocates against hoarding of cultural artefacts when it goes against the objective of cultural exchange that is central to UNESCO's culture mandate.²⁸

Merryman admits the dynamics at play echo colonialism, in the sense that developing nations are often the suppliers of cultural property, whereas developed nations are the consumers.²⁹ Rather than engaging with the problematic power dynamics, however, he dismisses them by saying that:

The international agencies that might be expected to represent the more cosmopolitan, less purely nationalist, view on cultural property questions – the United Nations General Assembly and UNESCO in particular – are instead dominated by nations dedicated to the retention and repatriation of cultural property. First World-Third World [. . .] politics combine with romantic Byronism to stifle the energetic presentation of the views of market nations. As a result, the voice of cultural internationalists is seldom heard and less often heeded in the arenas in which cultural policy is made.³⁰

Internationalism, thus, is equaled with the interests of developed countries, whom Merryman represents. Developing countries are accused of petty selfishness, of preventing the world

26. Merryman, *Two Ways of Thinking About Cultural Property*, *supra* note 1, at 846.

27. *Id.* at 847.

28. *Id.* at 847. *See also* Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 4 U.N.T.S. 275 (entered into force Nov. 4, 1946) [hereinafter UNESCO Constitution]. "Article 1(1): The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations." *Id.*

29. Merryman, *Two Ways of Thinking About Cultural Property*, *supra* note 1, at 850.

30. *Id.* at 850 (footnote omitted).

from accessing a heritage that belongs to all.³¹ Merryman suggests that, as international law evolves and state-centrism declines in general, cultural property internationalism should be on the rise.³²

Nearly twenty years later, in the follow-up article,³³ Merryman reengages the same duality. Cultural property internationalism equates with the wartime regime and the need to protect heritage that arose out of the horrors of conflict historically.³⁴ It also equates, in somewhat of a non-sequitur, with a free trade in cultural artefacts.³⁵ He opens this article with the proposition that cultural property internationalism “is shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives.”³⁶ This proposition, largely echoing the definition in the 1986 article, conflates any interest in the protection of cultural property with internationalism, seemingly assuming that nationalism, antithetically, cares less about heritage. Thus, by equating a political position (internationalism) with an emotional and Romantic response (cultural property must be preserved), which he, ironically, attributed to nationalism and criticized in his previous piece, Merryman closes off the debate in favor of internationalism, should one buy into this premise of his argument.

He moves on to affirm that internationalism “is not an argument or a hypothesis: it is an observable fact.”³⁷ He deepens his argument for internationalism on the basis of the protection of cultural property in wartime, referring to a wide range of selected historical examples predating the 1954 Hague Convention, all of which have led to support for the proposition that cultural property must be protected. Much of the practice he collects refers in fact to the idea that, yes, heritage must be protected, but also that it must remain or be returned to the country of origin, where it can be put in its original context.³⁸ That latter

31. *Id.* at 853.

32. *Id.* at 853.

33. Merryman, *Cultural Property Internationalism*, *supra* note 13.

34. *Id.* at 11.

35. *Id.* at 11.

36. *Id.* at 11 (footnote omitted).

37. *Id.* at 12 (footnote omitted).

38. *Id.* at 14–20.

part of the practice seems to be lost in his argument, but, because he equated any interest in protection with internationalism, it seems to be less relevant within the confines of his argument.

Again pressing for a freer market on cultural property as synonymous with internationalism, Merryman pushes for the self-regulation of said market by the actors involved in it (particularly dealers and collectors) as the optimal way to ensure that cultural property is protected and respected.³⁹ He charges archaeologists with being too “nationalistic,” and therefore working against the interests of “the international community.”⁴⁰ Merryman again defers to the market as the way to articulate and mediate the interests of various stakeholders in the field.

The reception to Merryman’s work in this area, particularly the 1986 article, has been strong. Looking at over 160 citations to the 1986 article,⁴¹ spread evenly across the years since 1986, one can see deep agreement with the existence of the dichotomy between nationalism and internationalism. References to this dichotomy have also increased over time, and it has had more of an impact in legal scholarship on cultural heritage than scholarship in the field of heritage studies.

Somewhat unexpectedly, most of the scholarship does not take a view on nationalism versus internationalism, simply assuming the dichotomy as a fact. Out of those who do take a view, however, nationalism seems to be the preferred opinion, and, over time, there has been less support for the internationalist viewpoint, regardless of Merryman’s 2005 follow-up article defending internationalism anew.⁴² One notable exception is the response

39. *Id.* at 27.

40. *Id.* at 29.

41. This data set is based on Google Scholar, which records over 600 citations of the piece. The work of collating the citations has been done by Matthew Kingsland, to whom this author is very grateful. The raw data is on file with the author.

42. Even specific response articles to his 2005 piece specifically suggest that nationalism is the preferred approach in the field, both within and outside the law. See for instance Nora Niedzielski-Eichner, *Art Historians and Cultural Property Internationalism*, 12 INT’L J. CULTURAL PROP. 183 (2005) (recalling the rise of scholarship “that questions traditional art history and its relationship to colonialism”); and Robert Hallman, *Museums and Cultural Property: A Retreat from the Internationalist Approach*, 12 INT’L J. CULTURAL PROP. 201 (2005)

to Merryman's 2005 article by David Lowenthal, a key figure in heritage studies. Lowenthal supports the internationalist view, but as a means to promote less "hoarding" of heritage in general, and even articulate possibilities to "discard" excessive heritage.⁴³ Lowenthal is pro-internationalism because he sees nationalism not only as hoarding, but also as chauvinism, not really articulating a response to potential criticisms of internationalism's politics.⁴⁴ Lowenthal's support for Merryman is thus more based on his critical stance on heritage (and the way the heritage "establishment" pays too much respect to national sensitivities) in general, rather than in actual support of Merryman's idealization of an internationalized view of heritage, and a free market in it. The only clear concession made to the idealized internationalism is that internationalization of heritage does away with the risk of entrenchment and ghettoization of identity through cultural property, but even Lowenthal acknowledges that, paradoxically, it is only nationalism that gives us value to heritage.⁴⁵

Regardless of the position one takes on the dichotomy, though, it is important to bear in mind its resilience and impact on the field. Merryman has at times been credited with being "the father of cultural property law,"⁴⁶ and "the lead theorist of cultural

(suggesting "there is little evidence of adherence to an internationalist perspective, at least among the official policies and publications of museums and museum organizations").

43. David Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 393, 396 (2005).

44. *Id.* at 403–11.

45. *Id.* at 405.

46. Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 77 (2005).

property law,"⁴⁷ and his work on this dichotomy has been referred to as "seminal,"⁴⁸ pioneering,⁴⁹ having widespread impact,⁵⁰ "widely accepted,"⁵¹ and "a point of reference for nearly all subsequent discussions."⁵²

Regardless of its merits, the work of Merryman has had deep constitutive effects on the field. Its widespread reception and reach to other international lawyers (given its original publication in *The American Journal of International Law*) has helped insert international cultural heritage law in the consciousness of international lawyers, even if it was only more recent events related to widespread looting and heritage destruction in the Middle East that have reawakened the interest of general international lawyers. Regardless, over time, a number of monographs by international lawyers who engage in fields other than cultural property law have been published,⁵³ not to mention articles, edited volumes, and even dedicated journals, and many of them in some respects owe their recognition to Merryman's work.

47. Guy Pessach, *Museums, Digitization and Copyright Law: Taking Stock and Looking Ahead*, 1 J. INT'L MEDIA & ENT. L. 253, 259 (2006).

48. Fishman, *supra* note 4, 359; Claire L. Lyons, *Thinking About Antiquities: Museums and Internationalism*, INT'L J. CULTURAL PROP. 251, 251 (2014); Alan Audi, *A Semiotics of Cultural Property Argument*, 14 INT'L J. CULTURAL PROP. 131, 163 (2007); Robin Feldman, *Remarks in Honor of the Legal and Public Policy Legacies of John Henry Merryman: Cultural Property and Human Cells*, 243 INT'L J. CULTURAL PROP. 249 n.16 (2014); Daniel Shapiro, *A Universalist: Fathering Fields*, 21 INT'L J. CULTURAL PROP. 237, 238 (2014); Raechel Anglin, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN. 241, 242 (2008); Alexander A. Bauer, *(Re) Introducing the International Journal of Cultural Property*, 12 INT'L J. CULTURAL PROP. 6, 7 (2005); and Cornelius Banta Jr., *Finding Common Ground in the Antiquities Trade Debate to Promote Pragmatic Reforms*, 53 HOUS. L. REV. 1113, 1116 (2015).

49. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 567 n.15 (1995).

50. Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 606 (2007).

51. Ana Slijvic, *Why Do You Think It's Yours?: An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*, 31 GEO. WASH. J. INT'L L. & ECON. 393, 393 n.2 (1997).

52. Lyons, *supra* note 48, at 251.

53. See for instance O'KEEFE, *supra* note 16; and SARAH DROMGOOLE, *UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW* (2013).

If Merryman's work has had constitutive effects on the field, so has the dichotomy he is credited with. And, in being constitutive, the dichotomy creates a world of cultural property law in which only the "international" (represented by UNESCO) and the "national" (represented by states) matter. To be sure, that is also a key part of how international law is usually read and appreciated. Even though Merryman criticizes a world of international cultural property law in which only states and institutions matter, as indicated above, he is himself at least partly responsible for this configuration.

A critique of the use of dichotomies as a way of explaining and making reality has been mounted a century ago by pragmatist philosophers, arguing that dualities are in many respects a monism duplicated, with all of its distorting effects on reality.⁵⁴ One of the key thinkers of pragmatism is John Dewey. Dewey's enduring significance to the history of philosophy lies precisely in his addressing the heritage of dualism.⁵⁵ He wrote an important text ("Duality and Dualism") in which he responds to realist Durant Drake's position on epistemological dualism. Dualism is, in Drake's view, what we might call today a framing exercise.⁵⁶ He differentiates epistemological dualism (his thesis) from ontological dualism.⁵⁷ As far as he is concerned, dualism works as a means of explaining the world, framing it, but not a way of making it.

In his response, Dewey points out that duality oversimplifies reality, in a way which misses the input of other factors in the way reality is projected.⁵⁸ He frames his position vis-à-vis epistemological dualism as one of "empirical pluralism,"⁵⁹ and denounces the constitutive effects of dualism, in its choices of which two events to choose as representative of reality, making them in effect cognitive.⁶⁰ In particular, he questions the notion that ideas were simply "pictures" of the world, and presents

54. Dewey, *supra* note 12, at 491.

55. Thomas M. Alexander, *Dewey, Dualism, and Naturalism*, in *A COMPANION TO PRAGMATISM* 184, 184 (John R. Shook & Joseph Margolis eds., 2006).

56. Durant Drake, *A Cul-de-Sac for Realism*, 14 *J. PHIL., PSYCHOL. SCI. METHODS* 365, 368 (1917).

57. *Id.* at 365.

58. Dewey, *supra* note 12, at 493.

59. *Id.* at 491.

60. *Id.* at 492.

them as “tools” to manage action.⁶¹ Epistemology, therefore, is constitutive, even if Dewey also acknowledges the limitations of abstract knowledge in relation to experience.⁶² Dewey, therefore, is skeptical of the defense that dualism can be only epistemological, and not ontological.

In other words, Dewey is critical of the intellectual fallacy committed “by simply positing these products as the real objects comprising the furniture of the universe, ignoring how much our own interests have helped constitute them.”⁶³ The only way to break the habit of thinking in dualities that is common to the western philosophical tradition is to think of reality as a continuum.⁶⁴

Dewey’s position has been criticized for overlooking the advantages of dualism as a heuristic device, which are particularly important from a pedagogical point of view.⁶⁵ They also criticize the unintended consequence of Dewey’s position: by bringing ideas and reality too close together, little room is left, at least in education, for abstract thinking and “big picture” mappings, which, with respect to law, are important to identify the broader effects of certain legal choices on reality, particularly marginalized groups.⁶⁶ Even these critics, however, acknowledge the importance of Dewey’s work in uncovering the elitist effects of dualism, and its role in ultimately sustaining hierarchy.⁶⁷ This criticism misses the point: even if dualism is intended to be heuristic, it is also in effect constitutive, and, in being constitutive, it sustains hierarchy and weds knowledge to an idealistic framework that is removed from reality on the ground. In the case of international cultural property law, and particularly Merryman’s position, the similarities are clear: the dichotomy sustains the hierarchy between developed and developing nations, or market and source nations, to use the parlance of international law related to cultural objects. At the same time the dichotomy divorces the treatment of cultural property from the needs of

61. Alexander, *supra* note 55, at 188.

62. *Id.*

63. *Id.* at 189.

64. *Id.* at 192.

65. Robert N. Carson & Stuart Rowlands, *A Critical Assessment of Dewey’s Attack on Dualism*, 35 J. EDUC. THOUGHT 27, 31–32 (2001).

66. *Id.* at 28.

67. *Id.* at 28.

those on the ground—that is, the communities living in, with, or around heritage.

This dichotomy makes the field of international cultural property law and its law and politics easier to explain, and therefore has important heuristic effects. But, more than heuristic, it is also constitutive, and, in doing so, it reinforces colonial patterns, in addition to territorializing heritage in unproductive ways and making heritage a state's concern. In underscoring the centrality of states, the dichotomy excludes other actors from accessing (let alone controlling) the heritage they live in, with, or around, at least as far as international law is concerned. As suggested above, if these key stakeholders are not involved in international decision-making, but international law in the area still tends to supplant domestic structures in many respects, then they lose access to their heritage and the benefits once derived from cultural property. Thus, there is at least a third way to think about cultural property, one that may bring the community closer. The next section discusses the need for a third way in more detail, as well as what it might look like in practice.

II. A THIRD WAY

A third way of thinking about cultural property in international law must start with acknowledging that there is more than states and a rather opaque category of “institutions,” to use Merryman’s terminology.⁶⁸ Instead, international cultural property law does, in fact, include states in a fairly central role, but there are also a number of stakeholders that are involved to varying degrees, some of whom have fairly pervasive influence on the field. This debate has attracted growing recognition, sometimes even explicitly framed against Merryman’s dichotomy,⁶⁹ but it has often fallen short of articulating the stakes within international cultural property law, making use instead of issues that doctrinally fall outside the scope of the relevant UNESCO treaties. The discussion that follows attempts to remedy some of that.

UNESCO is, naturally, a central institution in thinking about cultural property and its safeguarding in international law. In

68. Merryman, *Two Ways of Thinking About Cultural Property*, *supra* note 1, at 853.

69. See, e.g., Joe Watkins, *Cultural Nationalists, Internationalist, and “Intra-nationalists”: Who’s Right and Whose Right?*, 12 INT’L J. CULTURAL PROP. 78, 79 (2005).

many respects, the agency is a stand-in for internationalism, in opposition to states. To be sure, though, UNESCO is an inter-governmental organization that is not above being co-opted by political interests of states.⁷⁰ There is also, however, a dedicated class of international civil servants at UNESCO, committed to safeguarding cultural property.

A small part of this class of international civil servants, as well as a large group working parallel to them, is a class of experts whose individual commitment to cultural property is quite remarkable.⁷¹ As a group, though, these experts are largely responsible for the rise of the Authorized Heritage Discourse (AHD), a term coined by Laurajane Smith to mean that:

[T]here is . . . a hegemonic discourse about heritage, which acts to constitute the way we think, talk and write about heritage. The 'heritage' discourse . . . naturalizes the practice of rounding up the usual suspects to conserve and 'pass on' to future generations, and in so doing . . . validates a set of practices and performances, which populates both popular and expert constructions of 'heritage' and undermines alternative and subaltern ideas about 'heritage.'⁷²

It is beyond the scope of this article to fully discuss the role of expert rule in this area,⁷³ but suffice to say that experts are a prominent and powerful stakeholder, who in many respects are meant to be stand-ins for the community. In effect, however, the way expertise is governed allows this group to pursue agendas that do not necessarily align with the interests of communities whose aspirations they are meant to translate. The experts work for cultural property, not for the people living in, with, or around it, losing sight of the fact that their role is "to protect not only

70. Lynn Meskell et al., *Multilateralism and UNESCO World Heritage: Decision-Making, States Parties and Political Processes*, 21 INT'L J. HERITAGE STUD. 423 (2015).

71. For a discussion lamenting how the interests of those experts has been replaced with diplomatic posturing, see LYNN MESKELL, *A FUTURE IN RUINS: UNESCO, WORLD HERITAGE, AND THE DREAM OF PEACE* (2018).

72. LAURAJANE SMITH, *USES OF HERITAGE* 11 (2006).

73. For this discussion, see Lucas Lixinski, *International Cultural Heritage Regimes, International Law and the Politics of Expertise*, 20 INT'L J. CULTURAL PROP. 407 (2013).

objects, but also the relationships between those objects and people.⁷⁴ As we focus on the way this class of experts views heritage, we stop working on the problem of international governance of cultural resources, and start working on the field of international cultural property law.

Other groups with a stake in cultural property and its management include museums, collectors, and the community in general. The “community” is an elusive concept, but much hinges on it, as the centerpiece of whom cultural property law should serve. The promise of community involvement in heritage is to “realign” the very concept of heritage, and to suggest that everyone is a heritage expert.⁷⁵ There is a colonial baggage tied to the term community, from when communities were created as managerial units for colonial projects.⁷⁶ At the same time, though, the alternative to not facing the challenge of trying to define a community is to default to the positions of the dichotomy and the rather invisible but pervasive and problematic issue of expert rule.

The community can be best defined relationally, in opposition to other stakeholders. Thus, communities are groups who are neither states, nor UNESCO, and at the same time have no claim to scholarly expertise with respect to their heritage, but have expertise based on their experience with it, by living in, with, or around heritage, or practicing it as part of their cultural lives.

This definition is still fairly open-ended, but it is already a step farther than what current international law in the area offers. Under the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage,⁷⁷ for instance, the definition of community is left to the nation-state, leaving some room for abuse.⁷⁸ A way to attempt to define the community is as the set of actors

74. Watkins, *supra* note 69, at 89.

75. John Schofield, *Heritage Expertise and the Everyday: Citizens and Authority in the Twenty-First Century*, in WHO NEEDS EXPERTS? COUNTER-MAPPING CULTURAL HERITAGE 1, 1–2 (John Schofield ed., 2014).

76. JOHN D KELLY & MARTHA KAPLAN, REPRESENTED COMMUNITIES: FIJI AND WORLD DECOLONIZATION 5 (2001).

77. This Convention, because it is UNESCO’s latest treaty in the area of cultural heritage, also sets the current high watermark on international institutional thinking about cultural heritage, its role, and how different stakeholders engage with it.

78. As discussed in Lucas Lixinski, *Selecting Heritage: The Interplay of Art, Politics and Identity*, 22 EUR. J. INT’L L. 81 (2011).

who wish to engage in decision-making about the control of resources to which they have a physical, cultural, spiritual, economic or other connection. This criterion further underscores the lack of adequate fora for engagement by non-expert actors, in a somewhat circular fashion.

To be clear, this article does not argue that communities replace the state entirely in the governance of cultural property and other resources. After all, states are still the ones, under international law, with the primary duties and responsibilities in relation to those resources, not to mention the means to secure their safeguarding or exploitation. Safeguarding efforts can be expensive in certain heritage domains, meaning communities can face sustainability challenges, if unsupported. It is important here to overcome the “state bad, nonstate good” binary, and thus, avoid the trap of creating another dichotomy or set of dichotomies, such as state versus community and UNESCO versus community. Community governance requires changes to institutional practice and culture, and more inclusiveness, rather than a simple replacement of one stakeholder with another.

In order to show how the field avoids the problem, this article will use three brief situations:⁷⁹ (1) the very definition of cultural heritage in international law; (2) the economics of heritage in international law; and (3) the enforcement of international cultural heritage law. Each of these instances shows how certain stakeholders are privileged over others and the dark sides and unintended consequences of Merryman’s dichotomy. After examining those gaps, it will look at how communities can be brought into international cultural property law’s processes more effectively and engage with options for normative and institutional reform.

A. Defining Cultural Property in International Law: Untethering the Community from Legal Governance

The notion of “cultural heritage” has evolved in the different UNESCO instruments, but throughout these changes a feature has remained. Specifically, international law conceives of culture in these instruments as a proxy for sovereignty, and “heritage of [hu]mankind” as a banner of cosmopolitanism. Cultural

79. They have been discussed in far more detail elsewhere, and alongside other contexts. See LUCAS LIXINSKI, *INTERNATIONAL HERITAGE LAW FOR COMMUNITIES: EXCLUSION AND RE-IMAGINATION* (2019).

heritage is a notion where these two apparently conflicting views of international law and its role must be negotiated.

The move from cultural property to heritage, while it enhanced many of the values of cultural heritage, and particularly its connection to intangible cultural processes rather than tangible buildings, monuments, and artefacts, has also had the (unintended) consequence of disassociating communities from heritage they live with or around, and for whose survival they are necessary. As a result, a return to a specific way of conceptualizing property may be needed, at least in some respects.

A full genealogy of the concepts of “cultural property” and “cultural heritage” in international cultural property law is beyond the scope of this article, but, in brief, it showcases how debates over sovereignty and cosmopolitanism have played out during the second half of the twentieth century inside a UN Specialized Agency. Additionally, this article attributes part of the disconnect promoted by the law between communities and their heritage to a disconnect between domestic and international: while international legal discourse, and cosmopolitanism with it, has embraced the notion of heritage, domestic law still relies heavily on the category of property as a means to implement international legal obligations with respect to heritage. As such, while the language of heritage in international law has introduced key values into the way we think about culture, domestically the language of property seems to be impervious to or deny those aspirations. The effect of this mismatch is once again to exclude communities from controlling their own culture. Therefore, the dichotomy of nationalism and internationalism creates a blind spot that affects even the very conceptual core of the field.

The blind spot becomes glaring on the basis of multiple sources, including primary sources,⁸⁰ scholarly work around the history of UNESCO,⁸¹ work on the definition of cultural heritage in international law, and the shift from cultural “property” to cultural “heritage”⁸² (the latter two being more closely connected

80. The visit to the UNESCO Archives was facilitated by a grant from the Faculty of Law, UNSW Sydney.

81. This historical scholarship includes CHRISTOPHER E.M. PEARSON, *DESIGNING UNESCO: ART, ARCHITECTURE AND INTERNATIONAL POLITICS AT MID-CENTURY* (2010).

82. The main works in this respect are Francioni, *A Dynamic Evolution of Concept and Scope*, *supra* note 5, at 221; Blake, *On Defining the Cultural Heritage*, *supra* note 2; Prott & O’Keefe, *supra* note 5; Regina Bendix, *Héritage et*

to international law). The purpose of using these sources is to paint a clearer picture of how heritage is defined by international law across the spectrum of UNESCO instruments, and to ultimately show how there is ambiguity at the center of the field, which “may at times lead to contradictory positions and unintended outcomes.”⁸³

The history of the key UNESCO treaties reveals that the category of “property” is fairly resilient. The drafting history also reveals that property does not usually mean the common usage of property as a private law category of ownership, which was left for the *domaine réservé* of states. For the most part, property is a proxy for state sovereignty, a means to balance the cosmopolitan spirit embodied in the idea of heritage since the 1954 Hague Convention. One must not forget that treaties are products of their time, and that in this respect protection of sovereignty was in line with the state of international law in the Cold War era.⁸⁴

As to the shift in international legal discourse from ‘property’ to ‘heritage,’ it is largely seen as meaning an acceptance that the protection of heritage goes beyond the protection of the actual sites, objects, and artefacts;⁸⁵ instead, what is to be protected is the relationship between these sites, objects, and artefacts and human beings,⁸⁶ with a view towards intergenerational safeguarding of culture.⁸⁷ In this sense, what is protected is precisely the element of intangibility behind all heritage, even if the competing social goals of heritage and property still subsist and need

patrimoine: de leurs proximités sémantiques et de leurs implications, in LE PATRIMOINE CULTUREL IMMATERIAL: ENJEUX D'UNE NOUVELLE CATÉGORIE 99 (Chiara Bortolotto ed., 2011); and Francesco Francioni, *Cultural Property—International Law*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Oxford Univ. Press, 2008). For a pre-World War II evolution of the idea of cultural property in international law, see generally, ANA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS (2006).

83. Blake, *On Defining the Cultural Heritage*, *supra* note 2, at 85.

84. *Id.* at 62.

85. Bendix, *supra* note 82.

86. This shift was also mirrored in general debates about property law. Property has shifted from being a legal protection of an object (or the exclusive rights of the owner to its property towards non-owners) to the relationship between non-owners and the property, to the extent some rights can also be granted to non-owners. For a discussion and reconceptualization of property law, see generally, David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 ACCT. ECON. & L. 1 (2011).

87. JANET BLAKE, INT'L CULTURAL HERITAGE LAW 8–9 (2015).

to be balanced.⁸⁸ This focus on the relationships implies the articulation of the idea that cultural heritage belongs to the whole of humankind, and must be protected to favor those communities more connected to it, as opposed to the individuals in possession of the items.

By rejecting “property,” as a term of art, however, international cultural property law also rejects an important yardstick that connects the values articulated in the international (beautifully contained in the word “heritage”) to the needs of people on the ground. In search of a replacement yardstick, international heritage law defers to sovereignty as a basic principle of international law. The effects of this deference are alienation, and, ultimately, the reinforcement of the AHD.

Further, the back and forth between heritage and property also shows a largely lost narrative of the engagement between a legal (property) and a non-legal (heritage) concept and category. The embrace of the term heritage in latter treaties is a victory of non-lawyers in the field, but it also means less legal certainty. It also means a further divorce between law and non-law in the safeguarding of cultural heritage, as legal processes where enforcement is clearer, like domestic law, still rely on the legal and better circumscribed category of property over heritage.

If property is still used domestically, particularly locally, in heritage management, it is a category worthy of exploration. The continued use of property in domestic law to refer to, define and manage cultural heritage may be read as meaning that international law’s aspirations have failed, and the terminology disconnect creates a pathway to ignore the values of the international. “Cultural property” is not necessarily the ultimate commodification of heritage and its subordination to neoliberal economics that are just as, and probably even more, exclusionary than the shield created by the term “heritage.”

Cultural property internationalism, therefore, and the move to the concept of “heritage” it embodies, has the effect of creating disincentives for the inclusion of certain stakeholders. Instead, it privileges others that can speak the uniform language of cultural heritage, which tend to be states and experts. Further, the move towards heritage disengages the private of “property” by privileging the public of “heritage,” thereby creating another

88. Prott & O’Keefe, *supra* note 5, at 309.

means that facilitates, or at least has the unintended consequence of facilitating, the exclusion of communities and other sub-state actors.⁸⁹

At a minimum, property cannot be understood without the incorporation of public goods, in a purposive interpretation. It operates through institutions, and is closely connected in many respects to freedom of contract.⁹⁰ Yet, it is also often tied to a rights binary, which sees public interests, including heritage specifically, as an integral part of property.⁹¹ Therefore, the divorce between heritage and property, executed in international law for pragmatic reasons, cannot be sustained in the application of international heritage law.

Taken a step further, the notion of property as rights still fails to fully incorporate marginalized groups like the communities that this article argues need to be incorporated into heritage governance at all levels. That is, however, only because its contingencies are missed, and in fact dismissed as belonging to a reified legal tradition. Instead, these contingencies should be taken as part of the anthropological and archaeological discourse that informs not only the conservation paradigm, but the making of international heritage law more generally. Therefore, a maneuver that insulates property from the main forces behind international heritage law has the effect of further under-appreciating what property, or at least certain versions of property, can do for heritage and, more importantly, heritage holders.

That international law more broadly has for pragmatic reasons avoided delving into matters of property law could have been once justified, but that no longer seems to be as strong an explanation. As general principles of law around property have coalesced, the divide among the large legal families has been bridged. Therefore, international heritage law can engage with property as more than a proxy for state sovereignty. Property can be read as a language of power and distribution, or outright transformation, that can benefit heritage indirectly by benefiting communities, and also heritage directly as simply a part of the core of property law.

89. Betina Kuzmarov, *The Coherence of the Concept of Cultural Property: A Critical Examination*, 20 INT'L J. CULTURAL PROP. 233, 235 (2013).

90. HANOCH DAGAN, PROPERTY VALUES AND INSTITUTIONS 34 (2011).

91. See generally LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003).

Historical discourses about how cultural heritage gets intermingled with property may have helped pave the way for heritage as a sovereign prerogative, particularly in revolutionary France,⁹² but, read in their context, these discourses can also be considered to simply elevate cultural heritage as favoring the community connected to it, regardless of whether that community is the state or a differently configured entity. Therefore, the definition of heritage, allied with a version of property more aware of its public role, can go further than a heritage that is set as being in opposition to, or transcending, property. It is time to recover these narratives about the role of heritage vis-à-vis property, and of the concept of property more generally. This recovery can give more effectiveness to the concept of heritage as it has been transformed over time, and particularly its current iteration, which is more centered on communities as a central part of the definition, value, and safeguarding of this public good. Only then will the cosmopolitan values embraced by international cultural property law and UNESCO in particular really be advanced.

B. The Economics of Heritage: Moving the Conversation Elsewhere

The economics of cultural property is another site of exclusion. Even Merryman argues that international law on cultural artefacts has largely excluded the market by focusing only on the roles of governments and institutions.⁹³ In excluding the market, international cultural property law also excludes communities.

There are four main areas of significance of heritage: (1) economic, (2) social, (3) political, and (4) scientific.⁹⁴ The scientific value of heritage is the most important one from the expert's perspective, but it can have alienating effects. The social value of heritage is the one that matters most for communities, but it is difficult to define. Communities may also wish to make use of political values of heritage, but those are usually constrained (or even ruled out) by the AHD, and, when available, overwhelmingly favor the nation-state.⁹⁵ The economic values of heritage

92. Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1143 (1990).

93. Merryman, *Cultural Property Internationalism*, *supra* note 13, at 24.

94. Tolina Loulanski, *Revising the Concept for Cultural Heritage: The Argument for a Functional Approach*, 13 INT'L J. CULTURAL PROP. 207, 207 (2006).

95. SMITH, *supra* note 72.

are usually seen as somewhat taboo, even if those perceptions are slowly changing outside the law.

International heritage law's relationship to the market is fraught to say the least. It oscillates between potentially outlawing the market outright,⁹⁶ such as the prohibition on the traffic of cultural objects in the 1970 Convention⁹⁷ or the prohibition of salvage in the 2001 Underwater Heritage Convention,⁹⁸ to simply not mentioning the possibility of cultural heritage being in the market, such as the World Heritage Convention⁹⁹ and the Intangible Cultural Heritage Convention.¹⁰⁰ Even when economic activity, such as farming practices, is itself the heritage, once that economic activity is recognized as heritage, economic engagement becomes a challenge to heritage and foreign to it. The effect across heritage instruments is to push the market into the invisible and un(der)regulated private sphere.¹⁰¹ Much of this troubled relationship stems from a rejection of the possibility that heritage could belong in the market. Across many civil law jurisdictions, for instance, heritage is classically thought of as *res extra commercium*, or a thing outside the stream of commerce.¹⁰² That is because heritage is just too special; to add it to

96. The system for the protection of heritage during wartime is excluded from this discussion. For an analysis of the Hague system and the trade in cultural objects, see Thomas Fitschen, *Licit International Art Trade in Times of Armed Conflict?*, 5 INT'L J. CULTURAL PROP. 127 (1996).

97. The 1970 Convention regulates the cross-border movement of cultural objects, and was created to curb the market in antiquities.

98. The Underwater Heritage Convention was created in no small part to regulate and prohibit the practice of commercial salvage of shipwrecks.

99. The World Heritage Convention focuses, for the purposes of this section, on the risks that unbridled tourism pose to the conservation of heritage sites.

100. The Intangible Heritage Convention looks at economics from the perspective of the commodification of living heritage, and its transformation into kitsch and performances for the consumption of tourists.

101. For a critique, see Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347 (2011).

102. Kurt Siehr, *The Protection of Cultural Heritage and International Commerce*, 6 INT'L J. CULTURAL PROP. 304, 304 & 318 (1997). Common law countries seem to be more permissive, though. See Derek Fincham, *A Coordinated Legal and Policy Approach to Undiscovered Antiquities: Adapting the Cultural Heritage Policy of England and Wales to Other Nations of Origin*, 15 INT'L J. CULTURAL PROP. 347 (2008). For a discussion of other domestic categories, see John Henry Merryman's remarks in Daniel Shapiro, *Opinion: Legal Issues in the Trade of Antiquities*, 3 INT'L J. CULTURAL PROP. 365, 367–68 (1994) [hereinafter Shapiro, *Opinion: Legal Issues in the Trade of Antiquities*].

the market would be distasteful.¹⁰³ This idea aligns with the conservationist discourse that is typical of international cultural heritage law, and it has been referred as having “an air of fundamentalism.”¹⁰⁴ The market values of heritage are often seen as being in conflict with its cultural values, and an obstacle to them.¹⁰⁵

This treatment of heritage as too special for trade stems from a well-intentioned desire to protect it.¹⁰⁶ If heritage is outside the stream of commerce, then it cannot be vulgarized. It will always be special and will always have a value that transcends numbers and figures, or so the argument goes.¹⁰⁷ It is a terrific idea in theory. In practice, however, heritage has an economic dimension that is quite basic for its process.¹⁰⁸ Cultural objects are still traded,¹⁰⁹ or at the very least heritage is impacted by economic activities around it, such as intense tourism in places like Angkor Wat, which end up jeopardizing the World Heritage Site).¹¹⁰ Thus, when the law excludes the economic possibilities of heritage, the market does not go away. The market simply moves elsewhere, often into the invisible private, or to other fora that are less sympathetic to the cultural needs of heritage, because the goals of these institutions, such as the World Tourism Organization, lie more in the promotion of economics.

103. G.J. Ashworth, *Heritage and Economic Development: Selling the Unsellable*, 7 HERITAGE & SOC'Y 3, 5 (2014).

104. Randall Mason, *Be Interested and Beware: Joining Economic Valuation and Heritage Conservation*, 14 INT'L J. HERITAGE STUD. 303, 304 (2008). For a useful table comparing economic, heritage and functional values of historical buildings, see Anna Krus, *Heritage — Function — Economy: Three Perspectives on Values in Estate Management*, in ECONOMICS AND BUILT HERITAGE — TOWARDS NEW EUROPEAN INITIATIVES 71, 80 (Mikko Mälkki et al. eds., 2008).

105. Stephen Deuchar, *Sense and Sensitivity: Appraising the Titanic*, 2 INT'L J. HERITAGE STUD. 212, 212 (1996).

106. ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 65 (2014).

107. For a summary and critical analysis of this conversation in the context of heritage commodification, see Britt Baillie, Afroditi Chatzoglou & Shadia Taha, *Packaging the Past*, 3 HERITAGE MGMT. 51 (2010).

108. Ashworth, *supra* note 103, at 3.

109. In fact, the 1970 Convention is often blamed for the creation or at least great expansion of the black market in antiquities.

110. Tim Winter, *Cultural Heritage and Tourism in Angkor, Cambodia: Developing a Theoretical Dialogue*, 17 HIST. ENV'T 3 (2004).

An often-made promise to communities is that listing their heritage, making it available to the world, will translate into development, and boost the local economy. In practice, though, it seems that most of the money spent on cultural heritage ends up benefitting other parties.¹¹¹ Therefore, once again, communities end up alienated from their heritage, as control over heritage tends to pass to those that have more tangible economic stakes. An international heritage law oriented towards communities therefore needs to be mindful of the impact economics has on heritage and the relationship between heritage and local communities. It must also promote means of translating the economics of heritage into benefits for those whose heritage it really is.

One of the big problems with engaging heritage in the market, of course, is that it contradicts international law's impulse to think of heritage as an absolute, a common good that belongs to all of humanity. To make heritage less than an absolute implies acknowledgment that it has no intrinsic value and that its values are defined relationally. That is a proposition that seems to be acceptable to a number of heritage studies scholars, and the vast majority of economists engaged in cultural heritage matters, but one that finds less receptive minds among international lawyers in the field.¹¹² One of the advantages of accepting that heritage has no intrinsic value in this case is that it allows engagement with the market. The dark side, of course, is that one may be taking the first step down a slippery slope that will vulgarize and ultimately destroy cultural heritage. Yet heritage is only important if it means something to the people who will ultimately live with it and care for it. Allowing them to perceive and engage with heritage beyond its symbolic dimensions is a means to expand the range of cultural heritage that local communities will want to care for, all the while providing them with the means to safeguard their own cultures.

A significant issue in the governance of cultural property by local communities is that those groups are often characterized as unwilling or unable to preserve heritage, lacking the expertise to identify it, or even that communities willingly destroy

111. See, e.g., BRIAN M FAGAN, *THE RAPE OF THE NILE: TOMB ROBBERS, TOURISTS, AND ARCHAEOLOGISTS IN EGYPT* (2004).

112. For a summary of these positions, see Randall Mason, *Conference Reports: Economics and Heritage Conservation: Concepts, Values and Agendas for Research*, Getty Conservation Institute, Los Angeles (December 8–11, 1998), 8 INT'L J. CULTURAL PROP. 550, 554–55 (1999).

heritage.¹¹³ Yet, as David Lowenthal has pointed out in response to one of Merryman's articles, maybe it is not a bad thing that some heritage is let go: "Packrats by nature, we preserve too well. Not only do we not need all we have, we need desperately to be rid of it. Moth and rust no longer suffice; culling and disposal must be integral to making and collecting."¹¹⁴ That is a fairly controversial position, and one that challenges a premise of the entire field of international cultural property law. If heritage is to be allowed to evolve, however, it must also be allowed to disappear, in some instances, if anything so that new heritage can be created to occupy its place.

Merryman argued that an active international market in cultural heritage can (1) advance the international interest; (2) provide income to source nations; and (3) "reduce the harm done by the black market."¹¹⁵ Even if heritage is to be preserved at all costs, a licit market can still promote useful tools in that respect.¹¹⁶ The economics of heritage can create incentives for the safeguarding of heritage for governments, and, particularly, for communities. The creation of a licit market is also an opportunity to create conditions to renegotiate the terms in which heritage is seen and exploited. It can therefore challenge some of the existing practices with respect to the dichotomies between source and market nations, the public and the private, the nation-state and communities, and the local and the international.

C. Enforcement of International Cultural Property Law: A New Hope?

If the very definition of cultural property or heritage in international law, as well as the regulation of its economic aspects, have deep exclusionary effects, then there seems to be too much room for the exclusion of communities, and the effects of Merryman's dichotomy appear unshakable. The implementation and enforcement of these international treaties, however, while replicating some of the problems of the dichotomy, can also offer some breathing room. Therefore, in this subsection, this article

113. Shapiro, *Opinion: Legal Issues in the Trade of Antiquities*, *supra* note 102, at 381–82.

114. Lowenthal, *supra* note 43, at 396.

115. John Henry Merryman, *A Licit International Trade in Cultural Objects*, 4 INT'L J. CULTURAL PROP. 13, 13 (1995).

116. Lyndel V. Prott, *The International Movement of Cultural Objects*, 12 INT'L J. CULTURAL PROP. 225 (2005).

seeks to focus on some of the possibilities of enforcement of international cultural property law, and the pathways that are opened to communities.

The role of communities in the enforcement of international cultural property law is somewhat diminished, since courts and other court-like bodies play the more central role in that respect. Further, international enforcement usually involves reframing heritage and its goals within the constraints of another area of international law, as heritage treaties themselves lack judicial enforcement mechanisms. In fact, there is a mismatch between the normative development of the field and the possibilities of enforcement within it.¹¹⁷ The displacement of the claim away from international heritage law and its conversion into a claim under, for instance, international criminal law, allows for international enforcement, but it also creates an additional filter through which community aspirations have to attempt to break, often unsuccessfully.

In spite of these difficulties, communities can still be involved in showing how the negative impact on heritage has also a negative impact on community life (if that is the case). This connection heightens the stakes of any enforcement procedure and also informs, for instance, reparations and other remedies for the violation. The role of communities, though, is still somewhat limited, and they can easily become part of the context, as opposed to a key stakeholder in the foreground of the case.

The enforcement of international heritage law has given teeth to the field and added a dimension different from the cooperation mechanisms discussed above, in addition to enhancing the visibility of international heritage law. Much of this enforcement happens through other regimes of international law, particularly International Humanitarian Law and International Criminal Law¹¹⁸ through a plurality of legal mechanisms that matches the cultural pluralism that heritage law aims to safeguard.¹¹⁹ For that reason, it is beyond the scope of this article to

117. Francesco Francioni & James Gordley, *Introduction*, in *ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW* 1, 1–2 (Francesco Francioni & James Gordley eds., 2013).

118. On this relationship, from the perspective of IHL with respect to cultural heritage, see O'KEEFE, *supra* note 16, 343–56.

119. Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, in *ENFORCING INTERNATIONAL*

exhaustively examine the matter of enforcement; rather, it suffices to make the point that enforcement helps develop the field. In fact, it has been pointed out that cultural heritage helps develop international law more generally in three respects: (1) international crimes against heritage as war crimes and crimes against humanity; (2) the development of individual criminal responsibility under international law; and (3) the development of the law of state responsibility for intentional acts against cultural heritage.¹²⁰

In helping develop international law more generally, however, the enforcement of cultural property law also deepens the problem of exclusion of communities from their own heritage at the international level. More specifically, resolving international heritage matters through the rules and mechanisms of other regimes of international law adds to the difficulty of community access to those regimes, for the most part. It also packages international cultural property law in a way that excludes much of the politics of heritage in favor of the politics (or lack thereof) of the other regime. In this translation process, communities tend to be the first ones lost.

Certain legal enforcement mechanisms outside of heritage, in spite of their state-centric nature, can also open important avenues for communities to engage, such as international human rights adjudication, but those often come with tradeoffs.¹²¹ Most importantly, from the perspective of international law, the enforcement of international heritage law through other bodies needs to handle the risks and promises of fragmentation of the international legal system.

The creation of a specialized international cultural heritage law court has been proposed elsewhere.¹²² Such a court would be able to render specialized decisions that take into account the cultural values of heritage, and, in the process, reinforce the

CULTURAL HERITAGE LAW, *supra* note 117, at 9–10 [hereinafter Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*].

120. Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 EUR. J. INT'L LAW 9, 10 (2011).

121. Francesco Francioni & Lucas Lixinski, *Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage*, in HERITAGE, CULTURE AND RIGHTS — CHALLENGING LEGAL DISCOURSES 11 (Andrea Durbach & Lucas Lixinski eds., 2017).

122. For a review of the literature, see CHECHI, *supra* note 106, at 200.

body of international heritage law.¹²³ An unsuccessful attempt under the League of Nations has shown how difficult this idea actually is in practice, and the notion was not taken up by any of the UNESCO treaties.¹²⁴ The same obstacles that exist with respect to the effectiveness of international law in general—state sovereignty, the complexity of disputes, and the overall relative effectiveness of international adjudication—speak against such an endeavor.¹²⁵

Additionally, a new specialized regime would only contribute further to the fragmentation of international law and to the possibility of conflicting normative findings in different fora. It would also further entrench the conservation paradigm, at least to the extent an eventual specialized court would put heritage at the very center of its normative universe and look at the safeguarding of heritage as its primary goal, and an end in itself. Thus, while such a system would be advantageous from the perspective of the dominant heritage paradigm and could open the door for more effective community participation, its institutional mandate would favor the AHD greatly as well.

The alternative is to allow for the enforcement of international heritage law in other fora, which are not specialists in international heritage law matters.¹²⁶ That strategy can lead to better integration of heritage in the international system, and its placing among other competing priorities. The disadvantages are obvious though: making heritage just another thing the body has to grapple with almost inevitably means making it a low priority, and the body will not have sufficient expertise to properly address the needs of heritage. Nonetheless, it has been argued that increasingly these bodies have become more sensitive to cultural matters.¹²⁷

In addition, a number of these systems are not equipped to hear claims from non-state actors, at least not with respect to how they value their heritage. Thus, the participation of non-

123. *Id.* at 205.

124. *Id.* at 206.

125. *Id.* at 208–17.

126. Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, *supra* note 119, at 17–20.

127. Alessandro Chechi, *Plurality and Coordination of Dispute Settlement Methods in the Field of Cultural Heritage*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW, *supra* note 117, at 177–78.

state actors is fairly restricted. The enforcement of cultural heritage through international criminal law, often hailed as a promising new avenue, is a good case study of the possibilities and challenges of enforcement of international heritage law through other means. In *Prosecutor v. Ahmad Al Faqi Al Mahdi*,¹²⁸ the International Criminal Court (ICC) Prosecutor put the destruction of heritage—the World Heritage-listed city of Timbuktu, in Mali—as the central crime in the case.

Al Mahdi was charged with intentionally directing attacks against ten buildings in Timbuktu.¹²⁹ All but one of the ten buildings were part of the World Heritage site.¹³⁰ By June 2012, the World Heritage Committee, upon the request of authorities in Mali, placed the city on the List of World Heritage in Danger.¹³¹ During the prosecution of the crime, a plea agreement was reached, the first plea agreement in the context of ICC proceedings.¹³² The Trial Chamber's¹³³ judgment on conviction and sentence was issued on September 27, 2016, accepting the plea and finding that Al Mahdi was responsible for the destruction of the heritage site.¹³⁴ The Trial Chamber sentenced Al Mahdi to nine years' imprisonment, minus the time he had already spent in custody, which is the lower end of the sentence range agreed,

128. *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016) [hereinafter *Al Mahdi*].

129. *Id.* § 38.

130. *Id.* § 39.

131. World Heritage Committee, Decisions Adopted By the World Heritage Committee at Its Thirty-Sixth Session (St. Petersburg, 2012), WHC Doc. WHC-12/36.COM/19, at 146, ¶ 6 (2012) (Decision No. 36 COM 7B.106 – Mali World Heritage Properties (Mali)).

132. For a history of plea bargaining in international criminal law, see Jenia Iontcheva Turner, *Plea Bargaining and International Criminal Justice*, 48 U. PAC. L. REV. 219 (2016).

133. The Trial Chamber is the first instance in which a judgment on the merits can be made by the International Criminal Court, but it comes after the Pre-Trial Chamber, where confirmation of charges hearings, for instance, takes place. Judgments of the Trial Chamber can be submitted on appeal to the Appeals Chamber. For a discussion of the ICC Structure in Chambers, see INTERNATIONAL CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 9–10 (n.d.), available at <https://www.icc-cpi.int/ic-docs/pids/publications/uicceng.pdf> (last visited May 20, 2019).

134. *Al Mahdi*, *supra* note 128.

but consistent with previous sentences in the International Criminal Tribunal for the former Yugoslavia (ICTY) cases.¹³⁵

The *Al Mahdi* case has important implications for the field of international heritage law, to the extent it advances a more community-centric version of cultural heritage law and the values associated with cultural sites. This has been referred to as a cultural relativist approach to the definition of protected objects,¹³⁶ and is one that is in marked contrast with the more universalist approach of previous ICTY jurisprudence.¹³⁷ The ICC Trial Chamber stressed the importance of the mausoleums and mosques in Timbuktu for the community;¹³⁸ that said, it ultimately seems to have decided the case based on Timbuktu's international importance,¹³⁹ reinforcing an internationalist view of heritage in the judgment.¹⁴⁰ In fact, the ICTY took into account specific references Al Mahdi made to the status of the buildings as part of a World Heritage site to determine that Al Mahdi clearly directed the attacks not only to the buildings themselves, but also to the cosmopolitan values enshrined in the UNESCO Constitution, of promotion of peace and mutual understanding through culture.¹⁴¹ The Trial Chamber's reliance on its international listing sends an important message to heritage managers in particular, and highlights the importance of listing

135. The International Criminal Tribunal for the Former Yugoslavia was created by a United Nations Security Council Resolution in the aftermath of the wars of dissolution of Yugoslavia, at a time where there were credible (and subsequently proven) accusations of war crimes and crimes against humanity during the conflict. The ICTY ended its operations in 2017 and heard a number of cases involving the destruction of cultural property as an element in the crime of persecution in the ICTY Statute (which did not include a separate crime on cultural heritage destruction). Out of these cases, the sentencing was as follows: seven years in *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1 Judgment (Mar. 18, 2004); eight years (reduced to seven and a half on appeal) in *Prosecutor v. Pavle Strugar*, Case No. IT-01-42, Appeals Chamber Judgment (July 17, 2008).

136. Paige Casaly, *Al Mahdi Before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. INT'L CRIM. JUST. 1199, 7 (2016).

137. *Id.* at 15. For a contextualization, see Karolina Wierczyńska & Andrzej Jakubowski, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, 16 CHINESE J. INT'L L. 695 (2017).

138. *Al Mahdi*, *supra* note 128, ¶ 34.

139. *Id.* ¶ 46.

140. Casaly, *supra* note 136, at 15–16.

141. *Al Mahdi*, *supra* note 128, ¶ 46.

as a mechanism of raising the visibility of and awareness to the importance of cultural property of international importance.

The Trial Chamber considered that World Heritage status,¹⁴² as well as the connection people felt to Timbuktu in their ordinary cultural practices in the city, spoke to the gravity of the crime,¹⁴³ as opposed to being an aggravating factor to be considered in sentencing.¹⁴⁴ The collective practices of conservation and symbolic maintenance events involving the entire community were taken into account as well.¹⁴⁵ These community connections and events are essentially intangible cultural heritage associated with the World Heritage Site. The connection between tangible and intangible heritage¹⁴⁶ played a role in this judgment.¹⁴⁷ That connection helps articulate the ‘victimhood’ of the residents of Timbuktu, since focusing only on the World Heritage status would rather suggest that the ‘international community,’ or Mali as the territorial state, were the victims. Therefore, in engaging the intangible elements of the site, the Trial Chamber advanced a more holistic view of cultural heritage, one that, while embraced by many scholars and UNESCO officials, is difficult to implement within the constraints of treaty texts.

The Trial Chamber walked a tightrope in this case. On the one hand, it wanted to acknowledge the harm done to the local community in Timbuktu, and how “destroying the mausoleums . . . was a war activity aimed at breaking the soul of the people of Timbuktu.”¹⁴⁸ This type of engagement speaks to the intangible elements connected to the site, discussed above, as well as to the identification of victims as being the local population. However, on the other hand, Timbuktu is on the World Heritage List, “and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of crimes,

142. *Id.* ¶ 80.

143. *Id.* ¶ 79.

144. *Id.* ¶¶ 86–88. In fact, the Trial Chamber found there were no aggravating factors.

145. *Id.* ¶ 78.

146. Explored in detail in LUCAS LIXINSKI, *INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW* (2013) [hereinafter LIXINSKI, *INTANGIBLE CULTURAL HERITAGE*].

147. Exploring the connection between conflict and intangible cultural heritage, see Christiane Johannot-Gradis, *Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?*, 900 INT’L REV. RED CROSS 1253 (2015).

148. Al Mahdi, *supra* note 128, ¶ 80.

namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.”¹⁴⁹ The Trial Chamber therefore drew an important distinction between direct (people of Timbuktu) and indirect (Mali and the international community) victims.

Al Mahdi is an important case in that it brings communities in front and center; however, their role is largely as passive victims, with somewhat limited agency. That is so in spite of Mark Drumbl’s position that the judgment places cultural property in a position that defies the nationalist-internationalist dualism that is criticized in this article.¹⁵⁰ Further, the discussion on economics in the previous subsection suggests it is probably better to deal with heritage matters “internally,” rather than having to trust that the framing by other institutions will not be too distorted. Therefore, and particularly in this discussion of the national versus international dichotomy, there is room to also think of the domestic implementation of international cultural property law.

Community involvement is most central for implementation, as it is essential for the entrenchment of heritage values, and to ensure that heritage remains vital and relevant locally, which then promotes the international safeguarding goals of the treaty regimes under UNESCO. International cultural property law, however, has a way to exclude communities from the equation. This implementation happens on two different but interconnected levels, the domestic and the international. Domestic implementation often happens at the behest of, and modelled after, international mechanisms. Additionally, it can also often take a dynamic of its own, such as when domestic systems promote integrated approaches to different heritage domains that are not feasible in the current fragmented international system.

The implementation of international heritage treaties is imperative for the international enforcement of situations that are very often transboundary, and ultimately for the safeguarding of heritage. Failure to implement treaties results in norms falling through implementation cracks, in a replay of the public/private distinction that permeates much of international heritage

149. *Id.*

150. Mark A Drumbl, *From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property*, J. INT'L CRIM. JUST. 1, 6 (2019).

law, mentioned above.¹⁵¹ For that reason, there is some potential in transnational law as a way of thinking about community-centric governance over heritage and resources. In blending public and private, transnational law can bring the invisible private into the light; it can also enhance agency beyond the state in the public. That said, transnational law mechanisms often assume a level of equilibrium among different stakeholders that, with respect to cultural property, is not often there, particularly in the more commonplace examples of traditional communities having their heritage (mis)appropriated by large corporations. Therefore, the state is still an indispensable presence in this area, at least as a means to counterbalance and correct asymmetries that occur if the private of transnational is left to its own devices.

In dealing with the domestic implementation of international cultural heritage law, the inclusion of communities in international processes is central. As far as international cultural heritage law is concerned, however, its state-centric nature requires that at least some of the domestic implementation happens through state authorities and those who are committed to the conservation paradigm.¹⁵² Assuming implementation can happen through authorities that are in principle sympathetic to community aspirations because they have mandates to that effect, an additional obstacle arises. More specifically, if domestic bureaucracies do much of the (at least initial) implementation work, there is a clear disincentive to relinquish control over heritage processes in favor of communities, as it means the state official receives no credit for the implementation work, nor for the eventual success of heritage safeguarding at the national level. Therefore, one of the big challenges in the domestic implementation of international heritage law, if communities are to be more involved, is to figure out incentives for the state and its

151. See also Derek Fincham, *Social Norms and Illicit Cultural Heritage*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW, *supra* note 117, at 206–12.

152. For a more optimistic view, arguing that domestic implementation of the ICHC may in fact be changing the conservation paradigm domestically, see Janet Blake, *The Impact of UNESCO's 2003 Convention on National Policy-Making: Developing a New Heritage Protection Paradigm?*, in THE ROUTLEDGE COMPANION TO INTANGIBLE CULTURAL HERITAGE 69 (Michelle L. Stefano & Peter Davis eds., 2017).

officials to relinquish control over heritage once the basic safeguarding structures are set in place.¹⁵³

Domestic listing of heritage, even if it follows by and large the requirements set by UNESCO treaties, will still inevitably have a national flavor by virtue of different ideological filters created by states not only in presenting their items for international listing, but even in creating the conditions for domestic listing. Most of these filters are inscrutable based on a reading of domestic legislation alone, but they tend to lean towards valuing local culture in a way that serves nationalism and the local tourist industry.¹⁵⁴ Further, while international heritage law has been fairly successful in making heritage management practices uniform across the world, as shown in previous sections, there are still elements of the local that cannot be accounted for by international heritage treaties. More specifically, domestic managerial and bureaucratic practices beyond heritage inevitably influence the way heritage is handled as a bureaucratic and managerial matter. Certain documents like the Nara Document on Authenticity (and its counterpart Nara +20)¹⁵⁵ have drawn attention to the diversity in domestic administrative practices, and their impact on heritage.¹⁵⁶

These filters are not necessarily compatible with the UNESCO vision of cosmopolitanism, but they in fact act as an important counterweight to them, allowing for local involvement and local politics to filter through the system. Therefore, domestic implementation is a key means to allow for the voices of local communities to be heard. The problem is when domestic law does not

153. This author is very thankful to Harriet Deacon for this insight. Communication with Harriet Deacon, Visiting Fellow at Coventry University (Oct. 13, 2015).

154. ANTOINE GAUTHIER, *CONFESSIONS D'UN GESTIONNAIRE: LES POSSIBILITÉS ET LES CHOIX LIÉS AU PATRIMOINE IMMATÉRIEL À L'ÉCHELLE NATIONALE* 8 & 11 (2014).

155. These documents were adopted by the International Council of Museum and Sites, one of the leading international NGOs in the area of cultural property. They speak about the evolving notion of authenticity, and how tangible and intangible values are to be taken into account when assessing the worth of cultural property, as well as in determining the best means of undertaking conservation and restoration work.

156. Luca Zan, *Economic Discourse and Heritage Conservation: Towards an Ethnography of Administrations*, 6 *HERITAGE & SOC.* 167, 171 (2013).

open those possibilities, and that is one of the reasons why involvement of local communities at the international level is so important.

D. Bringing the Community Front and Center

As Dianne Otto has suggested, in her reading of Gayatri Chakravorty Spivak,¹⁵⁷ there are important disruptive effects associated with making the unseen visible; however, at the same time, there is a large problem in the movement from rendering the mechanism visible to giving a voice to the neglected subaltern.¹⁵⁸ The same happens with respect to heritage and in other resource contexts, particularly environmental governance.¹⁵⁹

It is one thing to identify the need to have communities involved more centrally in international governance of cultural property, it is another thing to actually work out the shape of that involvement. There are two main options suggested by this article in this respect.

The first option is normative, or to change existing rules to make sure communities are included in international heritage processes. Given the concern with listing across a range of instruments, it would seem that including communities in those listing processes would be an ideal first step. One of the avenues in this respect involves the requirement of prior and informed consent before a community's heritage is used internationally, a mechanism that is already being used in the broader context of access and benefit-sharing in the area of traditional knowledge and genetic resources,¹⁶⁰ and which also has specific potential for intangible cultural heritage, one of the UNESCO domains of

157. Spivak is one of the leading critical thinkers in post-colonial theory, and her work on feminism in this space is particularly influential. Dianne Otto is a key critical legal thinker in the area of international law, particularly connecting feminist and queer discourses to international legal practices.

158. Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 *SOC. & LEGAL STUD.* 337, 354 (1996) (citing Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 285 (Cary Nelson & Lawrence Grossberg eds., 1988)).

159. See, e.g., Graham R. Marshall, *Nesting, Subsidiarity, and Community-Based Environmental Governance Beyond the Local Level*, 2 *INT'L J. COMMONS* 75, 75 (2008).

160. For a recent overview and review of literature, see DANIEL F. ROBINSON, *BIODIVERSITY, ACCESS AND BENEFIT-SHARING: GLOBAL CASE STUDIES* 29–44 (2015).

cultural property.¹⁶¹ In the area of traditional knowledge, access and benefit-sharing protocols have been successful in promoting community development (in spite of it not being a clear objective of the international treaty that serves as the foundation of these protocols), as well as overall conservation of natural resources (often with cultural significant for affected communities), bringing together corporate actors, states, experts and communities.¹⁶²

Appealing to the access and benefit-sharing mechanism shifts the legal form to safeguard heritage away from “heritage” and “property” towards “contracts.” This shift, while contravening many of the foundations of the field, and somewhat unfamiliar in international legal spaces, presents novel possibilities for community control over heritage. A recovery of “property” as an analytical category in the field, discussed above, is a first step to bring the private of communities closer to the public of the dichotomy between nationalism and internationalism.

A downside is that these mechanisms can be easily abused, as indicated above. They are often relegated to the domestic in practice, with no international oversight of how Free, Prior, and Informed Consultation (FPIC)¹⁶³ is done. This alternative is discussed in more detail in the next section.

Instead of, or in addition to, normative reform, a second option is institutional reform. For instance, one of the few attempts to institutionalize community involvement in international heritage management has been through the World Heritage Indigenous Peoples Council of Experts (WHIPCOE),¹⁶⁴ an initiative taken in response to concerns about the lack of involvement of indigenous peoples in the management of World Heritage sites

161. See LIXINSKI, *INTANGIBLE CULTURAL HERITAGE*, *supra* note 146.

162. ROBINSON, *supra* note 160, at 176–77.

163. FPIC is the mechanism, developed originally in the field of bioethics, through which the persons or groups affected by a certain decision need to express their consent to the proposed intervention. In the Indigenous context, “consent” became “consultation,” which is largely a compromise weakening of the principle.

164. On Indigenous involvement more generally, see Mohsen Al Attar Ahmed et al., *Indigenous Cultural Heritage Rights in International Human Rights Law*, in *PROTECTION OF FIRST NATIONS’ CULTURAL HERITAGE: LAWS, POLICY AND REFORM* 311 (Catherine Bell & Robert Patterson eds., 2009).

internationally.¹⁶⁵ Here, as with other community-based initiatives, failure stemmed from colonial legacies and state sovereignty.¹⁶⁶

One of the bureaucratic objections to WHIPCOE was that it would involve engaging a large number of “unwieldy bureaucratic procedures, for an issue which only concerns a limited number of States Parties and which can be treated by other means.”¹⁶⁷ Even if this objection is deemed valid with respect to indigenous peoples, it does not hold true with respect to communities in general, as every country would have local communities affected by a number of heritage management practices and laws. Therefore, in this instance, the focus on indigenous people’s special rights was used as an argument against community aspirations. The ghettoization of communities is one of the strategic problems with promoting more community-based forms of governance over heritage and needs to be combatted.¹⁶⁸

The indigenous rights movement offers a number of lessons that can be useful for community-based heritage management. For instance, an important lesson from the indigenous movement is that, historically, international standard-setting concerns about indigenous peoples have often moved forward without acknowledging the need for indigenous participation in establishing rights pertaining to them (with the 2007 UN Declaration on the Rights of Indigenous Peoples a notable exception).¹⁶⁹ Another lesson draws from recent action around involving indigenous peoples in participatory processes, which has been on the agenda of the UN Human Rights Council, which revived in some way the proposal for the WHIPCOE, but even more broadly, by saying that UNESCO needed to create procedures to involve indigenous communities directly in international decision-making.¹⁷⁰

Communities face a number of challenges in their attempts to gain a seat at the international table. First, international law’s

165. Meskell, *supra* note 9.

166. *Id.* at 156.

167. Cited in *id.* at 164.

168. On strategic choices of the indigenous rights movement in general, see ENGLE, *supra* note 11.

169. Ahmed et al., *supra* note 164, at 315.

170. See generally U.N. Human Rights Council, Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making – Report of the Expert Mechanism on the Rights of Indigenous Peoples, ¶ 37, U.N. Doc. A/HRC/18/42 (Aug. 17, 2011).

exceptions to state sovereignty are usually rights-based narratives; however, communities cannot be easily accommodated in individualistic rights narratives that allow stakeholders such as museums and collectors to have more influence in some areas of international heritage action. That is because they are collectivities, and the rights paradigm has so far advanced relatively little vis-à-vis group or people's rights. This reluctance can be partly explained since groups, far more than individuals, can pose an actual challenge to state sovereignty. That is the second great challenge communities face: their position vis-à-vis states is usually assumed to be one of opposition, rather than cooperation, which creates difficulties in even admitting a conversation about community rights in international law. Groups are accommodated, to larger or smaller extents, under a number of states' constitutional or otherwise public law systems, but that always happens well within the confines of the state, with little input from international law.

The third challenge communities face in being more represented in international decision-making vis-à-vis their heritage is that, at least in theory, communities are already represented. Experts and expert organizations, after all, are meant to translate communities' desires with respect to the definition, management and future of heritage in international fora. Again, while good intentions abound, there is always room for improvement, and a system that sees heritage as an end in itself is less likely to be able to accurately convey community aspirations that largely see heritage as an instrument in the pursuit of broader goals. Translation filters fall short, in sum. Furthermore, even for those organizations that have been successful in bringing communities closer to heritage listing processes, their efforts are still largely voluntary, and communities are brought in under someone else's umbrella, playing under someone else's "stage management," and never in full.

A fourth challenge has to do with the very definition of who the community is, and how their agency is exercised. There is always a risk of essentializing the community, turning it into a monolithic entity with a single voice. This pull towards strategic essentialism¹⁷¹ creates a context that not only fails to acknowledge intersectionality in identity, but also, even taking the potential strategic advantage at its highest, often backfires in that any

171. See ENGLE, *supra* note 11.

semblance of a crack in the monolith is exploited in order to deny the existence of a claim altogether. The human rights paradigm, with its difficulties of accommodating community interests, may in fact be partly responsible for this move towards strategic essentialism, inasmuch as it expects that the community operates with one voice (thus, akin to an individual).¹⁷² Bringing communities to the international table forces a realization of pluralism and intersectionality that is likely to be deeply destabilizing.

These options with respect to cultural property, and as means of overcoming the unintended consequences of Merryman's dichotomy, can also apply beyond cultural property. As suggested above, insights can be taken from, and lent to, the international governance of other resources. The next section examines some of those possibilities.

III. THE THIRD WAY BEYOND CULTURAL PROPERTY

If there is a need, and possible ways, of including communities in the governance of cultural property and other cultural resources, there is also reason to believe communities can be included in the governance of other resources in, with, or around which they live. This section explores some thinking around community-centered governance of resources in international law in other contexts and draws out lessons from cultural property to bear in these contexts.

Like with cultural property, there is a shared sense of the importance of including communities in governance, with, for example, community-centric resource governance in international environmental law being referred to as "emerging as a new source of authority for pluralism."¹⁷³ Further, to the extent international law is an important site for the contestation of ideas about community and democracy,¹⁷⁴ it has a latent role to play not only with respect to cultural property, but across a range of other domains.

One of the ideas underlying community-centric resource governance, much like the definition of heritage, is that the space for it is carved out negatively. More specifically, much of the prompting to include communities comes from a perception of

172. For a discussion, see ENGLE, *supra* note 11.

173. Lee P. Breckenridge, *Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems Under International Environmental Law*, 59 TENN. L. REV. 735, 736 (1992).

174. Otto, *supra* note 158, at 359.

state failure in the specific domain.¹⁷⁵ Or, at least, it comes from the perception of states as trustees,¹⁷⁶ and the communities as the actors that hold that trusteeship to account.¹⁷⁷ International law governing these resources should, then, be “a route for vindication of local interests, and, in particular, of rights of . . . marginalized groups living within the world’s areas of richest [resources].”¹⁷⁸

Governance works best when there is a functional equivalent to the state (or the state itself) casting a “shadow of hierarchy.”¹⁷⁹ In other words, processes of community engagement with policy-making work best when there is a strong state, or, in the absence of this state, some other arrangement providing an incentive to engage in rule-making in non-hierarchical manners.¹⁸⁰ These shadows of hierarchy can be cast by institutions other than the state, like international institutions, but other actors need to be present. That is to say, even if the need to engage communities seems to arise from state failure, the alternative is not to replace the state.¹⁸¹ Nor is that the argument presented here. Local communities, after all, cannot provide a shadow of hierarchy.¹⁸² My position, as indicated above, is one that includes the community *alongside* states, experts, and international institutions, on equal footing, but never *instead of* these other actors.

A problem in this context is the equation of communities with experts who get to speak on their behalf, which, as discussed above, is problematic. A lot of assumptions tend to be made about what the community wants, with relatively few people

175. See, e.g., Karen Bakker, *The “Commons” Versus the “Commodity:” Alter-Globalization, Anti-Privatization and the Human Rights to Water in the Global South*, 39 ANTIPODE 430, 430–31 (2007).

176. See for instance EVAN DECENT-FOX & EVAN CRIDDLE, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016).

177. Breckenridge, *supra* note 173, at 748–49.

178. *Id.* at 767.

179. Tanja A. Börzel & Thomas Risse, *Governance Without a State: Can it Work?*, 4 REG. & GOVERNANCE 113, 114 (2010).

180. *Id.* at 113–14.

181. See also James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2036–37 (2000) (discussing the issue in terms of the replacement of classical sovereignty by popular sovereignty, and how the latter is almost moot in the total absence of the former).

182. Börzel & Risse, *supra* note 179, at 125.

daring ask them directly,¹⁸³ and therein lies much of the risk of expert rule as spokespeople for the community.

Communities branded as “civil society” can explore pathways to control their own resources. Collective management is advantageous and necessary in respect to resources such as water, for instance, for at least three reasons: first, because the resource may be subject to market and state failures. As indicated in the discussion of cultural property in the previous section, the market often fails the interests of communities (in part because the law refuses to engage with the market), as does the state in deferring to expert rule and its own political agendas over those of the community. Second, community governance is preferable given the historical, cultural, and spiritual dimensions attached to the resource. Thirdly, generally for these resources their use is most important, and mostly impacted, at the community level, and the resource can only be safeguarded “if communities are mobilized and enabled to govern their own resources.”¹⁸⁴

A clear obstacle is where the resource at stake is lucrative. In those cases, research has shown¹⁸⁵ decentralization of governance to local communities is rarer.¹⁸⁶ With respect to cultural property, there is often an aspiration, discussed above, that cultural property can be exploited profitably, which is not often met. Over-inflated figures of the value of the market in cultural objects do not help, either. Another obstacle often pointed out is the lack of clear processes for decentralization, with relatively clear divisions of competences.¹⁸⁷ To the extent experts and civil servants are unwilling to make way for community governance, and insist on acting as the (ultimate) filters of community aspirations towards, and interactions with, the resource, the implementation of community-centric governance will be hindered.

In terms of the model of engagement (normative or institutional reform), literature on water resources suggests that optimal strategies both reform state governance structures, while

183. See, e.g., Breckenridge, *supra* note 173, at 751.

184. Bakker, *supra* note 175, at 441. See also Breckenridge *supra* note 173, at 754 (on the connection to environment).

185. Most of this research has been done in the context of economics. For a meta-analysis and review of available research, see ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (2015).

186. Marshall, *supra* note 159, at 83.

187. *Id.*

simultaneously sharing alternative local models of resource management.¹⁸⁸ Thus, the lesson is that the answer may lie in both normative and institutional reform. Normative reform paves the way for local models to be considered, while governance structures are reformed at the institutional level.

The literature on other resources also reminds us of the limitations of human rights language in this area, in that it reinforces a public/private distinction that predicates the problem, and preempts possibilities for collective action.¹⁸⁹ In the cultural property domain, recent scholarship has also engaged with the risks of cooption and the limitations of a human rights model in the area of resource governance.¹⁹⁰ Human rights in many respects plays the role of deferring the debate, rather than addressing the problem. By introducing the familiar and all-encompassing emancipatory language of human rights, one can avoid dealing with the issue. Instead the issue is left for human rights lawyers, without considering that, for instance, the enforcement of international human rights law has a hard time accommodating group claims, and that in the translation of claims into individual rights something is necessarily lost. In other related areas, it has been shown that, more than rights, communities are more interested in capacity-building and self-governance.¹⁹¹

An inherent risk in this area is that the interests of communities become proxies for internationalism, or a rather undefined and amorphous cosmopolitan agenda.¹⁹² That move is problematic in that it still defines communities within the confines of the dichotomy of national versus international, and, most importantly, it allows the community's voice to be co-opted by a vision that, however idealistic it may be, does not necessarily fit the community's aspiration vis-à-vis the relevant resources. If communities are equated with a "new" international, then they are in fact co-opted into this amorphous international. The new international is, as discussed above, in many respects the domain of international civil servants who, however well-meaning,

188. Bakker, *supra* note 175, at 446.

189. *Id.* at 447.

190. Francioni & Lixinski, *supra* note 121.

191. Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 281 (2001).

192. As suggested by Breckenridge *supra* note 173, at 784.

are not always fully equipped to translate the interests of communities. It is international law's role to provide an avenue for the community's voice to be heard in spite of or even against the state, but not to presuppose that voice's clamor. If the international is to be legitimate, it requires input legitimacy from communities, that is, their participation in standard-setting, and not just legitimacy based on the outcomes of resolutions adopted by international bodies (output legitimacy).¹⁹³

To be sure, international law is constitutionally resistant to alterity and diversity, and the subaltern has a hard way ahead to carve out governance spaces.¹⁹⁴ Part of that has to do, in the resource context, with the idea that local communities are often "denigrated as primitive others and seen to be in need of civilizing and development missions by governments who seek to modernize them."¹⁹⁵ While these observations are often made in the context of indigenous peoples, they also apply more broadly to most forms of local or traditional communities, seen at the margins. Likewise, these considerations apply to biological, cultural, and intellectual property and even mineral resources.¹⁹⁶

Global administrative law may be seen as a way of making sense of these practices, by bringing to bear values of deliberative decision-making, institutional design, and procedural legitimacy.¹⁹⁷ A shortcoming in this literature, though, is that it often sees communities, and civil society more broadly, as aligned with the state against the "faceless bureaucrats" of international organizations.¹⁹⁸ Communities are not always aligned with states; were that the case, the dichotomy of internationalism and nationalism would still hold true, as nations would represent communities adequately. The point here is that international law

193. Börzel & Risse, *supra* note 179, at 127.

194. Otto, *supra* note 158, at 338.

195. Coombe, *supra* note 191, at 280.

196. On the connection between primitivism and the exploitation of mineral resources, see Mats Ingulstad & Lucas Lixinski, *Raw Materials, Race and Legal Regimes: The Development of the Principle of Permanent Sovereignty over Natural Resources in the Americas*, 29 *WORLD HIST. BULL.* 34 (2013).

197. See, e.g., Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L. J.* 1490 (2006); Benedict Kingsbury & Nico Krish, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT'L L.* 1 (2006); and Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (2005).

198. Esty, *supra* note 197, at 1494.

should exercise its function of providing an avenue for communities beyond, in spite of, or even against the state, precisely when things do not go in accordance with communities' aspirations for the governance of their resources.

It is important to resist the urge to standardize the world, and instead learn "to live with the inconsistency and instability of human multiplicities and the accompanying discomfort and uncertainty."¹⁹⁹ A recurring theme in this connection is that of strengthening the legal recognition given to communities, and understanding that engagement with the resource by all parties be done in a way that "must further the political aspirations and contribute to building political capacities within the community."²⁰⁰

A norm of international law that applies across the range of these resources is that of FPIC, which determines that communities must be consulted with respect to development projects affecting them.²⁰¹ This norm, however, still falls short of acknowledging the centrality of community governance and control, and places them more passively in relation to the resource. Further, the implementation of the norm to date still restrains community participation to the domestic level, which, as dis-

199. Otto, *supra* note 158, at 359.

200. Coombe, *supra* note 191, at 284.

201. See for instance the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, U.N. Doc. UNEP/CBD/COP/DEC/X/1 (entered into force Oct. 12, 2014). FPIC has also been discussed in some international cases in the indigenous context, perhaps most notably, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012). There is a dispute as to what the C in FPIC stands for. Original proponents wanted the C to stand for "consent", which was stronger language, drawn from bioethics, and that would effectively give indigenous peoples a veto power over projects. The language has been watered down to consultation, though, and that seems to be current consensus. This concept, however relevant, has been for the most part recognized in the indigenous context, and has found limited application outside of it. See, e.g., Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54 (2011–2012); Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570 (2009); and Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 16 INT'L J. HUM. RTS. 1 (2012).

cussed above, can be abused. Finally, FPIC subsumes the community into a preexisting institutional machinery where it will play a consultative and secondary role, rather than making the machinery serve the community. What is proposed here goes beyond FPIC, and beyond the domestic.

The proposal in this article enhances the possibilities of Permanent Sovereignty over Natural Resources (PSNR),²⁰² and extends them further. PSNR cannot always be a successful part of a human rights discourse,²⁰³ for the reasons discussed above. PSNR nonetheless seems to be more emancipatory than FPIC (at least in FPIC's current configuration), by focusing more on control over the resource than consultation around its use.

A few difficulties remain ahead. First, the obstacle of making sense of pluralism in a governable way. As communities are brought on board, multiple voices get a seat at the table, and, if it is challenging to make sense of existing voices in multilateral fora involving over 190 states, the problem can be further amplified if communities from those states join the conversation.

Second, and most crucially, is the challenge of convincing states and experts to give up their monopolies or oligopolies on power and decision-making affecting these resources. One way of driving the conversation is that safeguarding efforts are best achieved when communities are involved centrally. This may not be sufficient, however, if the economic stakes are high enough. That is a reason why international pressure and supervision are central to this equation. Normative reform without state consent may be hard to achieve, but it has been done in the past in other aspects of international cultural property law.²⁰⁴ The question is how to translate those efforts and interests more pervasively into other parts of international cultural property law, and then more generally onto other resources.

202. G.A. Res. 1803 (XVII), Permanent Sovereignty Over Natural Resources, at 15 (Dec. 14, 1962).

203. For this discussion, see generally, Temitope Tunbi Onifade, *Peoples-Based Permanent Sovereignty Over Natural Resources: Toward Functional Distributive Justice?*, 16 HUM. RTS. REV. 343 (2015).

204. Mapping changes in direction in the governance of the World Heritage Convention, for instance, see Francesco Francioni & Federico Lenzerini, *The Future of the World Heritage Convention: Problems and Prospects*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 401 (Francesco Francioni ed., 2008).

CONCLUSION

International cultural property law is an important microcosm of larger battles in the legal international, such as the legacies of colonialism, and the issue of stakeholder and governance regimes that include communities. The dichotomy between nationalism and internationalism, inaugurated by Merryman, has had constitutive effects on the field, but its simplicity betrays a far more complicated network of relationships and interests. By disregarding those, the dichotomy in effect creates conditions that threaten the resources the regime was meant to protect. A key blind spot is the exclusion of communities, as the groups who live in, with, or around those resources, from their governance.

A more community-centered international cultural property law is ultimately a better and more sustained way of safeguarding heritage for present and future generations. If communities remain involved with heritage, its future is more easily guaranteed. The exploitation of cultural property becomes not a threat, but a means to preserve it, as communities will ensure more of the money related to heritage tourism stays in the community, instead of going to foreign tourism operators, for instance.

There are a number of ways to bring communities into the international governance of cultural property (and other resources). A preliminary step is closer coordination among existing mechanisms under UNESCO, not only because this coordination helps expose blind spots, but also because it creates a unified front for communities to access and engage with, and a more coherent interpretation of definitions of heritage that is more in line with communities' aspirations towards their heritage.

Second, communities should be an integral part of the implementation of international law, not only domestically, but also internationally. For instance, communities should be allowed to propose elements for inscription on international inventories, so they can define not only their own heritage, but also the terms of engagement with it for themselves and other stakeholders. Relatedly, communities should also be allowed to access international funds directly for the safeguarding of cultural property, as, being closer to the situation on the ground, they are likely to have a better sense of how these funds are to be expended. At the very least, buy-in from communities for any conservation or safeguarding initiative is key to its enduring success, as past experience documented in this article shows.

Underlying all of these initiatives is the issue of control over heritage. Importantly, control is at its strongest, from a legal sense, when property titling is involved. As discussed above, however, property in this context takes on a more socially-aware and -responsible connotation, in which collective interests are a key part of the very core of property, rather than a disturbance of a near-absolute right. In this version of property, communities still get to control the meanings and uses of their property in the first instance, but they also negotiate with other stakeholders on an equal plane, as opposed to the current situation, in which they are at a necessary disadvantage vis-à-vis states and expert groups.

The reintroduction of property as a category in international cultural property law reapproximates international heritage law to domestic frameworks, therefore not being that far-fetched. It also creates an imperative for more engagement with the economics of cultural property within international law. Attempts to ignore, demonize, or even criminalize the market have failed, and thus international heritage law is no longer in a position to keep ignoring economics. Rather, it must assert its presence and role in these conversations.

Ultimately, none of these suggestions do away with current structures entirely, they are simply meant to further their mandates in light of the current state of international cultural property law in UNESCO's eighth decade of operation. After all, decisions on how to prioritize funding distribution still need to be made, as well as to what heritage is listed, and how it is safeguarded. Communities, however, should be an integral part of these "stage management" processes as well, instead of being filtered or tokenistic members of international heritage governance. Only then can we speak of a system of international heritage law with a clear mandate to realize its potential for promoting peace and human emancipation through culture.

Beyond cultural property, lessons can be borrowed from and lent to the governance of other resources, in ways that can aid rethinking international law's role more generally. More than focusing on a duality of domestic and international, international law would do well to be more sensitive to its effects on the ground, and how and whether the people more directly affected by international legal governance can have their voices heard, unfiltered, before the international. There is at least a third way

of thinking about cultural property, and, alongside it, international cultural property law draws from and feeds into a third way of thinking about international law.