UNIVERSIDADE CATÓLICA PORTUGUESA

LAW AS CULTURE: A STUDY OF LAW AS A CULTURAL ARTEFACT THROUGH THE STUDY OF INTERNATIONAL CULTURAL HERITAGE LAW.

Dissertation submitted to Universidade Católica Portuguesa to obtain a Master's Degree in Culture Studies – Management of Arts and Culture

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ABSTRACT

"In the past century, we studied the law from within. The jurists of today are studying it from without." (Pound, 1921:212) The twentieth century saw significant changes in legal thinking, from the philosophy of natural laws and pure theories of law to sociological legal studies, we see now the emergence of cultural legal studies. The interest for a combined field of law and culture is not something new; many academics and philosophers have tackled the question. For Friedrich Karl von Savigny, an eighteenth-century legal philosopher, the law was an expression of the *Volksgeist*. Since then, different fields emerged, legal humanities, interpretive sociolegal studies, and legal anthropology, which are all part of the cultural legal studies.

One can see the importance of cultural legal studies. Law influences everyday life and culture itself, but culture, as well, shapes law. However, defining cultural studies of law is difficult, as it has many subcategories and no clear methodology. (Coombe, 1996:36)
If we consider that law is a cultural element of our society, what is the reciprocal influence of law and culture on each other? How can cultural legal studies be put into practice? By studying the protection of cultural heritage from a legal aspect, we are suggesting that laws and jurisprudence are a cultural artefact in which lies the identity and development of society. In this thesis we would like to debate on the relevance of considering law as a cultural artefact, to study legal studies as if there were cultural ones. With this method, and taking international cultural heritage law as a case study we would like to expose that the difficulties of building an international legal framework are linked cultural difficulties and as being cultural products laws are creating positive and negative new behaviours and situations.

Preface

I still recall my first day at Law School. I was happy and proud, but also intimidated. There I was, sitting in a large, dark brown amphitheater - I had made it to a School of Law in Paris. I had entered it not out of love for law, but out of an interest in languages and cultural diversity. Choosing a Law school might seem odd, but this one offered a trilingual program studying three different legal systems. Law, then, seemed to me like a medium allowing me to learn about the culture and development of these different countries. At the beginning, like many, I naively believed that law would allow me to help people achieve "justice." But, the course director made it clear on the first day that "law is not justice." He added, "look to your right, look to your left, one of your colleagues will not be here next semester." The tone was set and I had entered a world of competition, reputation and, perhaps later on, financial reward, although, during my studies I eventually grew to appreciate and enjoy studying law. It was interesting, diverse and full of subtleties. Law is about finding a niche and being a convincing speaker. But, for some of my professors and the lawyers with whom I briefly worked, law was linear and immalleable - it is almost predictable. While law certainly needs this predictability to be applicable and to achieve a sense of justice, I found this way of interpreting law boring and restricting. Therefore, I decided to turn to a different field, one that impassioned me as equally as law: arts and culture. I decided that in order to reflect on law and legal studies, I would have to dive into the study of culture.

Introduction

"Law, at first glance, appears easier to grasp if considered in opposition to culture - as the articulated rules and rights set forth in constitutions, statutes, judicial opinions, the formality of dispute resolution, and the foundation of social order," writes Naomi Mezey (2013;35). One might then consider why, throughout the centuries, legal philosophers and jurists, as well as humanists, poets and civilians, have and still are debating over the nature of law. What is law? What are legal rules? Jurisprudence? Does law refer to a law of nature or physics? Is it *Jura, Recht* or *Gesetz* in German? Is it *le droit, la loi* or *la légalité* in French? Perhaps law is order and power, or is it justice? The poem of Wystan Hugh Auden, "Law Like Love," explains the complexity and diverse nature and meaning of law:

Law, say the gardeners, is the sun,
Law is the one
All gardeners obey
To-morrow, yesterday, to-day.

Law is the wisdom of the old,
The impotent grandfathers feebly scold;
The grandchildren put out a treble tongue,
Law is the sense of the young.

Law, says the priest with a priestly look,
Expounding to an unpriestly people,
Law is the words in my priestly book,
Law is my pulpit and my steeple.

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,

Law is but let me explain it once more,
Law is The Law.

Yet law-abiding scholars write:
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Good morning and Good night.

Others say, Law is our Fate;
Others say, Law is our State;
Others says, others say
Law is no more,
Law has gone away.

And always the loud angry crowd,
Very angry and very loud,
Law is We,
And always the soft idiot softly Me.

If we, dear, know no more
Than they about the Law,
If I no more than you
Know what we should and should not do
Except that all agree
Gladly or miserably
That the Law is
And that all know this
It therefore thinking it absurd
To identify Law with some other word,

Unlike so many men
I cannot say Law is again,

No more than they can we suppress
The universal wish to guess
Or slip out of our own position
Into an unconcerned condition.
Although I can at least confine
Your vanity and mine
To stating timidly
A timid similarity,
We shall boast anyway:
Like love I say.

Like love we don't know where or why,
Like love we can't compel or fly,
Like love we often weep,
Like love we seldom keep.

(Auden, 1989:89)

Religion is the law, karma is the law, weather is the law, politics and government are the law and the people are the law. There seem to be as many words associated with law as there are languages, philosophies and beliefs. This is certainly the idea that Auden wants to convey in his poem: law is unattainable. Like love, we do not know where law comes from; like judges, we believe that "law is the law," as if it had a life of its own. Auden seems to reflect more on the etymology and various meanings of the word "law," which makes this poem a good introduction to the complexity and broadness of the subject. His poem should invite the reader to consider that law and the concept behind it is not as straightforward as it might appear.

This thesis will engage with the complexity of law, not as Auden's poem suggests, by making a study of the origins and different meanings of the word law, but by connecting law and culture. In this thesis, I will look at the influence that law and culture have had on each other by analyzing law from a cultural studies perspective, while also understanding how some cultural changes occur through legal development.

As it might have been clear in the previous phrases, in this thesis I define law in terms of legality and legal rules. Giving a clear definition of this is not easy, and as Kant points out in his book, *Critique of Pure Reason*, "jurists are still searching for their definition of law" (quoted in: Schuhr, 2006:27) (my translation). So, over two hundred years we do not seem to have progressed much nor agreed on a definition. But, several opinions and schools of law have emerged for the study of the concept of law. This indecision and the variety of interpretations of the nature of law will be addressed in this thesis. I will argue in this thesis that law is not something fixed in time but that it is tied to culture and language. Law is created by people and their thinking at a specific moment in time. The concept of law is as broad as the concept of culture because law *is* culture and they are constantly re-creating and influencing one another as time passes.

The study of this interrelation between law and culture is not something new. For example, legal philosophers like Roscoe Pound and the School of Sociological Jurisprudence studied law as a social science. More recently, two movements have emerged: the Critical Legal Studies movement in the 1970s and the Cultural Legal Studies movement in the 1990s. For example, there are numerous propositions about the association of law with other subjects described in the book, *Cultural legal studies: law's popular cultures and the metamorphosis of law*:

> "the cultural studies of law; law and cultural studies; law and popular culture; law as culture; law in the domain of culture; cultural-legal studies; and its myriad compatriot "law-ands", ranging from law and literature, to law and film, law and aesthetics, to law and humanities" (Sharp and Leiboff, 2015).

Sharp and Leiboff continue by saying that:

> "To cut to the chase, cultural legal studies is concerned with animating law's popular cultures – the multivalenced forms and practices ranging from the humanities to video games and beyond – as a means through which to transform or animate questions of law and justice" (Sharp and Leiboff, 2015).

The association of law with culture seems to be a well-trodden path. Why would I claim any novelty in this association? But, by reading the definition given by Sharp and Leiboff of cultural legal studies, it seems that they take "law's popular culture" as their subject of analysis; indeed at the end of the first chapter in their book, called *Naming,* the authors write, "cultural legal studies is concerned with the real, which makes law's popular culture its agent of exploration, of criticism and of practice" (Sharp and Leiboff, 2015). It seems that this analysis only deals with the representation of law in popular culture, using it as a medium of interpretation and critique of the law. Although this method of analysis might be interesting in its own right as it looks at how law is understood in practice by people and how they interact with it, this does not allow us to look at how culture itself has an impact on the law. This method still seems to distinguish between law and culture; the objectives of their study is strictly a cultural one and not a legal one, as they are only looking at law's representation in popular culture. They align their thoughts with other writers and philosophers, for whom law and culture are "conceptualised as distant realms of action and only marginally related to one another" (Mezey, 2001:35).

The term "cultural legal studies" should perhaps be taken more literally, and legal studies could be approached as if it were cultural studies. The objects for analysis should not be popular cultures, such as film, photography or music, but law itself and it should be analysed as a cultural object.

What I would like to propose in this thesis is a different methodology for analysing cultural legal studies. Similar to the work of an archeologist I would like to treat law as if it was a cultural artefact and place it within a historical context. I will analyse law from a cultural

point of view. By approaching law as such, I hope to not only reinforce the argument that law is culture but also illuminate how law and culture mutually influence each other. This can be thought of as a reciprocal relationship, as culture has created law, a tool of power, that itself has the power to influence society and cultural values.

It is not possible within this thesis to provide a comprehensive analysis of the concept of "the law," as this would be the project of more than a lifetime. But I will strive to analyse just one branch of law, namely cultural heritage law. International cultural heritage law will then be the case study of this thesis. I will also limit myself to looking at it only on an international level and I will not attempt to analyse the differences between national legal systems, as this would require more space than a master's thesis. I chose international cultural heritage law as my case study not only out of personal interest but also because 2018 was designated European Year of Cultural Heritage by the European Commission. On the website *europa.eu*, the reason for having chosen cultural heritage as the focus of 2018 is: "cultural heritage has a universal value for us as individuals, communities and societies. […] You may think of heritage as being 'from the past' or static, but it actually evolves through our engagement with it" (European Union, 2019). To this end, the European Commission had "a total budget of 5 million euros to be allocated to projects under the Creative Europe programme."[1] To celebrate this year of cultural heritage, the European Commission had selected twenty-nine cultural projects that were in line with the slogan "our heritage, where the past meets the future" (European Commission, 2018).

I decided to reflect on my understanding of cultural heritage and how my studies in law and culture might influence and engage with it. I started to ask myself why cultural heritage has such an important place in our society, and why some of us want to give it such a prominent place. This is one of the questions that I will look at in this thesis by examining, retrospectively, laws, written or unwritten, that target cultural heritage and cultural property. From this departure point, several questions arise: who wanted, and still wants, to protect cultural heritage? What are the benefits of its protection, or in many cases its

[1] Main EU programme supporting cultural and creative sectors.

destruction? Who has the capacity to protect or destroy cultural heritage and with what means?

Integral to these questions is the opportunity of combining legal studies with cultural studies. Indeed, not only is law one of the tools used in the protection, or destruction, of cultural heritage, but the international community, including Europe, has for the last sixty years tried to create the need for an international legal system protecting cultural heritage and property. This is, in my opinion, the perfect case study for demonstrating the difficulties that an international legal system often faces due to the law's attachment to and interaction with culture.

So, a number of questions arise throughout this thesis. There are some general ones relating to the methodology and core subject: how do we put cultural legal studies into practice? If we consider law as a cultural object, how should we study it? There are also some more specific questions related to this case study: if law and culture influence each other, how does culture and society influence the international legal system of cultural heritage protection? Is international law effective and what impact does it have on cultural heritage today?

This thesis proposes a way of analyzing law through a cultural lens, as if legal studies were cultural studies. Through this analysis, the thesis might shine some light on some difficulties that international laws on cultural heritage protection face. However, this thesis is not meant to propose solutions; it merely aims to serve as a starting point for reflection and debate on these complex problems.

In the first chapter, I will start by presenting the main schools of legal thinking, explain my methodology and why I chose to treat law as a cultural artefact. In the next three chapters, I will consider law as an object which can be contextualised in the past, present, and future, in order to fully understand its meaning and impact on culture and how culture, in turn, impacts international law.

Chapter One

The importance of contextualisation:

presentation of the methodology

This first chapter not only provides a contextualisation of the subject, but also an explanation of the methodology that will be used in this thesis. Therefore, an introduction to the leading schools of jurisprudence, as well as their historical and cultural contextualisation, is important. The idea here is not to dismiss these schools of jurisprudence, firstly because it is not in our capacity to discredit centuries of legal thinking, and secondly, because each one is of some importance to this project's method.

I- SHIFTS IN THE SCHOOLS OF JURISPRUDENCE: FROM LEGAL NATURALISM TO CULTURAL LEGAL STUDIES

"Until recently," writes Roscoe Pound, "it has been possible to divide jurists into three principal groups, according to their views of the nature of law and of the standpoint from which the science of law should be approached" (Pound, 1911:591). Dating from the seventeenth century to the end of the nineteenth century, these main schools of jurisprudence are: the Natural School, which takes the philosophical approach of legal positivism, the Analytical School, sometimes also referred to as the Imperative School, and the Historical School, which argues that law is a result of historical development. As will be described in the following paragraphs, and as Austin Sarat and Jonathan Simon point out in an essay on the rise of cultural studies and its place in legal studies, law was the "dominant form of expertise relevant to government […] to rationalize power" (Sarat & Simon, 2001:4). Until the end of the nineteenth century, law relied on courts and legal concepts, like those of sovereignty, property and contracts. Then, as the mindset of society changed, so did law. The twentieth century brought another body of expertise that "became a co-equal, if not dominant, partner to governance": the social sciences (Sarat & Simon, 2001:4). But today,

with the rise of cultural studies, governance has now arguably shifted its focus from "social" problems to "cultural" ones (ibid.). This has led to the emergence of cultural legal studies.

The Natural School of Jurisprudence[2]

"They're [unwritten and unchanging laws] not just for today or yesterday,/but exist forever, and no one knows/where they first appeared" (Sophocles, [442BC]2007:23). This phrase, part of the dialogue between Antigone and Creon, is often used as illustrative proof that the Natural School of jurisprudence had already existed in antiquity.[3] In the eponymous play, Antigone defends herself by stating that there are unwritten and unchangeable laws (coming from the Gods) that apply despite the disagreement of the sovereign body, Creon. Advocates of the Natural School of jurisprudence believe that natural laws are revealed by the nature of man or reason, or derived from God. It is with these natural laws that all human-made laws should be in accordance (Starr, 1984:674). Locke, Rousseau and Hobbes are widely recognised for their similar opinions on the existence of natural laws, but also for their divergent definitions of the existence of a state of nature and the application of a "social contract."[4]

On the state of nature, for example, Locke believed that people are:

> "in a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man" (Locke, [1690]1980:8).

[2] This school of jurisprudence can be divided into three parts: the French-Rousseauist school (eighteenth century), a Metaphysical school (beginning of the nineteenth century) and the Social Philosophical school. Since, we want to provide an overview of the development of legal thinking, we will not make a distinction between these three subcategories of the natural school of jurisprudence.

[3] The natural School of Jurisprudence is one of the oldest and most used methodologies used since the coming together of Roman jurists with Greek legal philosophers.

[4] The social contract theory was developed to regulate the authority of the sovereign, who was claiming unlimited, unrestricted and uncontrolled power, which led to the violation of individual liberty.

In this state of nature, humans are free and possess a natural mutual respect, people are rational beings and have natural rights that no legislator has created. But, Locke's view of natural law is also an early definition of property law; everything that has been created or valorised by humans makes them its proprietors. Life, liberty and property are, according to Locke, natural rights and the government should only exist to secure these natural rights.

On the other hand, Hobbes[5] believes that "every man is enemy to every man" (Hobbes, [1651]1839:113). He describes the state of nature as one of perpetual war, in which there is competition for resources and a multitude of selfish and conflicting passions and desires causing people to destroy and subjugate each other. Therefore, a government is necessary to impose law and order. According to him, a natural law is a general rule "found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same" (Hobbes, [1651]1839:116-117).

Lastly, Jean-Jacques Rousseau[6] wrote that:

> "Every one of them, in short, constantly dwelling on wants, avidity, oppression, desires and pride, has transferred to the state of nature ideas which were acquired in society; so that, in speaking of the savage, they described the social man" (Rousseau, [1751]1913:175).

According to Rousseau, men are "noble savages" that civilisation has corrupted. In his opinion, it is the government that is responsible for corrupting people.

These philosophers are linked by the concept of a social contract, although they each conceive it differently. For Hobbes, the social contract is a contract of submission and this

[5] Naturalist or positivist debated

[6] That Rousseau is an important philosopher whose writings influenced the French revolution (Gross, 2004:3) is not disputed, but he is also criticized for putting aside the facts in order to preserve the "purity of the dream" (Kopp, 2016:35), and imagining an ideal world based on his interpretation of human nature.

submission to a third party is the key to a unified society. For Locke, it is a contract of association and conditional submission. In contrast, for Rousseau, as he writes in the fourth chapter of his book *The Social Contract or Principles of Political Right,* the social contract is:

> "a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before." (Rousseau, (1751)1913)

Above all, this school of jurisprudence is a philosophical school of law which studies what law *should be* and not *what it is*. The Natural School attained the golden age of its thinking during the Enlightenment, which explains, for example, both the liberal views of Rousseau and the rationality of Locke.

The Imperative School of Jurisprudence

Also known as the Analytical School, this school of jurisprudence is based on a legal positivist approach and is considered the direct opposite of the Natural School. The nineteenth-century legal philosopher and main supporter of this school, John Austin, writes in his book, *The Province of Jurisprudence Determined*: "The existence of law is one thing; its merit and demerit another. Whether it is or not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry" (Austin, [1832]1995:157[Note]). What the legal positivists have in common is the idea of studying law as *it is* and not as *it ought* to be. They conceive law as being the command of a sovereign body. Therefore, the analysis does not lie in the potential "rightness" of the law, but in its element of authority.

John Austin criticised natural law and stated that "every law […] is a command" (Austin, [1832]1995:21). He was convinced that positive laws are made by human lawmakers and that, in order for them to implement the commands, they must attach to them a threat or a sanction in case of non-compliance. He writes:

> "A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded" (Austin, [1832]1995:21).

For Austin, legality is determined by the source of a norm, not the merits of its substance.

Austin was mostly inspired by Jeremy Bentham. Like other jurists of the eighteenth century, Bentham was a legal positivist and also the founder of modern utilitarianism. He believed, like Austin, that there should be a separation between law and morality, but as a utilitarian, he also believed that "it is the greatest happiness of the greatest number that is the measure of right and wrong" (Bentham, [1823]:vi[preface]). In his book, *Principles of Morals and Legislation,* Bentham wrote that "nature has placed mankind under the governance of two sovereign masters, pain and pleasure" (Bentham, 1823:1), following on by writing that "they [pain and pleasure] govern us in all we do, all we say, all we think" (Bentham, 1823:1). According to Bentham, humans act according to feeling either pain or pleasure, and the principle of utility "recognises this subjection [that a man will remain subject to their empire even though he may pretend to abjure it] and assumes it for the fabric of felicity by the hands of reason and of law" (Bentham, 1823:2). Therefore, law is a medium through which to maximise utility, personal pleasure or pain. Moreover, it is important to mention that Bentham did not completely reject morality, but thought that morality should be a separate issue altogether. As he describes:

> "To the province of the *Expositor* it belongs to explain to us what, as he supposes, the Law is: to that of the *Censor,* to observe to us what he thinks it *ought to be*. The former, therefore, is principally occupied in stating, or in enquiring after *facts*: the latter, in discussions *reasons*" (Bentham, 1838:229[Preface to the first edition published in 1776]).

A more recent legal philosopher, Herbert Hart, is best known for his criticism of Austin and his theory that laws are commands, in his book, *The Concept of Law* (Hart, 1961:20). For Hart, laws are not only commands, but he distinguishes between "the basic or primary type of rule," that "human beings are required to do or abstain from certain actions, whether they wish to or not" (Hart, 1961:78-79), and "secondary rules" which "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined" (Hart, 1961:92). Therefore, there are rules which demand duty, but also those which recognise or facilitate rights.

Finally, Roscoe Pound, a supporter of the Sociological School of Jurisprudence, describes the Imperative School as a "jurisprudence of conceptions," in which answers to new cases are found by deduction from older principles (Pound, 1911:596). This school of jurisprudence was mostly prolific during a period of intense legislation and codification, such as the introduction of the *Code Napoléon* in 1804. It does not mean that the legal positivists are wrong in how laws are made in a mature legal system, but it also does not mean that it is the correct or most beneficial way for citizens to make law.

The Historical School of jurisprudence[7]

"The common consciousness of the people is the peculiar seat of law," writes Friedrich Carl von Savigny (1831:28), one of the most important legal philosophers, and considered the founder of the Historical School of Jurisprudence. The idea of *Volksgeist,* the spirit of the people, is a key term in this School of Jurisprudence, which is considered by this school as the source of law. As Savigny writes:

> "[T]he subserviency of the present to the past will manifest itself even when the present is purposely opposed to the past. There is consequently no mode of avoiding this overruling influence of the existing matter; it will be injurious to us as long

[7] The Historical School of jurisprudence can be divided into two categories

> as we ignorantly submit to it; but beneficial if we oppose to it a vivid creative energy, -obtain the mastery over it by a thorough grounding in history, and thus appropriate to ourselves the whole intellectual wealth of preceding generations" (Savigny, 1831:132-133).

For him, it is only in history and the people themselves that we can fully understand what law is, how it came to be and the constant improvements that can be made to law. He considers the people to be lawmakers because of their "organic connection" with law (Savigny, 1831:27). Therefore, law (similar to language) develops and responds to the habits and customs of the people, it "grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality" (Savigny, 1831:27). In contrast to the analytical jurist, the historical jurist and the philosophical jurist agree that law *is found*, not *made*. However, in contrast to the philosophical jurist, the historical one conceives that a principle of human action or social action is founded on human experience and is gradually developed into and expressed in a rule (Pound, 1911:599). Therefore, the Historical School considers that law is not a political phenomenon, but a social and non-individual one, which is in complete opposition to the ideas of modern critical legal studies.

Aligned in a similar thought to Savigny's, the German jurist Georg Friedrich Puchta believed that customary law was the most genuine expression of common consciousness, and thus, far more superior than legislation. "What is visible to us is only the product, law, as it has emerged from the dark laboratory in which it was prepared and by which it became real," he writes (Puchta, 1887:38).

Based on an understanding of the history of the legal process, the Historical School is understood as a legal methodology. Since this school considers that law is a representation of people's habits and customs, its supporters believe that laws do not have universal application, and that law is not a product of human consciousness or determinate will (Pound, 1911:599). The Historical School of jurisprudence is considered as having laid the basis for what would become the Sociological School of jurisprudence, although Pound

denies similarities by affirming that the Historical School simply uses similar concepts to the school they are seek to criticise, namely the Imperative School (Pound, 1911:600).

The Sociological School of jurisprudence[8] and Legal Realism

"Laws, in their most general signification, are the necessary relations arising from the nature of things," writes Montesquieu in his book, *The Spirit of Law* (Montesquieu, 1777:1). Although Montesquieu was not the founder of this school of jurisprudence, his ideas are very much rooted in this legal thinking. Sociological jurisprudence seeks to understand the role of law in society and involves the application of the social sciences to the study of law.

Rudolf von Jhering believed that a nation forms as the result of all single individuals; how they think, how they feel and how they trade is, therefore, how a nation thinks, works and trades (Jhering, [1875]1915:56). For Jhering, law was to "be brought into harmony with changing social conditions" (Gardner, 1991:2). He considered the function and outcomes of law, in contrast to the previous schools of jurisprudence which were focused on the speculation of the nature of law (Gardner, 1961:2). For Jhering, conscious purpose is the dominant factor in legal evolution (Kocourek, 1915:XIV[Introduction]) and law, therefore, protects societal and individual interests. In this case, in order to properly understand law, one must study the interests behind it.

Similarly, Eugen Ehrlich was a defender of legal history and what he called "living law." According to him, law was merely one manifestation of society; as he writes in his book, *Fundamental Principles of the Sociology of Law,* "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself" (Ehrlich, 1936:Foreword). Ehrlich's most important concept is "living law," which he describes as:

[8] Which has to be differentiated from the sociology of law, which is a part of sociology that seeks to understand the social reality of law in all its dimensions. Whereas sociological jurisprudence is a method of studying law combining the lawyer's technical knowledge of the law and the insights produced by the sociology of law.

> "the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved" (Ehrlich, 1936:493).

For Ehrlich, a good jurist is one who learns from observations and not from what he calls "bundles of legal papers" (Ehrlich, 1936:498). A similar view is held by one of the most famous legal thinkers of the Sociological School of jurisprudence: Roscoe Pound. He differentiated "law in action" from "law in the textbooks" in an article called *Law in Books and Law in Action,* in which he explains the lack of adaptation of the law from textbooks to social reality. Pound was also famous for his concept of "social engineering", which he envisaged as a way of working which accelerates the process of social ordering by making all possible efforts to maintain a balance between competing interests in society: the private/individual interest, the public interest and social interest. Although Pound criticised the realists, it is quite difficult to expose the differences between the Sociological School of jurisprudence and Legal Realism, which, for some, was just the "left-wing branch of sociological jurisprudence" (Ingersoll, 1981:491). Legal Realism was more of a reactionary movement of the times,[9] as Grant Gilmore wrote: "Realism was the academic formulation of a crisis through which our legal system passed during the first half of this century [twentieth century]" (Gilmore, 1961:1037).

Oliver Wendell Holmes Jr., a jurist and Associate Justice of the Supreme Court of the United States, is often considered as a forerunner of Legal Realism, and a critic of the Imperative School, as he writes in his book, *The Common Law:*

[9] Rapid industrialization, population growth, and economic development, producing a common-law system with innumerable, undistinguishable precedents and a complex legal system (Ingersoll, 1981:492).

> "The life of the law has not been logic: it has been experienced.[…] The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become" (Holmes, 1881:1).

At the beginning of the twentieth century, supporters of American Legal Realism were much more sceptical about the status of law as a rule. They tried to work toward the reformulation of the relationship between the normative element of the law and its effectiveness (Millard, 2014:92).

The Sociological School of jurisprudence and the Legal Realism movement both arose at times when social change was at its height and industrialisation, labour movements and Marxism were taking a hold.

Critical Legal Studies

More a movement than a school of jurisprudence, Critical Legal Studies[10] (CLS) built itself up around a socio-cultural approach to law that rejects both the utilitarianism of Bentham and the positivism of Austin. For supporters of CLS, law is a cultural phenomenon that reflects the culture of a society and not the will of a sovereign body (Michaut, 2014:2). Heavily inspired by Legal Realism, the main difference between the two is the critique that CLS provides of liberal legal thought and the idea of legal objectivity.

Supporters of CLS believe that laws are something ideological, catering to and legitimising established social and economic interests. Ronald Dworkin, in his book, *Law's Empire,*

[10] The critical legal studies have now several subgroups like: the feminist legal theory, the critical race theory, the post-modernism, and the economic law theory.

proposes the theory of law's integrity. He distinguishes between two forms of integrity: integrity in legislation and integrity in adjudication. He writes:

> "The first restricts what our legislators and other lawmakers may properly do in expanding or changing our public standards. The second requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones" (Dworkin, 1986:217).

For adherents of Critical Legal Studies, legal concepts and laws are unable to provide the correct answer for a case, and therefore judges have to rely on political factors to make their decisions. However, judges conceal the political influences of their decisions by elaborating, post hoc, rationalizations of their decisions, making them appear objective and a product of what is called legal reasoning (Dworkin, 1986:161). Following this reasoning, for adherents of CLS, law is an instrument used for political ends and goals, which often protects and preserves an unjust status quo.

II- CULTURAL LEGAL STUDIES AND LAW AS A CULTURAL ARTEFACT

> "One relates to the point that law creates the conditions of culture to some degree. Another notes that law, as a cultural product, has something in common with other cultural products. In the anthropologist's definition, laws are part of culture. Still another focuses on the point that while law is to some extent a mandarin text, it is itself a subject of popular culture" (Weisbrod, 2009:2).

Throughout this chapter and the presentation of these various schools of jurisprudence, we can see shifts in the interpretation of law among legal scholars, from pure theories of law to Cultural Legal Studies, including sociological jurisprudence and Legal Realism along the way. Each of these schools represents an interpretation specific to their time and context. This is key and it cannot be emphasised enough that law outside of its political and cultural context is irrelevant. Legal thinking follows the societal/governmental thinking of the time; as Gardner writes about Pound's legal thinking, the "definitions of law change with social circumstances, and no final answer to the question about the nature of law is possible" (Gardner, 1961:12). More recently, there is a new shift that has occurred in legal thinking: the rise of "the cultural." As Sarat and Simon write, "everywhere it seems that culture is in the ascendance. […] The cultural itself has become a subject of political discourse to a much greater extent than in the past" (2001:3). In a long view of the emergent movement of Cultural Legal Studies, I take the position in this thesis that law is culture; it emerges from it but also shapes it. Laws are written by people of their time and thus reflect perfectly the essence of society.

To reflect this, I would like to propose an alternative methodology to that of Sharp and Leiboff for putting Cultural Legal Studies into practice. In this thesis, law and culture will be considered as one single field, meaning that they develop almost simultaneously and are mutually dependent on each other. If Raymond Williams writes that "culture is ordinary" (Williams, 1989:3), law is part of everyday life as well; as Coombe writes, "like other cultural studies, legal studies might attend to the important but often unnoticed dynamics of everyday life" (Coombe, 1998:481). To study law as a cultural artefact that influences everyday life and in order to analyse the law of cultural heritage, I will use an approach known as cultural materialism. This thesis is influenced by the methodology of cultural materialism defined by Raymond Williams, as well as Jonathan Dollimore and Alan Sinfield. As Dollimore and Sinfield write:

> "Our belief is that a combination of historical context, theoretical method, political commitment and textual analysis offers the strongest challenge and has already contributed substantial work. Historical context undermines the

> transcendent significance traditionally accorded to the literary text and allows us to recover its histories; theoretical method detaches the text from immanent criticism which seeks only to reproduce it in its own terms; socialist and feminist commitment confronts the conservative categories in which most criticism has hitherto been conducted; textual analysis locates the critique of traditional approaches where it cannot be ignored. We call this "cultural materialism"" (Dollimore & Sinfield, 1994:vii[Introduction]).

Using material culture to my advantage, international cultural heritage law will be approached as if it were a cultural artefact. At first, treating law as a cultural artefact may seem completely irrelevant, because material culture implies something that is tangible. But, law itself produces material consequences like buildings, codex and papers that are now, in some cases, even exhibited as cultural artefacts in museums and worth millions. "Material culture as a study is based upon the obvious fact that the existence of a man-made object is concrete evidence of the presence of a human intelligence operating at the time of fabrication," writes Jules Prown (1982:1). Consequently, I will argue in this thesis that law is man-made and a material consequence of the culture and society of its own time because, as Prown continues:

> "The underlying premise is that objects made or modified by man reflect, consciously or unconsciously, directly or indirectly, the beliefs of individuals who made, commissioned, purchased, or used them, and by extension the beliefs of the larger society to which they belonged" (Prown, 1982:1-2)

As we have seen in the earlier discussion, legal thinking has developed and changed with time and, similarly, cultural and societal thinking has changed as well, bringing us to the contemporary era of "the cultural." After having very briefly contextualised the evolution of legal thinking in Europe, I will now introduce my case study: the international law of cultural heritage.

Chapter Two

Contextualising the past:

from destruction to protection and the power of cultural heritage

My analysis of cultural heritage law as a cultural artefact begins with a retrospective. Of course, the idea of protecting, destroying, preserving, collecting and selling cultural property and cultural heritage are not recent ones. They have changed and developed over time according to political influences, and hence the importance of contextualisation. Similar to the work of an archaeologist, I will look at the origins in order to understand the present. I will dwell on the formation of our modern legal system which is deeply rooted in previous ideas and concepts, but also very much linked to the values that are attributed to cultural heritage. In this chapter, I would like to use historical evidence to understand and then analyse the development of international cultural heritage law.

I- FROM ANTIQUITY TO THE BELLE ÉPOQUE

The protection or destruction of cultural heritage is very much linked to conflict and to the development of the laws of war. As Raphael[11] wrote in a letter to Pope Leo X in ca. 1419:

> "This noble city [Rome], which was the queen of the world, so wretchedly wounded as to be almost a corpse. [...] So the famous works which now more than ever should appear in the flower of their beauty, were burned and destroyed by the

[11] The letter is attributed to the artist Raffaello Sanzio da Urbino, otherwise known as Raphael, written in collaboration with his friend Baldassare Castiglione (quoted in Holt, 1982:289).

> brutal rage and savage passions of men wicked as the wild beasts" (quoted in Holt, [1419] 1982:289).

Raphael continues, claiming that human interference is much more dangerous and destructive than time itself for cultural artefacts. As we will see in this chapter, the protection of cultural property is subject to the powers that be being able to enact commands and also to the value that they attribute to cultural property.

Antiquity – power through conquest and destruction

War is almost a synonym of antiquity, just as revolution could be seen as synonymous with the nineteenth century. Indeed, the common feature of many ancient civilizations is violence and devastation with the ultimate goal of conquering and possessing. In these conditions and with this behaviour, it is inexorable that cultural artefacts would suffer the consequences of warrior offensives, fires, vandalism, looting and pillage (Verri, 1984:69). During antiquity, "nations [did] not express the rules of war in written agreements; they [arose] instead from custom and tradition" (Delahunty & Yoo, 2012:3). For the Greeks, for example, religion was of great importance and was protected during war, so they not only allowed religious ceremonies to continue, but also "promoted respect for sacred objects and places [and] gave religious sites and personnel, such as temples and priests, immunity in combat" (Delahunty & Yoo, 2012:5). Apart from "religious obligation, self-interest, or concern over reciprocal treatment" (Delahunty & Yoo, 2012:7), the Greeks did not show any restraint during war - the only exception was religion.

Theoretically, our modern understanding of the laws of war and the protection of cultural property might be closer to the Roman way of thinking. Indeed, Cicero, for example, insisted on the idea that "we must resort to force only in case we may not avail ourselves of discussion. (...) we should always strive to secure a peace that shall not admit of guile" (Cicero, [44BC]1913:35[Book I.xi]). Cicero was not a pacifist (Harrer, 1918:27), but he did introduce the idea of a "just war." For a just war, an *iusta causa* is needed; for example, self-

defence, response to an earlier wrongdoing, a breach of treaties or the supporting of an enemy are all reasons that could justify entering into war (Delahunty & Yoo, 2012:7). This was Cicero's theory, though what happened in practice was slightly different. Indeed, "while there are instances where Rome obeyed the just war principles, there are many, if not more examples where Roman leaders manufactured events to satisfy the form and rules of just war" (Delahunty & Yoo, 2012:8). Unfortunately, once the Romans had found a reason to justify their wars, "a cry of oppression and pain rises from every page of the history of Rome. War was aimed at conquest, and conquest engendered massacre, the sack of cities, spoliations and a series of untold horrors" (Verri, 73:2004) (my translation).

For example, the ancient city of Carthage is infamously known for its destruction by Marcus Porcius Cato, the Censor, who constantly repeated the phrase, "*Delenda est Cartago.*"[12] And, thus, writes Kiernan, Carthage was destroyed, nothing was left there to stand, not a single monument, not a temple. It is even said that salt was spread on the ruins of Carthage to make sure the grass would never grow again (Kiernan, 2004:27). Francois Bugnion described the brutality with which the city was destroyed, the impact of which is still visible centuries later:

> "even today, when one strolls through the ruins of this ancient city, which once ruled half the Mediterranean and rivalled Rome, one cannot help but be struck by how little is left, evidence of the savagery with which it was destroyed" (Bugnion, 2004:313)(my translation).

Some conquerors did raise their voices against the looting and destruction of the cities they were attacking, as "what law does not defend, honor sometimes does"[13] (Seneca [ca.1st century]1834:147) (my translation). This protection was mainly reserved for religious buildings; for example, when Abu Bakr Siddiq, first Caliph of the Rashidun Caliphate and father-in-law and first companion to the prophet Mohammed, attacked Syria and Iraq, he first ordered his soldiers not to destroy the monasteries as they might "come upon a people

[12] Carthage must be destroyed.

[13] "Quod non vetat lex, hoc vetat fieri pudor"

who live like hermits in monasteries, believing that they have given up all for Allah. Let them be and destroy not their monasteries" (Bugnion, 2004:315). But, this less violent treatment was not the expression of a general conscience, but the sensibility of a peculiar personality (Verri, 2004:69).

During antiquity, religious beliefs were strong and anchored in each individual. As Athenian democracy was built on an Assembly made up of citizens, it was natural that their beliefs would become habits and customs which transformed into unwritten laws. In contrast, Roman laws and decisions were mainly made by the Senate, which was constituted by magistrates, themselves chosen by the citizens. The Senate and the magistrates would then choose a dictator. The Roman system, more similar to ours, leaves it easier for the dictator or the Senate to exercise individual agendas. Therefore, destroying monuments or the places of worship of an enemy meant a destruction of their identity, history, culture and faith. It was a way to eradicate all traces of the enemy's presence and, in some cases, their very existence. Destruction was a demonstration of power, used to ensure the inability of the enemy to reconstruct itself.

The Renaissance – false peace: the search for the justification of destruction

As seen in chapter one, the Renaissance, and particularly the Enlightenment, was a period in which the development of law tended towards the Natural School of jurisprudence. Over this period, an important subject tackled by legal thinkers and philosophers was the appropriate behaviour that should be observed during wars. The legal development around the law of war became known as the "just war" doctrine.

The Italian priest Thomas Aquinas wrote considerably on the "just wars" doctrine. For him, the harm to an enemy's life and property is morally justified when war is waged to enrich the good, punish evil-doers and to secure peace: "True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good," he writes (Aquinas, [1485]1920:Part II, II, Q.40). This was notably used in an attempt to justify the religious wars

of the Crusades as "just wars," as there "cannot be just on both sides." However, we might argue that his arguments were already biased since he was a priest and a Doctor of the Church.

For Hugo Grotius, known as the father of international law, a "just war" is when "there is no other *reasonable* Cause of making War, but an *Injury* received: So says St. *Austin, The Iniquity of one Side,* that is, the Injury received, *furnished a just Occasion of War"* (Grotius, [1625]2005:393). Many thinkers at this time were not against war *per se*, and Grotius argued that "where the Methods of Justice cease, War begins" (Grotius, [1625]2005:393). In their attempt to find a definition of war, the jurists and philosophers of the time, such as Grotius, Rousseau, Hobbes and Hume, thought it necessary to regulate, for example, the destructive behaviour of conquerors and their armies toward cultural property.

In his book, *The Rights of War and Peace,* Hugo Grotius does not only look at when and for what reasons it is just to make war, but he also asks what is "allowable in War" (Grotius, [1625]2005:1185). For Grotius, "what is simply in itself allowable in War, shall be considered first from the Law of Nature, then from that of Nations" (Grotius, [1625]2005:1185). The first rule he lays down is that, in war, things of a moral nature, which are necessary to attain the end in view, are permissible (Grotius, [1625]2005:1186).

Today, we would consider Grotius' way of thinking somehow paradoxical. Indeed, he seems to have a very liberal approach regarding private property, for example, writing that "every Man converted what he would to his own Use, and consumed whatever was to be consumed" (Grotius, [1625]2005:421). This is what he calls "Men's primitive Simplicity," where all commodities are in common and people should just consume what they need (Grotius, [1625]2005:421). This is what Grotius argued was given by the "almighty GOD at the Creation (...) to Mankind in general" (Grotius, [1625]2005:421). But, as the number of people increased, lands had to be assigned to families, introducing private property. For Grotius, this means that the proprietor can use the land first, but all the surplus can be claimed by someone else for the necessities of life (Grotius, [1625]2005:436). In contrast, Grotius, also used this way of thinking about private property as a justification for the settlement of Europeans in the Americas. He believed that "only settled possession enabled

the farmers to plant seed and harvest crops unmolested, thereby to produce new commodities that could be used to fulfill basic needs" (2005:XXIX[Introduction]). Therefore, for Grotius,

> "it was not the Europeans settlers who were guilty of any injurious actions when they took hunting grounds away from the primitive peoples of the world; it was the primitive peoples themselves who were behaving badly when they tried to resist the settlements, and who could be punished for their conduct" (Grotius, 2005:XXIX[Introduction]).

Grotius' way of thinking about the Law of Nature and private property is an important point , as for him the Law of Nature was the one created by a Christian god, which at the time was (or still is) a very European concept. As a consequence, the laws he wrote, even though some of them were very modern for the time, were very impregnated with the religious way of thinking in the seventeenth century. Therefore, we could argue that when Grotius writes that it is the law of nature that applies before the law of a nation, in today's way of thinking Grotius' law of nature *was* that of his nation.

On cultural property itself, Grotius refers to "Things of another" (Grotius, [1625]2005:1457) and during the seventeenth century, cultural property worth saving seems very similar to that in antiquity, namely, religious buildings and artefacts. Grotius agrees, when he writes "what I have said [Reverence should be given to holy Things if no danger arise from them] of sacred Things, the same may also be understood of Sepulchres, and even of Monuments that have been erected in Honour of the Dead" (Grotius, [1625]2005:1470). Therefore "things" considered of cultural importance can only be destroyed if they impose a threat to the belligerent party. But, how can such "holy Things" or monuments be a danger? We can only assume that what is meant by "danger" is the cultural and political power that such buildings, monuments or artefacts might represent against the power of the conqueror, particularly if they embody the religious, political and artistic ideas of the enemy. Indeed, in a final phrase Grotius writes that this reverence should be especially given to "those who worship the same GOD according to the same Law" (Grotius, [1625]2005:1468). As we saw

previously in the section about antiquity, conquering and crushing the enemy physically, as well as psychologically, necessarily involves destroying things of cultural and religious importance.

On the question of property, Emer de Vattel agrees with Grotius that it is "lawful to take away the property of an unjust enemy in order to weaken or punish him" (Vattel, [1758]1835:366), adding that "the same motives justify us in destroying what we cannot conveniently carry away" (Vattel, [1758]1835:366). Vattel also provides two justifications for war in general. The first one strongly resembles the words of Thomas Aquinas by saying that wars should be waged against unfaithful countries or populations that are labelled as different. He writes about:

> "the necessity of chastising an unjust and barbarous nation, of checking her brutality, and preserving ourselves from her depredations. Who can doubt that the king of Spain and the powers of Italy have a very good right utterly to destroy those maritime towns of Africa, those nests of pirates…" (De Vattel, [1758]1835:367).

But, a few paragraphs later he states that:

> "For whatever cause a country is ravaged, we ought to spare edifices which do honour to human society, and do not contribute to increase the enemy's strength, such as temples, tombs, publics buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste" (De Vattel, [1758]1835:367-368).

Here again, we find ourselves wondering how vague and perhaps even paradoxical some of these principles are. Vattel writes that you can take away the property of an unjust enemy

and destroy what you cannot carry, but then claims that we should spare the edifices "which honour human society." What are these edifices? What is an unjust enemy? These are some of the many questions that we might find answers to with the help of contextualisation. During the sixteenth and seventeenth centuries, religious wars raged in Europe in which worshipping a different church made you an enemy of the State. Laws were used as a justification for wars and were a perfect reflection of the way of thinking that was guiding people's behaviour. Hugo Grotius, considered as a philosopher and advanced jurist, laid down the foundations for international law and was a perfect example of this narrow-minded epoch.

Thus, the Renaissance was, in many ways, similar to antiquity - the only difference is that the laws that were written to justify similar behaviour were written to justify the behaviour of conquerors.

The Romantic era – power through appropriation

With the French Revolution of 1789 emerged the need to assert a national identity. As the monarchy fell, the new government needed to regroup the population in order to create one nation, and create a common identity. A common identity was seen as the key to forming the new society that was emerging. After the nationalisation of royal and church assets and after the confiscation of cultural property, the Comte de Kersaint declared them to be, "the heritage of all", In other words, "national heritage."" (O'Keefe, 2006:13-14) Many of the cultural objects left were an impersonation of the *Ancient Régime* and therefore the target of many revolutionaries, but on April the 13th 1793, a *Directive on the Means of Inventorying and Conserving throughout the Republic all Objects capable of serving the Arts, Sciences and Teaching*[14], written by Félix Vicq d'Azyr was published. In this publication, these objects were seen as an inheritance or a heritage. (O'Keefe, 2006:14) This directive was followed by a decree forbidding a person,

[14] Original french title: *Instruction sur la manière d'inventorier et de conserver, dans toute l'étendue de la République, tous les objets qui peuvent servir aux arts, aux sciences, et à l'enseignement, proposée par la Commission temporaire des arts, et adopté par le Comité d'instruction publique de la Convention nationale.*

> "to remove, destroy, mutilate or alter in any way, on the pretext of effacing signs of feudalism and royalty, books, drawings, paintings, statues, bas-reliefs, antiquities..and other objects of interest in the arts, history or teaching located in libraries, collections or artists' residences" (quoted in O'Keefe, 2006:14).

This portrays the recognition that there was a certain awareness about the necessity of safeguarding cultural objects as historical evidence.

Even though France strove to protect its cultural heritage from the destruction and devastation of the revolutionaries, France, but more precisely Napoléon, did not apply such caring behaviour to the countries he wanted to conquer. The constant pillage of other places was intended "to enrich the newly-created Musée Napoléon or the Louvre" (Nahlik, 1976:1071). This was immediately covered by semi-legal/political justification, with the creation of "Evacuation Agencies," later called "Commissions of Sciences and Arts." The armies of Napoléon had the task of systematically transferring supplies, commerce, art and sciences, (Verri, 1984:83) based on the "vision of a pan-European artistic culture, of which France, as a republic among tyrannies, was best placed to act as custodian" (O'Keefe, 2006:15). In 1796 it had been written that "the French do not want to enchain to the char of victory any slaves, or any kings but the remains of glorious art" (Verri, 1984:83)(my translation). Among the voices of protest, that of Quatremère de Quincy stood out, protesting that a work of art created for a specific place can only be understood by studying it in this same environment and that a work of art will lose its value if we take it from its original place (Quincy, 1796:20-21) (my translation).

By the mid-nineteenth century it became clearer that a majority of European countries wanted to safeguard "culture." In 1860, Burckhardt stated that "the age in which we live is loud enough in proclaiming the worth of culture, and especially of the culture of antiquity" (Burckhardt, [1860]2012:131).

This concern for the preservation of antiquities did not stop at geographical borders, in 1854 the idea emerged of creating a common "European asset" (O'Keefe, 2006:17) which of course included the call for the "protection" and "preservation" of monuments in Turkey, Greece and Egypt, as "many Europeans regarded as their own heritage [antiquities found in the Ottoman Empire] from ancient Greece and Rome." (Blake, 2015:3) As a response, the Ottoman authorities developed a legislative and administrative system for the preservation of antiquities in the late nineteenth century. (Blake, 2015:2) In 1874, the government adopted the first Ottoman Historic Monuments act stating *inter alia*, that "excavation finds should be shared between the excavation team, the owner of the land, and the state and it placed all foreign excavation teams under the control and supervision of the ministry of education" (quoted in Blake, 2015:2). In 1884, a third version of this act was adopted, which allowed the state ownership of all antiquities and established the department of antiquities to administer the legislation. (Blake, 2015:2)

Of great importance in the development of international legal protection for the protection of cultural heritage, is the Lieber Code. The short name for Francis Lieber's *Instructions for the Government of Armies of the United States in the Field,* enacted in 1863. The rules and laws of war were now not only propositions made by legal philosophers but they were now codified rules. Article 22 of this code, for example, states that there is a "distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms" (This reminds us of Rousseau's famous statement about the laws of war a century before).

But, even if the Lieber Code called for the protection of works of art, it specified in article 36 that:

> "If such works of art, libraries, scientific collections, or precious instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation" (Lieber Code, [1863]1898:13).

There seems to be a paradox here again, as protecting cultural heritage and property would imply protecting the cultural artefact in its environment, and not destroy the surroundings and place of the cultural property. However, this is what happened during colonial times; the spoliation of cultural goods in colonised territories was a popular and systematic process carried out by colonial European countries. (Jaderojananont, 2016:3) Lowenthal describes it best in his book, *The Heritage Crusade and the Spoils of History:*

> "in the course of dispensing global benefits, Western powers also acquired globally? and then came to construe their spoils of conquest as global stewardship. European mandates to plunder stemmed from the common view that their Christian and scientific legacy was immeasurably superior to the barbarous customs of others" (Lowenthal, 1998:240-241).

The appropriation of cultural goods from defeated or colonised countries was a form of domination that was prominently used during the eighteenth and nineteenth centuries. It was a display of power, the more the countries had to exhibit and the more exotic it was, the better. But, also because it was thought that, ""the rest" were deemed incapable of creating, let alone conserving the legacies they lived among" (Lowenthal, 1998:241). Only the Europeans had the knowledge and ability to preserve great artefacts.

Even though, almost a millennium had passed since the Greek and Roman war practices, in the nineteenth century, the behaviour does not seem to have changed a great deal; conquest was still the main goal, cultural properties a way to acquire power and law a way to justify it.

II- LATE MODERN PERIOD: THE AGE OF INTERNATIONAL LEGISLATION

Ravaged by wars, Europeans countries, following the path of the Lieber Code, attempted to write conventions that would control the behaviour, rights and duties that should be

respected during war. The Hague rules, are a good example, as they literally seem to be a manual on how to correctly conduct a war.

The Hague Conventions of 1899 and 1907 with *Respect to the Laws and Customs of War on Land*, numbered from I to XIV, all focus on specific subjects and situations that might arise during a time of war. For example, the Hague VII has rules relating to the *Conversion of Merchant Ships into War-ships*. Concerning the protection of cultural property, it is the Hague Rules II and IV that contain regulations on this subject.

The Hague rules on cultural protection are remembered for three main principles that have to be followed in international conflicts:

- Article 27: "buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected" were to be immune from attack unless employed for military purposes. Such properties were to be marked with visible symbols by the besieged. (Hague Rule IV 1907:648)
- Article 23: "...it is especially *prohibited:* [...]to destroy or seize the enemy's property, unless such destruction or seizure be demanded by the necessities of war" (Hague Rule II 1907:257).
- Article 56: an occupying power cannot destroy, damage, loot or plunder cultural property, even if it is State property. Cultural objects and structures have to be treated as private property. If any seizure, destruction or damages are made they should be made the subject of legal proceedings. (Hague Rule IV 1907:653)

Even though, the Hague Convention responded to a need[15], it seems to be a bit unrealistic. If countries are at war and enemies, they might not be able to discuss which building they should destroy or not even if it was singled out. The twentieth century itself is a good example of the failure of many of the conventions and laws that were enacted for the

[15] A need for codification and legal structure after the ravage made by Napoleon for example.

creation of a uniform system of cultural protection during war times. Indeed, World War I and II stripped the twentieth century not only of millions of lives but also of precious cultural goods and property.

The First World War, brought plunder and devastation in many cultural and artistic places, like the burning of the library of Louvain and the Louvain University in Belgium, or the bombardment of Reims Cathedral in France. (Poulos, 2000:18) "The advent of aerial bombing and the realisation of the logic of total war led to the eclipse in the First World War of the relevant Hague Rules, with baleful incidental consequences for cultural property" (O'Keefe, 2006:35). The technology used during World War I made the weapons far deadlier than before, the transport development allowed bombings to go behind enemy lines and bombard towns. The main difficulties faced by the international community was the fact that the conventions did not provide regulations in the event of a bombardment. But, the international community had already stressed the urge to protect cultural property during war. Maybe it was necessary to list every single weapon or means by which cultural property could be destroyed? Would the State Parties to the Hague Rules have respected it then?
The failure of the convention made the international community reflect on it and create something else, a legally binding instrument that was directly relevant to the protection of cultural property in peace time was used. Thus, in 1935 the *Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments*, also known as the 1935 Roerich Pact was recognised as the first multilateral agreement which aimed at the protection of cultural property and, innovatively, the treaty could be applied in time of peace armed conflict. Although today, the pact has been replaced, it remains historically the first to focus exclusively on the protection of cultural property and included some avant-garde provisions which are still not applied in more modern conventions, such as the idea that cultural treasure should have an almost unlimited preference over military necessity (Roerich Pact, 1935: Article 1).

In 1945 the Second World War came to an end. This war was more murderous and devastating than the first one, and cultural heritage was not spared. Once again, the failure of existing conventions for the protection of cultural property was evident. However, what the rules did manage to facilitate was widespread condemnation afterwards. These were

written law and the failure to respect these laws by State parties led to post-war trials and the condemnation of countries who, among other things, carried out cultural destruction. Specifically though, this led to the trial of Germany but not other countries. Although Germany was justifiably condemned for its crimes, the Allies were not condemned for the cultural destruction they carried out. Cultural properties were destroyed or used for military purposes, even though the Roerich Pact expressed the overriding value of the preservation of cultural property over military necessity. We may wonder, then, for example, if it was necessary to completely destroy a city like Dresden and kill approximately 25,000 people?

> "In Germany alone, over 90 percent of the monuments had been hit by Allied bombings, and 60 percent had been destroyed. The rest were at the mercy of the occupying forces or new governments in lands taken from Germany. Allied directives issued in 1945, as part of the "re-education" process, demanded the destruction all German monuments and museums deemed "patriotic, nationalistic or idealizing German culture." (Veltman, 2015:5)

Laws of war are made in an attempt to try to justify it, never to act against it. We may wonder why there has been no attempt yet at creating an international law against armed conflict instead of being limited to how to conduct "just wars."

Our current international legal system for the protection of cultural heritage is mainly based on the conventions written after World War II and the international organisations created at that time. The first one of these, the United Nations and the UN Educational, Scientific and Cultural Organization, UNESCO was created in 1945. After the Universal Declaration of Human Rights adopted in 1948, the first convention agreed by UNESCO was dedicated to the protection of cultural heritage during wartime - the 1954 Hague Convention[16]. It was then followed by several other conventions and recommendations, like the safeguarding of

[16] Convention for the Protection of Cultural Property in the Event of Armed Conflicts.

the beauty of landscapes in 1962[17], and the preservation of cultural property endangered by public works in 1968[18]. The 1970 Convention on the prevention of the illicit trafficking and movement of cultural property[19] was the next big step as well as the 1972 World Heritage Convention[20]. Many other conventions and regulations followed based on the idea that "that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all nations of the world," which is one of the first statements made in the Preamble to the 1972 World Heritage Convention.
It seems that the second half of the twentieth century welcomed an age of preservation and conservation, that might paradoxically be regarded as extreme, if not sometimes destructive, as we will see later in this thesis. However, through the sustained preservation of hundreds of cultural and natural sites and artefacts, the international community has attributed new values to cultural heritage. They have put cultural heritage on a pedestal, making them something sacred, which increases their price and consequently their demand on the black market. In a report, UNESCO deplores the fact that State parties to the conventions are missing the aim of the conventions and are "more interested in the revenues generated by an inscription than in the virtues of universality and of protection and passing over of the site" (Zouain, 2000:3).

Retracing laws is retracing history. In the first part of this chapter we have seen that laws are made and applied by a person or a group of people in charge. Even when no laws were written about the protection of cultural property, but only existed in the form of a custom or oral command, we can interpret the behaviour and way of thinking according to the needs of each epoch. After looking over the past and highlighting the most important moments in the preservation of cultural property in Europe, it is important to interpret history.

[17] Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites.
[18] Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works.
[19] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
[20] Convention concerning the Protection of the World Cultural and Natural Heritage.

III- INTERPRETING HISTORICAL EVIDENCE

Tracing back over the international protection of cultural heritage law or the behaviour of protection, or in some cases, the destruction of cultural heritage is an interesting process as it allows us to see how cultural property has been used over the centuries for political purposes. It also highlights the attempts by many to fiercely safeguard cultural heritage. One may wonder why so many attempts and efforts were made, and still are, to protect or destroy cultural heritage; it is because "cultural heritage *is value* in the sense that it is neither the object nor the practice itself which is of some importance to people, but the importance itself" (Forrest, 2010:4-5).

The nineteenth century saw a shift in general opinion, from the destruction of cultural heritage to its protection. Today, as Merryman writes, "it is abundantly clear that people care a great deal about cultural property. The interesting question is "Why?" Indeed, what are the values that push people to erect thousands of museums; university departments of arts, archaeology, and ethnology; to write as many laws as possible in an attempt to preserve and save the destruction of cultural heritage, as well as the regulation of its illicit trading. Agencies are created to protect it, as well as institutions and galleries to sell it. (Merryman, 1989:345) People are devoted to cultural heritage in many ways, and for many reasons. Cultural heritage and property as we have seen are objects of cultural and political power, but in the second part of the twentieth century we have also learned how to extract information and money from cultural heritage.

Sociocultural values[21]

At each moment in time when wars were waged, the destruction and spoliation of cultural property was almost systematic, almost enjoyed by the winning country. Of course, many voices were raised against these devastations. The horrors of the Second World War were the trigger that created our modern legal system of protection of cultural heritage. But,

[21] Term used by the Getty research report on the value of cultural heritage.

whether we are witness to the protection or destruction of these objects the underlying reasons are the same. In the Getty Research Report, sociocultural values are at the core of cultural heritage conservation[22] because "it holds meaning for people or social groups due to its age, beauty, artistry, or association with a significant person or event or (otherwise) contributes to processes of cultural affiliation" (Mason, 2002:11).

The expressive value[23]

In his book, Craig Forrest, describes one of the main values of cultural heritage as an "expressive value," or, as Merryman would describe it, "the expressive effect". The aesthetic value of cultural heritage "expresses beauty in its form, colours, contrasts and context" (Forrest, 2010:4). But, it also may

> "embody and express religious or moral attitudes which give the cultural heritage a divine sanctity. Non-religious objects may invoke feelings of nostalgia for people, events and cultures and express values as heroism, ingenuity and leadership. They are a link to the past the only objects to survive from a past age" (Forrest, 2010:4-5).

We all relate in different ways to cultural heritage and the past, it is very personal but also collective. We gladly look at cultural properties because of the certainty they give us - this is what Merryman calls "Truth and Certainty". In our search for authenticity and craftsmanship, (Merryman, 1989:346) we turn to cultural artefacts; to museum objects. We want to see the "real" object, and for a few seconds while looking at it we are transported into the past. Merryman for example uses the manuscript of Justinian's Digest, which can be found in the Gregorian Library in Florence. He suggests that looking at it gives us a sense of satisfaction but the moment we are made aware that we are not looking at the original,

[22] And I think destruction.

[23] Used by Forrest. Merryman refers to it as "aesthetic value" or "expressive effect." The Getty research report distinguishes between the aesthetic value, the cultural/symbolic value, the social value and the spiritual/religious value. I chose Forrest's term of "expressive value" to refer to all of them.

which is kept elsewhere for protection, but at a perfect reproduction of it, we feel tricked and cheated. (Merryman, 1989:346) Certainty might not be the only feeling that artefacts can give us. Merryman, in a separate consideration, refers to “pathos” and the more melancholic feelings that artefacts might give us like “nostalgia for the people, events, and cultures that produced them” (Merryman, 1989:348). He suggests that this awakes “the sleeping philosopher in us, reduces the preoccupations of the busy present to a more appropriate scale” (Merryman, 1989:349). For Forrest, cultural artefacts “invoke emotions of pride, sorrow, pity, wonder and joy. The uniqueness of an item of cultural heritage lies not only in its physical attributes but also in the sum of emotions that only that particular item can engender” (Forrest, 2010:5). Often we are looking at these objects, or traditions, as if they retained the truth because it is the past and as Lowenthal wrote “the past validates present attitudes and actions by affirming their resemblance to former ones” (Lowenthal, 1985:40). It is in the past that we are looking for what Lowenthal calls, “reaffirmation and validation” of our present. Frequently people evoke the past in their actions, because “this is how it is done”, “it always has been like this.” But, reaffirmation and validation might not be the only things we are looking for in the past, maybe, as Lowenthal suggests we are looking for an escape. “Besides enhancing an acceptable present, the past offers alternatives to an unacceptable present” (Lowenthal, 1985:49). It is in yesterday that we look for what we miss today, but “yesterday is a time for which we have no responsibility and when no one can answer back” (Lowenthal, 1985:49). Some prefer to live in the past to forget the present.

Many people, see cultural heritage and property as an expression and as the beholder of their identity. UNESCO writes on its website “Heritage is Identity, Don’t Steal It!” (UNESCO, Illicit Trafficking of Cultural Property, 2017) Lowenthal and Merryman describe this feeling through the concept of “sureness” - the connection to the past reassures us. Lowenthal writes that “the past is integral to our sense of identity; the sureness of “I was” is a necessary component of the sureness of “I am”” (Lowenthal, 1985:41). We rely on our past to give our present meaning, purpose, and value. In similar words, Merryman writes that when cultural objects are being destroyed during wars, disasters or vandalism we “feel a sense of loss” (Merryman, 1989:349). We feel that we have “lost the opportunity to connect with others” (Merryman, 1989:349). Because, indeed, cultural heritage does not only have importance for the identity of an individual but also for that of a community. People might

be linked through traditions or cultural objects without having even met, thus creating an "imagined community", as Benedict Anderson writes (1983). Or, as André Malraux writes in his book *The Metamorphosis of the Gods* "People of all lands, hardly aware of what it is they have in common, seem to be asking of the art of all time to fill a void they dimly sense within them." (Malraux, 1960:34) Here again we can cite UNESCO, fervent defender of cultural heritage as a representation of identity. In its *World Culture Report of 1998*, they refer to cultural identity as the affirmation and expression of a specific culture of every nation and people. (Polycandrioti, 2006:20).

If cultural heritage and artefacts are beholders of identities and memories it is no surprise that besides human lives, cultural properties are targeted during genocides as this is the intentional destruction of a racial, religious, ethnic or national group as such. (Genocide Convention, Article II) Ethnocide or cultural genocide are genocide components, because:

> "you begin to liquidate a people, [...] by taking away its memory. You destroy its books, its culture, its history. And then others write other books for it, give another culture to it, invent another history for it. then the people slowly begins to forget what it is and what it was. The world at large forgets it still faster" (Kundera, 1996:218).

Preservation of archaeological and historical evidence

In the letter of Raphael to Pope Leo X (circa 1515) we discover that he was given the task of making "a drawing of ancient Rome" (quoted in Holt, [1419] 1982:292) based on the existing remains in order to know exactly what they were. We can assume that Raphael had to reconstruct the city and study its architecture and the use of the buildings. He learned from the study of the architecture of these buildings and was highly impressed by the work the Romans carried out, as he wrote to the Pope,

> "if one considers what may still be seen amid the ruins of Rome, and what divine gifts there dwelt in the hearts of the men of ancient times, it does not seem unreasonable to believe that many things which to us would appear to be impossible were simple for them" (quoted in Holt, [1419] 1982:290).

This could be compared to our modern interpretation of the work of conservation and preservation in order to understand the past. More recently, Merryman writes, "Cultural objects embody and preserve information" (Merryman, 1989:353). Indeed, cultural artefacts are important in terms of archaeological records and as historical evidence. The understanding of history and its existence is itself based on documentary evidence (MacWhite, 1956:3). Through the textual evidence left behind by previous generations, historians can reconstruct the past bit by bit. But, archaeology also plays it's part in the writing of history. In an article for the American Archaeologist, MacWhite makes a table in which he describes the *Levels of Archaeological Interpretation for Predocumentary Periods,* from the taxonomic and mechanical work to the psychological work. Indeed, archaeology is a work of interpretation[24], it necessitates analysing the object itself; what it is? how and what did it produce? Archaeologists have to look at the sites and the environment, to then make ecological, historical and economic assumptions and interpretations (MacWhite, 1956:5) which will be then corroborated, or not, by written historical evidences or the findings of further material evidence. The learning process, does not stop at archaeological interpretation, it continues with scholarly research that allows the artefact to be put into a wider context and associated with other discoveries. (Forrest, 2010:5) Archaeological sites and their integrity should be preserved (Monden & Wils, 1986:328) as the value of the artefact will be examined in terms of information that archaeologists and historians will be able to extract from it.

However, archaeological and historical works are important not just for the sake of retracing history but also because it is important to acknowledge and understand the past. The better

[24] Ironically very similar to law, which necessitates interpreting everyday life and society.

preserved artefacts and sites are, the more objective[25] the information can be. For Lowenthal, understanding and reconstructing the past should not only be for learning *about* the past but *from* the past, "the past is most characteristically invoked for the lessons it teaches" (Lowenthal, 1985:46). George Santayana in a similar vein of reasoning to Lowenthal wrote in *The Life of Reason: The Phases of Human Progress* "those who cannot remember the past are condemned to repeat it" (Santayana, [1906]2009:312). Therefore, we should use the past as "guidance", to use Lowenthal's term. It is important to look at the past to sometimes understand the present, and "apply past solutions to present difficulties" (Lowenthal, 1985:47).

Work on the preservation and conservation of cultural properties not only enriches us in terms of knowledge and information, as Lowenthal writes "a well-loved past enriches the world around us" (Lowenthal, 1985:47) but we can also benefit every day from the past, sometimes in the form of tangible heritage like living in an old house, communing with museum relics or wandering in an ancient city, (Lowenthal, 1985:48) as well as intangible heritage, like folklore performances.

"While a variety of cultural heritage items may give rise to similar expressive or economic values, at times only the one item of cultural heritage can uniquely reveal specific knowledge about the past" (Forrest, 2010:5). But as we will see in the next part there are several narratives of the past according to which government is in power.

Objects of political and economic power

Cultural objects have not only been safeguarded throughout history for their aesthetic, expressive and scientific value, but also for their political and economic power. This may be as important because, if the government and political powers did not see any interest and

[25] We can argue about the objectivity of information. As stated in the previous paragraph, even if archeologists are looking at evidence (whether artistic artefacts, sites, written texts) there will always be a part that is interpretation and assumption. Therefore, looking at the past in an objective way, and not how each community is creating its own understanding of its origins, is a difficult task, some might say impossible.

advantages in these cultural artefacts, their destruction or protection would not be a concern.

> "Heritage is not the same as history. Heritage is highly processed through mythology, ideology, nationalism, local pride, romantic ideas or just plain marketing into a commodity" (Schouten, 1995:21).

Political value

The political aspect of cultural property implies power. As laws, can be perceived as power, the use of cultural property as political tools may also be understood as power. Indeed, cultural heritage makes people believe and can give them habits and customs, as well as a very precise way of thinking, that will later on eventually develop into a law. The notion of power is central to the construction of heritage, and consequently identity, giving weight to the argument that heritage "is not given; it is made and so is, unavoidably, an ethical enterprise" (Harvey, 2001:336). Therefore, "those who wield the greatest power, can influence, dictate or define what is remembered and consequently what is forgotten" (Graham & Howard, 2008:43). Stuart Hall writes that "It is us, in society, within human culture, who make things mean, who signify. Meanings, consequently, will always change, from one culture or period to another" (Hall, 1997:45). Therefore, heritage is not only linked to the past but very much to the interpretation of what the present is making of it. An interpretation is then being used differently at each period, at political convenience. Because cultural heritage and property represent identities, history and memory and can be used as a "binding tool, to augment the development of nationalism" (Forrest, 2010:10). The identity and traditions created by cultural heritage is on a narrow pass where on one side it can be feelings and ideas that have been passed on from generation to generation, but on the other side it could have been also purely created by an elite and ruling class, because a united crowd is easier to control than independent, original minds. The need to reinforce nation-states during the nineteenth century is a good example.

> "Indeed nationalism and national heritage developed synchronously in nineteenth-century Europe. The nation-state required national heritage to consolidate national identification, absorb or neutralize potentially competing heritages of social-cultural groups or regions, combat the claims of other nations upon its territory or people, while furthering claims upon nationals in territories elsewhere." (Graham, Ashworth & Turnbridge, 2000:183)

To ensure power and increase the feeling of nationalism, emphasis is made on "the attributes of otherness" which "are fundamental to representations of identity, which are constructed in counter-distinction to them" (Graham & Howard, 2008:5). The idea of otherness places an important role as "recognition of Otherness will help reinforce self-identity, but may also lead to distrust, avoidance, exclusion and distancing from groups so-defined" (quoted in Graham & Howard, 2008:5). Cultural identities are defined and subject to political and economic powers, and cultural heritage is a tool in the creation of these identities.

Economic value

> "Economic valuing is one of the most powerful ways in which society identifies, assesses, and decides on the relative value of things" (Mason, 2002:12).

Cultural heritage and properties have what I will call a "material value" and an "immaterial value." I am not using the term intrinsic value, because this would imply a value that is not impacted by the market. Which is not possible as even the value of metal, gold, or wood are determined by the market. What I call the material value are the materials constituting the cultural artefact itself. For example, a "Highly important Celtic La Tène gold warrior Fibula", as described by Christies, made out of a unrefined ancient gold containing 79.6% of gold, 11% of silver and 9.4% of copper, is priced on Christie's for 1,103,750 GBP. (Christies, Sale 9088, 2001) But, the Mona Lisa, which is a painting not containing any precious metal or

component is worth a 100 million dollars, almost a hundred time more than a full golden ancient artefact, even more ancient than the Mona Lisa. This is an important point to make because it means that the value comes from the cultural importance that we give to cultural artefacts. The rarity of it, its aestheticism, or its historical and archaeological importance also play their part in setting the value and now the new prestige for cultural sites, artefacts and landscape is the World Heritage UNESCO List. This list has become "an aim in and of itself," (Zouain, 2000:3) because of what it will bring to the country and city namely "added prestige, heightened visibility" that will guarantee revenues from tourism. (Zouain, 2000:3).

This added economic value that UNESCO brings to cultural heritage will play a political role. Cultural heritage is part of a market and an industry, "although many would argue that cultural heritage should not be subject to market forces, the stark reality is that they are, as are allocation of budgetary resources, necessary for its support" (Forrest, 2010:7). The material value of the cultural artefact will only be a small part of the item's market value. (Forrest, 2010:5) Marx in *Capital,* describes a commodity as an "external object, a thing which through its qualities satisfies human needs of one kind or another" which has an exchange-value. We could certainly apply this definition to cultural property and we would not be the first to state that it has become a commodity. Cultural heritage and cultural property are consumed in many different ways. For example, tourists are big consumers of cultural heritage, indeed, "tourists have been demonstrably more and more interested in consuming heritage" (Ashworth & Tunbridge, [2000]2011:53-54). Tourists are looking for the authentic when they come to visit a city, and cultural heritage is what will satisfy their search for the local. But, looking at some antiquities in the ground or displayed artefacts behind glass is not enough. The demand is high, as well as the expectancies. Narratives and creative display are demanded, goodies and souvenirs are required. Because "the relics of history are already perceived as *products*" (Loulanski, 2006:210-211); "products" which of course are subjected to consumer demand, like tourism. This process is:

> "the commodification of the past," in which "heritage products" intended for consumption by already specified markets are being purposefully created or "assembled"

> through “interpretation and packaging” out of the existing stock of “heritage resources”.” (Loulanski, 2006:211).

This “commodification of the past” has inevitably brought governments to value more the economic benefits that cultural heritage and cultural properties could bring, to the extent that:

> “Economists, [...] complain about the failure of culturalists to acknowledge the economics of heritage in the public arena, as bureaucrats and politicians are increasingly relying on economic valuations in order to justify public expenditures on the arts” (Klamer, 2001).

Indeed, today “spending on culture is viewed in light of its “contribution to employment and income” (Klamer, 2001). Every government relies now on “economic impact studies […] since they are meant to show that each euro spent on a cultural project has a multiple effect on the local economy” (Klamer, 2001).

The international legal system for the protection of cultural heritage is deeply anchored in warfare as we saw. The need for the protection of cultural heritage is as strong as the one for destruction because of the diverse representations and values that are attached to it. It appears, therefore, to continuously at the centre of political games.

Has this new system, implemented by the international community in the mid-twentieth century, really changed of our views and approach to cultural heritage? Can we really talk today, in a society where even cultural heritage is a means to mass consumption, of an international law of cultural heritage?

After having looked at the past and tried to understand from where the need to create this international system was derived, I will look at how this system applies today and its relevance.

Chapter Three

Contextualising the present:

legal difficulties as cultural ones

In the continuation of this analysis of law as a cultural artefact, I will now look at how international cultural heritage law is used today. As we saw in previous chapters, laws and treaties have emerged at an international level to protect cultural heritage. But how are these laws implemented? Are there any difficulties faced by the international cultural heritage legal system? By looking at the lawmaking process and implementing the process of international cultural heritage law, we can understand where any difficulties of its application lie. This chapter is meant to look at the impact that culture might have on law by viewing legal difficulties as cultural ones.

I- THE INTERNATIONAL TOOLS OF CULTURAL HERITAGE LAW

International cultural heritage law was, as we saw in chapter two, mostly developed during the second half of the twentieth century. But, an independent field of international cultural heritage law does not currently exist as such and it is only now slowly emerging in law schools and/or law firms. No single codex exists, nor any precise lecture that can be taught. It is more a collection of different, yet interrelated, fields: the taxation and governance of non-profit organisations,[26] alternative dispute resolution,[27] wills, trusts and estates,[28] family law and bankruptcy[29] are but a few examples of fields that may be drawn from in cases of resolution or analysis. But, cultural heritage law also demands a certain curiosity and open

[26] Many entities in the art and cultural heritage field are non-profit organisations.

[27] ADR is used in many cases over litigation.

[28] Many historic preservation goals are achieved through use of local ordinances.

[29] Disputes over artworks often arise because of death, divorce and debt.

mind towards different cultures, their history and development. Today, international legal systems for cultural heritage mainly consist of international conventions, treaties, recommendations and international organisations which regulate the art market or subsidise the preservation of cultural heritage sites. In this first part, I will offer a quick overview of existing major international organisations and conventions, as well as the recent protection of cultural heritage under international human rights law.

International Organisations

International organisations are "social constructs, created by people in order, presumably, to help them achieve some purpose, whatever that purpose may be" (Klabbers, 2002:8). As Jan Klabbers sarcastically points out, it is quite difficult to define or explain the purpose of international organisations. Indeed, organisations set their own goals and purposes. Additionally, the development of laws that govern international organisations is still at an early stage; for example, there is no convincing legal theory on the "personality" of international organisations, nor do we know if an international organisation (or its members) can be held responsible if it fails to meet its legal obligations (Klabbers, 2002:3). Nevertheless, the common delimitation[30] made between international organisations is the nature of the body of law governing the activities of the organisation. An international organisation or intergovernmental organisation is governed by international law, whereas a non-governmental organisation is governed by domestic law (Klabbers, 2002:8). Additionally, although not itself a legal institution, UNESCO can adopt and use legal instruments such as declarations, recommendations and conventions.

There are several international and non-governmental organisations currently protecting or doing conservation work on cultural heritage sites or artefacts. The table below provides a brief overview of them. Some organisations are not directly specialised in the preservation of cultural heritage, such as the UNODC, for example, which tries to control the trafficking of

[30] Other main characteristics about international organisations should be considered, like the three ways an international organisation can be created: between states, on the basis of a treaty or as an organ with a distinct will.

drugs as well as crimes related to corruption. This is because the illicit trafficking of cultural artefacts is not only an illegal trade, but is also often the source of funding for terrorism and other black markets (UNODC, October 30th 2012).

INTERPOL	International Organisation	International Criminal Police Organization - 1923	Enables police around the world to work together.

EUROPOL	Agency of the European Union	European Union Agency for Law Enforcement Cooperation - 1998	Centre for law enforcement cooperation, expertise and criminal intelligence that assist EU Member States in the fight against international crime but do not possess any executive power.
ICCROM	Intergovernmental Organization	International Centre for the Study of the Preservation and Restoration of Cultural Property - 1956	Promotes the conservation of all forms of cultural heritage of its Member States.
UNESCO	Specialized Agency	United Nations Educational, Scientific and Cultural Organisation - 1946	Pursues its objectives by conducting activities in their five programs: culture and communication, social and human sciences, education and natural sciences.
ICOMOS	Professional Body	International Council on Monuments and Sites - 1965	Works for the conservation and protection of cultural heritage places.
WCO	Intergovernmental Organisation	World Customs Organization - 1952	Its objective is to enhance the efficiency of its Member States customs administrations.
UNODC	Agency	United Nations Office on Drugs and Crime - 1997	assist its Member States in interrelated issues of illicit trafficking of drugs, crime prevention and criminal justice, international terrorism, and political corruption.
UNIDROIT EUROPA NOSTRA, WMF, IIC, GHF, ETC.			

International Conventions

Within international cultural heritage law, all international texts are conventions and not treaties. The differences between a treaty and a convention are very subtle, to the point where the terms are often used interchangeably. Usually, a treaty refers to agreements that

are made in an attempt to end a conflict and/or disagreement, whereas a convention is the result of a discussion between several countries on a global issue on which they have reached an agreement. Treaties have a legally binding nature, whereas a convention, despite possessing general rules of law, supposedly touch less fundamental areas than treaties. It is also important to mention the number of state parties, as conventions will apply only to them and they are the only ones able to invoke them.

Here again, like for the international organisations, it is important to mention the major legal texts regulating the black market of art and the preservation of cultural heritage.

Convention for the Protection of cultural Property in the Event of Armed Conflict (Hague Convention 1954) and Protocols	Prohibitions and obligations that the States Parties are expected to observe in peace- and in wartime. In peacetime, the State Parties have to adopt protection measures for the safeguarding of their cultural properties. The convention being part of the law of armed conflict[31], the State Parties have to respect the cultural property of other States Parties during times of conflict and occupation.	129 State Parties
UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (1970 UNESCO Convention)	Aims to prevent the illegal export and import of cultural property. This Convention has been relied on by States a number of times, but its application continues to be circumscribed by the reluctance of some of the major art-market States to subscribe to its broad and sometimes vague provisions.	136 State Parties
EC Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State 2014 (Recast of EC Directive 93/7/EEC) (EC Directive) and the EC Council Regulation on the Export of Cultural Goods 2009 (EC Council Regulation)	These directives are exclusively European initiatives.	-
UNIDROIT Convention on Stolen and	Aims to harmonise the laws of the States Party with	42 State

[31] The law of armed conflict also called the law of war or international humanitarian law is a lex specialis. Meaning that a law governing a specific subject matter overrides a law that only governs general matters. In the case of the Laws Of Armed Conflict, they regulate the conduct of military operations during armed hostilities.

Illegally Exported Cultural Objects 1995 (UNIDROIT Convention)	respect to claims for the return of stolen or illegally exported cultural objects. This convention includes two concepts that the 1970 Convention had neglected: the problems for private individual owners bringing international claims where stolen cultural property ends up in a foreign country; and the extend of the duty on States to return illegally exported cultural property.	Parties
UNESCO World Heritage Convention 1972 (World Heritage Convention)	Founded on the philosophy that some natural and cultural sites constitute 'common heritage' and that the disappearance of such heritage would be of irreparable loss to mankind. This is the only convention dealing exclusively with immovable cultural property (nominated sites of cultural or natural heritage).	193 State Parties
UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001	Ensures and strengthen the protection of the underwater cultural heritage.	58 State Parties

International Human Rights Law

On March the 26th 2009, the Human Rights Council adopted Resolution 10/23, entitled "Independent expert in the field of cultural rights," in which they reaffirm "that cultural rights are an integral part of human rights, which are universal, indivisible, interrelated and independent" (Human Rights Council Resolution 10/23, 2009:Article 2). In a report of the United Nations general assembly of 2016, entitled *Special Rapporteur in the field of cultural rights*, cultural rights are defined as protecting:

> "the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts,

> institutions and ways of life." (Human Rights Council A/HRC/31/59, 2016:4)

Strong connections are seen between human rights and cultural heritage because of the improvement that both heritage and human rights can bring to present and future generations. However, these improvements are mainly created, according to the needs of today (Lowenthal), particularly heritage which is "selected according to the demands of the present and, in turn, bequeathed to an imagined future" (Graham & Howard, 2008:2).

"In a similar way, human rights is not only improving our present but also, in a profound sense, about creating conditions that allow us to become the people we wish to be in the kind of society we wish to live" (Blake, 2015:272) So, the choice and access to the values, exposed in the previous chapter, brought by cultural heritage are the ones considered and protected as a human right. The Human Rights Council writes,

> "Cultural heritage is significant in the present, both as a message from the past and as a pathway to the future. Viewed from a human rights perspective, it is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities and their identity and development processes" (Secretary-General A/71/317, 2016:4).

What makes this interesting is that usually human rights are referred to as belonging to "the individual in his or her quality as a human being" (Office of the high Commissioner for Human Rights in Cooperation with the International Bar Association, 2002:4). whereas cultural heritage is often assigned to a community. But, now cultural heritage is declared as an individual right. "The preservation of cultural diversity is now recognized as a right of all humankind, while safeguarding intangible cultural heritage now places a duty on States to ensure its viability" (Blake, 2015:270)

This association of cultural heritage and human rights might be in the way of some international conventions, like the 1972 World Heritage Convention, which has a cultural internationalist approach towards cultural heritage. If the access and "use" of cultural heritage has become a human right, which is by definition an individual right, how does this equate with the approach that cultural heritage is part of mankind as a whole. For example, if an object is being displayed in a museum and is accessible to a bigger audience, as "mankind's right," couldn't one individual for whom the object is of historical and cultural importance argue under human rights, that it is his right to have access to this object?

This contradiction could be further developed with Article 15 of the International Covenant on Economic, Social and Cultural Rights and the right to take part in cultural life. Indeed, article 15 (1) (a) states that "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life;" But, tangible cultural objects can be part of the everyday cultural life of some communities, therefore there is an inaccessibility of some of these objects, due to their museal exposure. Finally, as it will be explained in the last chapter, UNESCO could be denying this right to several communities by doing its work of preservation.

Protected under so many laws, conventions and by several organisations it seems impossible nowadays for cultural property to be endangered. Yet, Interpol has a list every month of the wanted cultural artefacts that they are actively researching, ICOM has a red list of stolen artefacts, the World Heritage Committee has listed sites and properties that are considered to be in danger, etc. The list could continue even without mentioning the reports about armed conflicts during which numerous cultural properties are being destroyed or stolen.

II- THE INEFFICIENCY OF INTERNATIONAL LAW

Today the art market is the third biggest black market in the world after drugs and arms trafficking; so much for creating an international legal system protecting cultural heritage and property. Used in political ascension or used as a display of power and money, the

prestige of possessing or destroying cultural artefacts has, as we saw in the previous chapter, existed for several centuries, and our time is no exception. It could be said -correctly- that we are protecting heritage today, but it would also be correct to say that we have commodified cultural heritage like none of our ancestors before. Despite the much more elaborate international legal system that we have created, cultural properties are still exposed nowadays, sometimes as much as they were centuries ago.

UNESCO has a list of dangers that could potentially destroy cultural heritage, but, we are mostly interested in human destruction.

Cultural destruction through armed conflict: the mosques and manuscripts of Timbuktu

Where there are wars, it seems that cultural destruction is inevitable. Here, I disagree with Roger O'Keefe's words in his book, *The Protection of Cultural Property in Armed Conflict*, when he writes that, "The fact is that, since the end of the Napoleonic Wars, malicious destruction and plunder by armed forces and flagrant disregard for the wartime fate of cultural property have been exceptions [...] and condemned by other states on each occasion" (O'Keefe, 2006:1-2). I do not believe that malicious destruction has become an exception since the mid-nineteenth century; rather, incidents have become less common because there has been less conflict in Europe. But, what about the Buddhas of Bamiyan[32], the Mosques of Bosnia[33], cultural destruction during the Armenian genocide[34] or the destruction of Baghdad's National Library[35]? Moreover, I do not completely agree with O'Keefe's statement that other states have condemned this behavior. Sometimes, the destruction is condemned orally, but rarely legally, and this is one of the difficulties of international cultural heritage law that I will discuss in the next few paragraphs.

[32] Destroyed in 2001 by the Taliban through artillery fire, explosions and a rocket.

[33] Sixteen mosques destroyed during the Bosnian War between 1992 and 1995.

[34] Numerous books, buildings, monuments or any material representation of armenian culture have been destroyed during the 1915-1923 genocide.

[35] Looting of the national library in 2003 after the US bombed the city.

A good example of malicious destruction of cultural heritage can be found in the mosques and manuscripts of Timbuktu. Described by UNESCO as an "intellectual and spiritual capital and a centre for the propagation of Islam throughout Africa in the fifteenth and sixteenth centuries," they write, "its three great mosques, Djingareyber, Sankore and Sidi Yahia, recall Timbuktu's golden age" (UNESCO, Timbuktu). In its golden age, Timbuktu was an important place in Islamic culture and a trading post on the trans-Saharan caravan route. In March 2012, the military coup that took place in Bamako, the capital of Mali, led to the occupation of Timbuktu by "radical Islamists, who, in alliance with Tuareg rebels, captured large parts of northern Mali in the name of a Tuareg homeland (Azawad) and in order to impose a "pure" form of Islam on the population" (Joy, 2018:15). Even though, the destruction of the cultural heritage of the Timbuktu manuscripts is a war crime for UNESCO, this this did not stop ISIS destroying them. They consider representational art idolatrous, and as a result, works of art at museums, mosques, and churches have become targets of its hammers, axes, bulldozers, and bombs. Mostly they have looted archaeological sites, to sell the artefacts on the black market, that would then fund their activities. The destruction in Timbuktu is a result of the long unstable history of Mali.[36] As a note I should add, that Mali has been a member of UNESCO since 1960 and a State Party of the World Heritage Convention since 1977, yet law is not a magical shield, and cultural property has still been destroyed.

The important point this example illustrates is that, still today, cultural properties are being destroyed during war, and are often targeted due to ideology. Cultural property has as much importance as previously but are still used as weapons of war and political advancement.

Cultural destruction through tourism industry: Mont-Saint-Michel and its bay

Tourism undoubtedly brings many benefits, and the money generated often allows for the conservation and restoration of some cultural properties which were otherwise fated to disappear. But, unfortunately, too often mass tourism is at the centre of the destruction of cultural heritage. As ICOMOS pointed out in its Charter of Cultural Tourism in 1976:

[36] The political conflicts intensified when the second Tuareg rebellion started in the 1990s' National Movement for the Liberation of Azawad, "a group of secular Tuareg rebel group."

> "Whatever, however, may be its motivations and the ensuing benefits, cultural tourism cannot be considered separately from the negative, despoiling of destructive effects which the massive and uncontrolled use of monuments and sites entails" (ICOMOS 1976).

Yet, sometimes the property itself is not necessarily materially destroyed and sometimes the destruction lies instead in the surroundings of the property or the minds of people. Let us take the example of Mont-Saint-Michel and its bay. It has often been described as being the "Wonder of the West" (UNESCO, Mont-Saint-Michel and its Bay), and from the beginning of its creation in the 10th century, Mont-Saint-Michel quickly became a major pilgrimage site of the Christian occident (Centre des Monuments Nationaux). The abbey and the Mont itself are famous for the architectural diversity that they offer, since construction started in the tenth century only ending in the nineteenth century when restorations had to be made. Since 1979, Mont-Saint-Michel and its Bay have been a UNESCO World Heritage site and, similarly to the pilgrims of the tenth century, tourists now flock there as if it was the holy land of mass tourism.

> "Its narrow, medieval streets are quickly crowded with tourists, who shoulder to shoulder, four or five thick, mill about like subway commuters at rush hour along the main street, which is nonstop cafés, hotels, restaurants and shops, selling every kind of souvenir imaginable […]" (Stille, 2014).

Indeed, each year Mont-Saint-Michel is visited by approximately 2.3 million tourists, while only 50 locals live on the "rock" (lefigaro.fr, December 19th 2017). To say that the balance between the amount of tourists and the locals is unequal would be quite an understatement. This is where the destruction starts, and where it is not visible to everyone. As Orbasli wrote in his book, *Tourists in Historic Towns*:

> "the benefits of tourism for conservation are negligible if they are outweighed by the pressures and subsequent destruction caused by tourism. The interface between 'host' residents and 'visitor' tourists can so easily become one of tension and conflict, caused by social differences, attitudes and (limits of) tolerance" (Orbalsi, 2002:161).

This pressure and tension between the tourist and the local is characterised by the fact that "tourists require and attract ancillary services facilities" (Ashworth, 2009:81). For example, the Mont-Saint-Michel, as a protected cultural heritage site requires certain safety and the creation of certain facilities

> "The small community of people who live between the abbey and the shops feel angry and betrayed by the changes taking place in and around Mont-Saint-Michel. "This whole project has been driven by the idea of turning Mont-Saint-Michel into a picture postcard – the island with water around it – and not a place where people actually live," says Jean-Yves Lebrec, whose old family home sits halfway up the hill to the abbey. Outside his house is a large banner with the words "Stop the Massacre of the Rock!"" (Stille, 2014).

This is where the double face of the law emerges: it needs to be anchored in culture but it also need to influence it. It is from this duality that the complexity of the legal issues arises.

It appears through these examples that our current international legal system for the protection of cultural heritage does not respond completely to the need. We can ask ourselves if it will ever do? Indeed, how can we unify our ways of thinking and approaching the protection of cultural property if we all have a different definition of it?

III- FROM LEGAL DIFFICULTIES TO CULTURAL DIFFICULTIES

"Law is a fact of culture written in History. By this, law, is capable of characterising the society it emerges from" (Assier-Andrieu, 1996:119) (my translation). As we saw in the first chapter, our methodology is based on the idea that law and culture are influencing each other. It is then with no surprise, that this thesis will make the statement that legal difficulties, and in our case the ones surrounding international cultural heritage law, are tied to cultural diversity.

Defining the object and purpose of the law

When writing a law, the first task is to define the subject of the law; what it will be about and define clearly what person, what object and situation are subject to this law. So, in our case we need to define the terms cultural heritage.

"While cultural experts of various disciplines have a fairly clear conception of the subject matter of their study, the legal definition of the cultural heritage is one of the most difficult confronting legal scholars today" (Prott, 1989:224). Cultural heritage is a difficult phrase for many legal scholars, as it is for cultural studies scholars. Yet, it is interesting that they tend to not consult each other. A legal text would never cite Raymond Williams, for example. Even still, Prott states that cultural studies scholars are now experts in defining the notion of culture, yet Raymond Williams seems to disagree: "culture is one of the two or three most complicated words in the English language," he writes. (Williams, 1976:76) There probably cannot be a definite notion of what culture is as it constantly develops and is being refined. But, in his book *Keywords*, Williams identifies three categories of definition for the word culture:

> "(i) the independent and abstract noun which describes a general process of intellectual, spiritual and aesthetic development […]; (ii) the independent noun, whether used generally or specifically, which indicates a particular way of life,

> whether of a people, a period, a group, or humanity in general […]; (iii) the independent and abstract noun which describes the works and practices of intellectual and especially artistic activity" (Williams, 1976:77).

Concerning the legal world, in every convention, treaty or legal text, the first article or paragraph will usually be devoted to the definition of the object and/or purposes of the text. Yet, such definitions are often specific to that legal text and it may not be "possible to achieve a general definition suitable for use in a variety of contexts" (Prott & O'Keefe, 1984:8). Let us take the examples of the 1970 UNESCO Convention and the 1972 World Heritage Convention. The former refers to "cultural property" and the latter refers to "cultural heritage." This is possibly because the 1970 UNESCO Convention is about the illicit trafficking of material objects, whereas the 1972 World Heritage Convention is concerned with the protection of intangible heritage as well as tangible. Another interesting difference is the fact that the 1970 UNESCO Convention mainly defines culture worth saving (and prevented from being illegally exported) as being material and at least a hundred years old,[37] such as "property relating to history" or "articles of furniture more than one hundred years old and old musical instruments." The 1972 Convention seems to put just a little less emphasis on time, although it refers to heritage as "an inheritance received from the past, to be held "in trust" by the current generation (that may enjoy its value in the present) to be handed down in at least as good a state as it was received to the next generation" (Blake, 2015:7). We might wonder then: is the legal definition of culture all about the production of material or immaterial things that are of historical importance? Is the age of the property a decisive criterion? What about heritage created during more recent history, would that not be old enough? Yet, we sometimes preserve "old history" to the detriment of more recent

[37] "Answers to the deeper question of why age should be an asset may be just that age increases a building's rarity value on the survival principal of the older the fewer, which is why age criteria exist in most of the protective legislation." (Ashworth & Tunbridge, 2000:10)

history, as in the case of the destruction of the Palace of the Republic[38] in Berlin to rebuild the former Castle of Berlin.[39]

The criteria defining qualification as a UNESCO protected site, artefact or intangible culture, are as vague as the definitions given in the conventions. A first important point is that in order to have a protected site, a nation state must sign and ratify the 1972 World Heritage Convention. Only then can a nation apply for the protection of a particular site, artefact or intangible culture. But, as the convention's definition of cultural heritage is so vague, UNESCO came up with a long and bureaucratic process, in which it is necessary to justify why the site, artefact, or intangible culture should be protected.

The following table attempts to give a simplified explanation of the process through which cultural artefacts and sites can become designated UNESCO cultural heritage.

STATES	SIGN	UNESCO 1972 World Heritage Convention
CONSULTATIVE ORGANISATIONS	MAKE	Inventory of the most important sites within its frontiers
FINAL COMMITTEE	CREATE	Indicative list of goods and sites that the State will be able to propose for inscription within five to ten years
	ADVICE	Consultative organisations : ICOMOS, UICN and ICCROM
	FINAL DECISION	Intergovernmental Committee of cultural heritage

Information compiled from the "Operational Guidelines for the Implementation of World Heritage Convention" published in 2017.

[38] Opened in 1976 in East Berlin, it was the seat of the Parliament of the German Democratic Republic.

[39] The castle was first built in the fifteenth century and had since its destruction, due to the damage caused by the Second World War, been the house of the Prince-Electors of the Holy Roman Empire and later the Prussian Emperors.

Through the very act of defining, we are also excluding cultural artefacts we may not consider to be of "great importance to the cultural heritage of every people" (Hague Convention, 1954:Article 1(a)) or as "being of importance for archaeology, prehistory, history, literature, art or science" (UNESCO Convention, 1970:Article 1). But, it might be important from the perspective of a specific community or group of people. Once again, we see that the legal world of cultural heritage is divided between preserving culture and preserving an art market, as the term "cultural property" implies a market value and the commodification of the cultural artefact. (Blake, 2015:66) Lastly, we may wonder if Raymond Williams had not forgotten, in his three categories, to add the legal definition of culture or if legal texts forgot to look outside their bubble in order to better define something that they seek to regulate.

A major debate that arose while writing these conventions, and that is apparent while reading them, is that of cultural internationalism and cultural nationalism. The cultural internationalism approach can be summarised as: "One way of thinking about cultural property […] is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction" (Merryman, 1986:831). Whereas the cultural nationalism point of view states; "Another way of thinking about cultural property is as part of a national cultural heritage," (Merryman, 1986:832).

To take the examples of the 1970 UNESCO Convention and the 1972 World Heritage Convention again, the former refers to cultural property as constituting "one of the basic elements of civilization and national culture," arguing that "its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting," which is more in line with a nationalistic approach to cultural property. On the other hand, the 1972 World Heritage Convention, as the title suggests, considers cultural heritage from a more international point of view, as it states that "parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole." Cultural internationalism will usually favour the international movement of cultural property, whereas cultural nationalism will give more power and control to a nation-state over "its" cultural heritage/property. For example, in the case of cultural nationalism, the art market will be divided into "source nation" and a

"market nation." A "source nation" is a country that has a high volume of valuable cultural property and a "market nation" is a country that buys cultural property (Roehrenbeck, 2010:189).

Perhaps "too much is now asked of heritage. In the same breath we commend national patrimony, regional and ethnic legacies, and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible" (Lowenthal, 1998:227). Indeed, these conventions each defend different points of view, some are protecting a global art market and other ones are in favour of the preservation, in their environment, of cultural heritage sites. The division made the nationalistic approach is at the source of restitution and repatriation cases. Indeed, if cultural heritage belonged to Mankind, then there would not be the question of returning it to "someone". Cultural nationalism creates the idea of an illicit trade, whereas cultural internationalism would probably be much laxer. As we explained in Chapter Two, cultural nationalism is of importance for cultural artefacts because of their historically and geographical context that gives us more information about the object itself, its use, and maybe an understanding beyond the artefact. But, it also has very political purposes - it reinforces the idea of a national culture with a national identity belonging to one community only and that this culture will only be fully understood and enjoyed at its most complete by "the nationals". But, cultural internationalism creates another difficulty, it makes source countries more vulnerable, and looting feeds the black market of art (which under cultural internationalism would just be a commodity sold on a market) benefitting mostly western countries as most of the museums, research centres and legislative reside there.

An important point to make in the discussion of cultural nationalism and internationalism is, according to Lowenthal, the connection between a global view of heritage and the Eurocentric colonial tradition (Blake, 2015:3):

> "[i]n the course of dispensing global benefits, Western powers also acquired global heritage and then came to construe their spoils of conquest as global stewardship. European mandates to plunder stemmed from the common view that their

> Christian and scientific legacy was immeasurably superior to the barbarous customs of others [...] ”the rest” were deemed incapable of creating, let alone conserving, the legacies they lived among”” (Lowenthal, 1998:240-241).

Indeed, there is this constant tension and opposition between large western museums holding large collections of cultural objects (and even sculptural elements) ascribing it a universal value, and local communities claiming these artefacts as theirs, ascribing it a national value.

Moreover, the acquisition of these artefacts by Europeans mainly happened during colonisation. In these cases, cultural internationalism appears more like a justification to keep these objects, and by assigning it a legal status the market countries make it difficult if not financially impossible for source countries to pursue legal claims. (Blake, 2015:4)

Once again, the legal texts reflect the state of mind of society towards cultural heritage and cultural property: protecting heritage but feeding the art market and maintaining political power. We must ask, are things directly created by a community/civilization nationalist and the natural heritage, (landscapes for example) or can they be considered as an international heritage?

Implementing the law

In the context of international law, once the convention, treaties and regulations have been written, it is necessary to implement the international law by incorporating it into national law. This part reinforces the point of this thesis in the sense that international law has to be implemented into national law, as law is cultural and cannot be unified if we do not have one culture[40].

[40] Which would seem a ridiculous statement similar to saying that everyone has the same opinion.

Once the conventions are written, and the difficulties of defining and taking a position on preserving heritage or commodifying it are passed, they need to be implemented into domestic laws. This is not an easy task as nations are sovereign states under international law, and national constitutions will always take precedence over international law.

There are two main legal systems which are in use in the common and civil law countries; the dualist legal system and the monist legal system. In the dualist legal system, international law is not valid independently of national law. This means, that it is not recognized by domestic courts until it is implemented into national law. Once the State has signed a convention, it will have to be approved by the internal political processes of the State, they will have to *translate* the convention into national law. In a monist legal system, international law is considered to be already part of the national law.

International cultural heritage law is what is called a soft law. The *Dictionnaire de droit international* from Jean Salmon defines soft law as:

> "rules whose normative values would be limited, either because the instruments containing them would not be legally binding, or because the provisions in question, although contained in a binding instrument, would not create a positive legal obligation, or would create only lenient obligations" (quoted in Cazala 2011:41) (my translation)

The different international conventions and organisations only apply to certain States and the long and heavy process of implementation in some countries doesn't favour the idea of a unified legal system protecting cultural property and cultural heritage. For international conventions to apply, it is the States who first decide if they want to sign them and become a State Party, the same logic applies to the international organisations, who can only "intervene" [41] in the countries of their respective State Parties. Moreover, international law

[41] Even though the intervention power of an organization is quite limited and sometimes restricted to expertise and advice.

operates consensually, which means that there are no criminal sanctions in international law to force States to enter into treaties or to comply with their provisions.

Once the States have ratified the conventions, and because they are State Parties, they need to translate the texts, not only into the national language to make them linguistically accessible but also to translate the texts into domestic laws, translating the laws conceptually to make them culturally accessible.

Roman Jakobson divided translation into three categories, in his article *On Linguistic Aspects of Translation*: "intralingual translation, or rewording", "interlingual translation or translation proper", and "intersemiotic translation or transmutation." As written previously in this thesis, in the introduction, legal translation is considered as an intersemiotic translation as "a reported speech" in which "the translator recodes and transmits a message received from another source" (Jakobson, 1959:233).

The first difficulty of legal translation resides in the fact that law possess its own vocabulary, a technical wording that is assimilated into legal ideas and concepts[42]. The second difficulty, lies in the nature itself of legal language: law is a normative language. It is undeniable, and here we can agree with the imperative school of jurisprudence, law is related to norm creation, production and expression. This is necessary to give the translated laws a legal effect in the legal system of destination. (Gémar, 2015:480) The third difficulty concerns the cultural roots of law, and here is where we disagree with the imperative school of jurisprudence. The legal ideas and concepts, are culturally rooted, and the words constituting the legal language reflect the civilization that produced it. (Gémar, 1979:38) The words have different meanings in each society and it is necessary in the process of translation to understand their situation and role in their language. (Gémar, 1979:36) Thus, international conventions will need a legal and cultural translation to enable domestic courts to use them. Making international law applicable is a long process.

[42] Legal terminology plays a key role in the redaction of laws, since law has the function of a command that impose (positive) obligations and interdictions that might restrict individual freedom, there is a need to have a precise terminology making it comprehensible. (Lardeux, 2012:818)

Application of the law: law as a command

Another difficulty that law has to face and probably the major one that is identified in this thesis is that laws are not just respected without any justification, or often without any punishment. Here we can relate to the Imperative school of jurisprudence, when they argue that law is a command. To be respected by everyone, and not just those who agree Law has to be a command.

This might come in contradiction to the idea that law reflects culture and society. Indeed, if law was only a written habit why would it be necessary to make a command out of it? People would just respect it anyway because this reflects what they think and believe in. Firstly, not everyone agrees on a behaviour and way of thinking, even if you have a similar culture, from the same country[43], they may not have the same opinion. Secondly, when it is stated in this thesis that when law comes from culture it does not mean that it solely comes from the people themselves, but very much from the people leading a country and by the people who hold power. But, how do you make people abide by a law that they might not agree with or not care about ? You have to threaten them with sanctions and turn law into a command.

Law can be an efficient tool for the protection of cultural heritage as it may exert a "psychological" power upon people. People act according to what they, consciously or unconsciously, know to be legal or illegal. This is where the importance of the implementation of the law resides: the impact that law has on people's behaviour. This is what is called legal consciousness.

The nineteenth-century legal philosopher John Austin[44], stated that "Every law (…) is a command" (Austin, 1832:21). In an extreme interpretation of the power of law, we could say that people are more afraid of the consequences of not respecting law than the acceptance of what the law is stating. In this case, we could cite again John Austin when he writes "A

[43] If we believe the idea that one country equals one culture.

[44] Introduced in the first chapter. Major figure within the Imperative School of Jurisprudence.

command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded" (Austin, 1832:21).

This self-interested way of acting which could result from either the fear of the punishment, or the gain of reward is what Jackson calls "instrumental compliance" (Jackson et al., 2012:1055). Jonathan Jackson determined three main "pathways" of compliance with law. One of them is instrumental compliance where the individual is self-interested, then there is personal morality, where the person believes a given act, proscribed by law, is wrong. In this case, the individual is led by his moral principles to comply with a law, but the individual might just as well engage in an illegal act if he sees the behaviour as morally correct or neutral. (Jackson et al., 2012:1056) The third "pathway" is still link to morality, but this time the focus is on law, the individual complies with law because it is the law. It is not about the moral belief of the person judging whether the law is stating something good or bad, but an internalized belief that it is morally right to obey the law, that you "should", that you "have the right to" (Tyler, 2006:390). These three "pathways" of compliance could be compared to the three "stories" of legal consciousness. This concept places law as a constitutive part of society. (Jackson, 2012:1052) Whereas socio-legal research is mainly concentrating on the instrumental role of law within society, and how law is acting upon society from an external position. (Jackson, 2012:1053)

In the New Oxford Companion to Law, Susan Silbey, defines legal consciousness as a legal concept used to name "the understandings and meanings of law circulating in social relations." This movement developed within the Law and Society Association[45], created in 1964. The book by Patricia Ewick and Susan S. Silbey "The Common Place of Law – Stories from Everyday Life" is a cornerstone in Legal Consciousness Studies. The researchers

[45] The association describes itself as place where they are committed to develop "theoretical and empirical understandings of law" (Law and Society Association). At the time of its creation, the association presented itself as being against the idea that the juridical processes are neutral and rational, and against the legitimate authority claimed to be possessed by jurists and lawyers as sole entity capable of making it a science (Pélisse, 2005:115). The 1980s marked a turning point in legal studies from which emerged the Critical Legal Studies (CLS) and the Amherst Seminar, which will be the Legal Consciousness Studies (LCS).

conducted a series of 430 interviews in which they collected the stories[46] of events and relationships of these people, that they then used "as a lens to study law in everyday life and as a metaphor to represent what" they had discovered. (Ewick & Silbey, 1998:29) Some important things to remember from this book, are the three legal stories that people tell about law; "before the law", "with the law" and "after the law". The researchers call "before the law", the situation when the individual sees legality as something that exists in a different sphere than its everyday life. In this case law is described as a "formally ordered, rational, and hierarchical system of known rules and procedures." (Ewick & Silbey, 1998:47). Here, people express loyalty and acceptance of legal constructions.

In the situation "with the law", legality is described as a game. It is played in "a bounded arena in which pre-existing rules can be deployed and new rules invented to serve the widest range of interests and values." (Ewick & Silbey, 1998:48) The difference here, is that in these situations, people are less concerned about the legitimacy of legal procedures than about their effectiveness for achieving desires." (Ewick & Silbey, 1998:48) whereas in the first story of legality people believe in "the appropriateness and justness provided by the formal legal procedures, although not always in the fairness of the outcomes." (Ewick & Silbey, 1998:47) In the third and last story of legality, "after the law", people see it [legality] as being capricious and arbitrary. Being unwilling to stand before the law as they are unable to play with it, people act against the law. In this case, people will imagine ruses, tricks and subterfuges to appropriate part of law's power (Ewick & Silbey, 1998:28).

The international law of cultural heritage is a system without any international legal sanctions and without any international dedicated tribunal. Indeed, Article 28 of the first protocol of the 1954 Hague convention states:

> "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions

[46] The researchers used the language of stories and narrative because they believed that people could explain themselves better through it, rather than stating categorical principles, rules and reasoned arguments. (Ewick & Silbey, 1998:29)

> upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention" (Hague Convention, 1954:Article 28).

Even though, there is not any precise uniformed sanctions, the intentional destruction of cultural heritage is criminalised and can be brought to court, namely the International Criminal Court (ICC). But, they would be complex cases. Who brings whom to court? Who can be held accountable when you cannot "catch" anyone? That is why in 2016 UNESCO and the ICC decided to bring Ahmad al-Faqi al-Mahdi[47] to court who was charged with having directed the "attacks against nine mausoleums and the Sidi Yahia mosque in Timbuktu." In the case of TImbuktu, to have brought Ahmad al-Faqi al-Mahdi to court is quite exceptional, but very much needed for UNESCO who appeared powerless after the attacks on the Buddhas of Bamiyan and the Mosul Museum and Nimrud in Iraq (Joy, 2018:15). "It was therefore important to UNESCO for the ICC to make an example of the Timbuktu case in order to assert the institution's credibility as a defender of global cultural heritage" (Joy, 2018:15).

This example, illustrates perfectly what we wanted to explain in the previous paragraph about legal consciousness. Perhaps by setting a precedent and "making an example" of possible sanctions the crimes will decrease as the consequences have now become real. Sanctions are made in the hope that people will not reproduce this crime.

This is what is believed to have happened to Marion True, who was accused and brought to justice for having recommended the acquisition of italian looted artefacts. Marion True was the antiquities curator of the J. Paul Getty Museum in Los Angeles since 1986 and was indicted in 2005 in a court in Rome. (TraffickingCulture.org, 2012)) Paolo Ferri, the italian prosecutor at the time believes that ""She was on trial for one reason," he said. "To show an example of what Italy could do" (Edgers, 2015). Eventually, Marion True was never found guilt and the charges expired in 2010, but Italy wanted to set an example and provoke fear among American museums.

[47] Stated that he was a Tuareg/Tamachek, about 40 years old and born in a village near Timbuktu.

“[…] [T]he protection offered by cultural heritage law is not entirely satisfactory. The existing conventional instruments are affected by important weaknesses, as they are not retroactive, often not self-executing, and are characterized by broad or vague provisions” (Chechi, 2014:1). We can only agree with this statement, but by emphasizing that creating an international legal system will come up against the diversity of cultures and systems. If law is a translation of culture, then there are as many laws as there are cultures, which makes international law a bewildering task. If law, was independent from society and culture as the imperative school states, then, clearly, we would not face the difficulties today, of trying to understand the meaning of culture for hundreds of countries and communities and there could be more agreement on protecting cultural heritage.

Since, these conventions are very vague in their definitions and heavy in their application process, they encourage general directions for the States Parties to implement their own national laws protecting cultural heritage. So, paradoxically, international cultural heritage law states that nation-states should write their own laws to protect their own cultural heritage.

IV- THE EFFICIENCY OF DOMESTIC LAWS – THE EXAMPLE OF THE PORTUGUESE AZULEJOS

Passing local laws is a quicker process compared to the implementation of an international convention into domestic law. Moreover, national laws can be more precise and target a specific problematic or subject, in this case a particular cultural artefact or site. For example, in the case of Portuguese azulejos, the Law 79/2017 was passed on August the 18th 2017, and aims to protect Portuguese tiles heritage by altering the “Legal Regime of Urbanisation and Edification.” The Assembly of the Portuguese Republic had called on the government to "study and evaluate measures, namely within the framework of the “General Regime of Urbanization and Building,” in order to supervise and prevent the arbitrary demolition of

tiled facades and the removal of tiles from them and from interiors" (Assembleia da República Resolução n.°145/2017, 2017:versão 3) (my translation).

Following the above mentioned Resolutions of the Assembly of the Republic, the Parliamentary Group of the Socialist Party presented and submitted for discussion a bill, which was the origin of the final approved version of the Law 79/2017, which justified the protection of Portuguese tile heritage not only for historical reasons, given the prominence it occupies both in the "Historical and Artistic Heritage of Portugal" and in the "Heritage of Humanity," but also for reasons of the promotion of tourism in Portugal, as the tile is seen as an "attractive element and assumes an exporting role in the tourism sector" (PLMJ Advogados 2017) (my translation).

Thus, urban operations resulting in the removal of tiled façades are subject to administrative permits, regardless of their confrontation with the public road or areas (Assembleia da República Lei 79/2017, 2017:Artigo 4°, n°2, alínea I). Alterations inside buildings that do not involve the removal of tiled façades, are exempted from control, this, regardless of their confrontation with the public road or public places (Assembleia da República Lei 79/2017, 2017:Artigo 6°, n°1, alínea b).

This law passed by the Portuguese government targets a specific cultural good that is endangered in a particular situation: azulejos on the façades of buildings are being destroyed at the same time as the buildings are. But, the discussion of the protection of azulejos in Portugal is not something new, even though their protection seems to be almost an emergency.

This law, is the legal consequence of the work done by the "SOS azulejo Project,"[48] a project born from the necessity to fight the dilapidation of the Portuguese tile heritage. Indeed, azulejos are subject to thefts, vandalism and are being neglected by the Portuguese. Historically, azulejos were used as an artistic expression and created to make an honest

[48] which is an initiative from the Museu de Polícia Judiciária, part of the Escola de Polícia Judiciária. This project has a range of activities aiming to raise awareness on azulejos. A small exhibition for example, activities with schools each year, seminars, annual awards for people that accomplished a particular work regarding azulejos.

living. Today, azulejos are being stolen to make illegal profits. Tourism for example, has become the main income for many Portuguese, and tourists come to photograph and buy azulejos, it is not uncommon to find here and there some azulejos, with doubtful origins, being sold on markets to tourists. Even though, Portugal might not be a country in financial crisis, due mainly to the incomes brought by tourism, we could ask ourselves why, is it then necessary to rip off your own cultural heritage to sell it to tourists?

With this short example, we would like to show first, that laws are always culturally rooted and the response to a social question. Secondly, national laws can be more efficient than international conventions as they are not subject to the long implementation process, but also because they are written for one specific culture and legal system in which sanctions can be more easily applied in case of non-respect.

It is however important to keep in mind that laws might not be the answer and the appropriate solution for every problem. If, a country turns itself towards the dilapidation of its cultural heritage, it might mean that there is an economic difficulty that needs to be solved. Forbidding the theft of azulejos will not solve the problem that people need money to survive.

Domestic laws, as well as international ones, can have an impact not only on people but on the landscape and cultural heritage as will see in our next and last chapter. UNESCO, as well as some local laws, are creating a “bubble” around certain artefacts sometimes around whole cities that makes them almost unchangeable. The other way society has chosen to protect cultural heritage is to simply take culture out of society’s use to place it on another level and make it untouchable. This is called musealisation and could present some dangers.

Chapter Four

A question of perspective: the paradox of UNESCO

Once laws have been created, they appear to acquire a life of their own. This will have both expected and unexpected consequences on culture itself.

For many around the world, cultural heritage preservation and conservation is associated with the work of UNESCO. Although the positive effects of UNESCO on cultural heritage have often been pointed out and even proven, there is also a growing concern about the negative effects of UNESCO on cultural heritage and the consequences of extreme preservation. To describe these negative effects, David Berliner has developed the idea of "UNESCOization" (Berliner, 2012:4), while Jean Baudrillard uses a similar term: "museumification" (Baudrillard, 1994:10). The German scholar, Hermann Lübbe, has introduced the concept of "musealisierung" (or "musealising") the past (Lübbe, 2004:14). With the help of two case studies, I will now examine some of the consequences and dangers that UNESCO's protection of cultural heritage might pose.

I- THE CASE STUDIES

The towns Luang Prabang and the Dresden Elbe Valley region are the two cases that will be used for this last chapter. There will be a short explanation of why they are on the UNESCO World Heritage List and why the Dresden Elbe Valley has been removed, followed by the presentation of some key paradoxes and problematics later in the chapter.

Dresden – the black sheep of the list

The Dresden Elbe Valley in Germany was designated as a UNESCO World Heritage site in 2004 because of several criteria that are listed on UNESCO's website:

- the valley was considered to be a “crossroads in Europe, in culture, science and technology.[…] and an important reference for Central European developments in the 18th and 19th centuries” (UNESCO, Dresden Elbe Valley).
- it was also considered to possess important examples of “middle-class architecture and industrial heritage representing European urban development into the modern industrial era.”
- the Elbe Valley was also recognized for its “outstanding cultural landscape.”
- finally, it was praised for its land use, “representing an exceptional development of a major Central-European city.”

However, the valley was unlisted in 2009 after the construction of the Waldschlößchenbrücke, a new bridge that crosses the Elbe river. The construction of this bridge has been the subject of controversy for at least a few decades, if not a century, according to some Dresdeners (Noack, 2010).

When other historical bridges were built in Dresden (the Albertbrücke in 1875-77 and the Carolinabrücke in 1892-95), the building of a bridge in Waldschlößchen was also considered. (Hilbert, 2013:11) However, because it was not yet a highly populated part of the town, which is also located outside the city centre, they did not proceed to build the bridge. In 1911, according to urban plan drawings, the bridge was considered again, but for economic reasons it was not built. (Hilbert, 2013:12) During the twentieth century, two world wars, followed by the Cold War and the later reunification of Germany meant that political challenges prevented the bridge from being built. Then, following a referendum in February 2005, in which 50.8% of the population participated, the citizens of Dresden voted 67.8% in favor of constructing the Waldschlößchenbrücke. Work finally started in 2007, with the goal of lessening traffic in the city center and preserving the other historical bridges. The city of Dresden tried to keep the bridge very low in height, so as not to spoil views of the surrounding the landscape; they even, at one point, considered a tunnel, but bikes and pedestrians would not have been allowed through. I have chosen this case because, though UNESCO threatened to remove Dresden from the list if they continued construction of the

bridge, the city believed it was more important to facilitate the circulation of traffic (automobiles and pedestrians) in the center and its surroundings than being on the UNESCO World Heritage list.

Several key questions and paradoxes arise in this case:

- as mentioned earlier, the Dresden Elbe Valley region was applauded by UNESCO for its representation of "European urban development into the modern industrial era." Yet, surely, building a bridge that is needed by the town to facilitate more fluid traffic and a more agreeable city center (as well as better transportation links for people living in the outskirts) should be regarded as a "European urban development" of our contemporary era.
- if the bridge had been built in 1911, as originally planned, would it now, ironically, be part of the "outstanding Elbe Valley landscape?"
- is preservation of "cultural heritage" more important than the needs of the local population?

Luang Prabang – the big gun of UNESCO

"Luang Prabang slows your pulse and awakens your imagination with its combination of world-class comfort and spiritual nourishment," describes Lonely Planet. The town of Luang Prabang has been listed as a UNESCO World Heritage site since 1995, selected because:

- it possesses an "exceptional fusion of Lao traditional architecture and 19th and 20th centuries European colonial style buildings."
- it is an "outstanding example of an architectural ensemble built over the centuries."
- the town of Luang Prabang is considered to be "remarkably well preserved, illustrating a key stage in the blending of two distinct cultural traditions."

I have chosen this case because several authors have already expressed their opinions and concerns about the impact of UNESCO on Luang Prabang.

For example, David Berliner makes the point that nostalgia is a significant driving force in heritage-making, though not always with positive consequences. Having conducted several interviews with locals, as well as UNESCO experts in Paris and Bangkok, on the subject of Luang Prabang, Berliner mentions that UNESCO seems to have a:

> "Western romanticized perception of Buddhism and colonial conceptions of other people's traditional life, conveying nostalgia for local rituals, for a feeling of quietness and isolation in the Tropics, and for local people living their traditional life in their traditional houses and temples" (Berliner, 2012:773).

This is, of course, exactly what UNESCO aims to preserve, but the reality is quite different. Locals are moving out of the city center, not only because they can rent out their apartments to rich investors or build larger houses outside the center, but also because the town has now been overtaken by tourists. In one of the interviews Berliner conducted, a UNESCO consultant in Luang Prabang says, "it is like Disneyland now. It's a disaster!" (Berliner, 2012:774)

In this case, we can ask at least two pertinent questions:

- which preserved cultural traditions does UNESCO actually refer to, when *Tak Baad* (a Buddhist morning alms giving ceremony) is now described as a "touristic circus" and "a zoo where the tourists are feeding the monks as if they were animals?" (Berliner, 2012:775)
- how can culture be allowed to develop in a place that is frozen in time?

Both the Dresden Elbe Valley and Luang Prabang are good examples of UNESCO's limitations, particularly as they are perfect opposites. Dresden, a rich city in a Western

country, decided to pursue its own ideas of development, despite UNESCO's opinion on the matter. On the other hand, Luang Prabang, a touristic heaven in a developing country, decided to indulge and follow UNESCO's directives, possibly for financial reasons, though also at the expense of its local culture.

II- A CULTURE OF MEMORY: INTERNATIONAL CULTURAL HERITAGE LAW AS A REGIME

Today, history takes on a more and more prominent role in the public sphere. We often give yesterday more importance than today; "a cultural present gripped with an unprecedented obsession with the past", explains Andreas Huyssen while discussing Lübbe's theory of musealisation. (Huyssen, 2000:32) As we saw in the preceding chapter, UNESCO is the main actor on the cultural heritage scene. But, based on the case studies discussed in the first part of this chapter and the explanations given, it will be argued in this second part that UNESCO might also be the main destructor of cultural heritage. Using Jean Baudrillard's concept of museumification and Hermann Lübbe's concept of "musealisierung,"[49] I would like to propose two processes that are currently happening or may soon happen: the loss of cultural meaning and cultures becoming frozen in time. Finally, based on David Berliner's concept of UNESCOization, I will propose that UNESCO should be considered as a regime and legislator of international cultural heritage law, rather than a neutral organisation carrying the good word of law and implementing it.

Losing meaning

Preserving cultural heritage in the way UNESCO does risks a loss of cultural meaning, to a point where it is no longer clear what is being protected. This is what Jean Baudrillard calls "extermination by museumification" (Baudrillard, 1994:10), taking the famous example of the exhumation of Ramses, the third pharaoh of the Nineteenth Dynasty of Egypt:

[49] Original german term used by Hermann Lübbe.

> "Thus it would have been enough to exhume Ramses to ensure his extermination by museumification. Because mummies don't rot from worms: they die from being transplanted from a slow order of the symbolic, master over putrefaction and death, to an order of history, science, and museums, our order, which no longer masters anything, which only knows how to condemn what preceded it to decay and death and subsequently to try to revive it with science" (Baudrillard, 1994:10-11).

Here, Baudrillard makes it clear that taking cultural artefacts out of their context and their original purpose also takes them out of their timeline, so that they lose their meaning. The pharaohs, obviously, were not mummified so that two thousand years later we can marvel at them through glass in a museum thousands of kilometers away. But, could we also deduce a similar logic in UNESCO's behavior towards the city of Luang Prabang? Although this does not concern physical displacement, we could still nonetheless speak of the misplacement of meaning.

While UNESCO turns Luang Prabang into the perfect picture (Berliner, 2012:776), it has also distorted the history of the town. As one interviewee told Berliner, "Luang Prabang was a damned town for years after the Revolution. Then UNESCO comes and wants to make a nice town here. Tourist don't know that. But we have suffered a lot here" (Berliner, 2012:778). At UNESCO World Heritage sites, we certainly see beauty, outstanding achievements and development, invaluable cultural and architectural fusions (which often occurred due to colonialism), but do we really understand their historical and cultural significance? Do we properly consider the importance or the meaning of this past for the people of Luang Prabang? Perhaps they did not even want to remember.

A notable example of this loss of meaning is what they call *Tak Baad* in Laos. *Tak Baad* is actually a morning alms giving ceremony, during which locals offer food to their monks (Daly, Winter, Routledge Handbook of Heritage in Asia). But, it is now also a "must-see"

tourist attraction in Luang Prabang and has become a striking metaphor for cultural loss (Berliner, 2012:775). *Tak Baad* has become a spectacle that, unfortunately, relies "mostly on tourists and foreigners who live here, because local people have left the town center" (Berliner, 2012:775). And what is a city without its locals? As Georges Perec once wrote, "the charm of London does not come from its monuments, which have nothing special, nor from its mediocre perspectives, but from all the rest, the streets, the houses, the shops, the people" (Perec, 1995:84). Authenticity comes from the locals, from their actual everyday lives and routines, not from a spectacle merely simulating ancient routines. Like Baudrillard's definition of museumification, it is an ""agony of the real" : it is the creation of the apparently real in the face of a breakdown of the distinction between the authentic and the simulated" (MacDonald, 2013:139).

Cultures frozen in time

If UNESCO preserves the past, then what about cultural practices that are still evolving today? Is UNESCO not dangerously freezing cultural heritage in time without any chance of further development? Might there not be a risk that culture cannot properly develop at UNESCO sites because the need to preserve cultural heritage, unconsciously or not, actually forbids it? Indeed, we often walk through such sites as if they were museums and forget that they are actual living cities.

The German philosopher, Hermann Lübbe, calls this phenomenon "*musealisierung*," or what I will call musealisation in this thesis. For Lübbe, people use musealisation as a form of "cultural compensation" when there is a lack of social trust: we rely on explicit rules and regulation as we cannot do so on direct personal knowledge. Musealisation, thus, can be seen as a form of temporal anchoring or a reaction to the loss of tradition and the unsettlement brought about by an increase in the rate of technological and related change. Indeed, the combination of new technologies and modernization that have, and still are, rapidly changing cityscapes (and the fact that fewer people live lives connected to the land), have contributed to a constant experience of change, in which the past becomes markedly different from the present much quicker than before. This means that cultural events and

practices become “history” sooner and end up in museums faster, for example (Rüsen, 2004: 7[Introduction]).

When reading about this concept of preserving and anchoring the past, we have immediately assimilated with the practices of UNESCO. Indeed, UNESCO removed the Dresden Elbe Valley from its World Heritage List because the organization felt that “the property failed to keep its ‘outstanding universal value as inscribed.’” But, did it really? The city tried to keep the bridge as low as possible and even considered other solutions, such as tunnels, which we could interpret as sign of good faith in their efforts to preserve the “outstanding value” of the Elbe Valley. However, the city of Dresden is still a real city in which people live and go to work - it is not an entertainment park for tourists. The city has needs and must respond to them. Why was this bridge not considered an achievement, as it facilitates the life of many Dresdeners and decongests traffic in the historical city center? The problem is the same in Luang Prabang, except that they are still on the list because everything is done as UNESCO would like to have it. We interpret culture here in terms of authenticity and time, in the sense that “real” culture is what is old and traditional. For example, it has already been overheard in Luang Prabang that tourists lament the “contemporary vanishing of such purported authenticity.” (Berliner, 2012:777) Three Dutch tourists were heard saying that it was regrettable that locals were not wearing traditional clothing anymore (Berliner, 2012:777). Do these Dutch tourists walk around all day in *klompen*[50]? Another example is an American woman who realized how people had lost their traditions in Luang Prabang, having noticed televisions in people’s homes (Berliner, 2012:777). Of course, the irony is that the United States of America is the country that watches the most television every day[51] in the world (Statista.com Average daily TV viewing time per person in selected countries worldwide in 2016 (in minutes)).

UNESCO as a regime

[50] Traditional wooden clogs in Holland.

[51] 270 minutes per day in 2016.

The work of museumification and musealisation done by UNESCO could be united under one phenomenon that David Berliner calls UNESCOization. Today, being on the World Heritage List is a title that brings money, prestige and tourism, but also one that has created a new kind of competition: countries compete to possess the most "heritage", the best preserved heritage, the most visually outstanding one, etc. As Chiara De Cesari writes in her paper, "Thinking Through Heritage Regimes:"

> "UNESCO's rhetoric celebrates cultural diversity as its key value, and to be sure, this organization's interventions produce a rush for diversification since local and national actors tend to emphasize the specificity and exceptionality of their cultural practices in order to meet UNESCO's criteria" (De Cesari 2013:400).

But, De Cesari continues by saying that:

> "However, UNESCO itself a powerful agent of homogenization of heritage practices all over the world, for it promotes a standardization of principles and procedures of conservation […]" (De Cesari 2013:400).

Yet, homogenization is needed for the implementation of law. This is where the difficulty of international law resides, because UNESCO's requirement to standardize would also require a homogenization of culture. UNESCO, almost like a regime with its own laws is choosing what to preserve and how to preserve it. For example, in Luang Prabang the "Conservation Plan forbids pane glass and recently manufactured windows, flower pots, and fences, as well as the use of lacquer, which the experts *in situ* describe as "kitsch", all of these are widely adored by locals." (Berliner, 2012:775) Yes, restoration is important as is maintaining some of the old house and monuments with materials that are as "authentic" as possible, but are some of these restrictions on the locals really necessary when it oblige them to build their house with more expansive and less durable products? Locals have now to ask for permission when they want to repair their houses, as UNESCO wants locals to preserve

everything in an “old style”, whilst people want to make modern adaptation, “they are obsessed with the ancient” says one Lao. (Berliner, 2012:779) We might even wonder what would have happened if UNESCO had started its work in the Middle Ages. In what kind of world we would live then?

Moreover, an additional point can be made between the work of UNESCO and its respect of the cultural human rights. For example, to come back to Article 15 of the International Covenant on Economic, Social and Cultural rights[52], stating that every individual should be able to participate to the cultural life, seem to come in contradiction with some of the imposition that UNESCO brings and the consequences of being a World Heritage site. Again, to use the case of Luang Prabang and the Tak Baad ritual, which is now a tourist activity and not a moment where the local population can share with their monks their religious beliefs and traditions.

We proposed in this part to consider UNESCO as a regime due to its power and influence on some, if not all, cities. Due, to the advantages and financial benefits that UNESCO brings, it has also created a new market that is highly competitive and hungry for money. Governments want to be on this list, and want to stay on it, giving UNESCO leverage on imposing its idea. UNESCO brings short-term benefits, but long-term destruction on cultural development.

[52] First explained in Chapter three, in the title on International Human Rights.

Conclusions

"Historically structured and locally interpreted," writes Rosemary Coombe, "law provides means and forums both for legitimating and contesting dominant meanings and the social hierarchies they support" (Coombe, 1998:479). This quote, taken from Coombe's book, *Critical Cultural Legal Studies*, summarizes the main point that this thesis has tried to make. Analysing law as if it were a cultural artefact has allowed us to not only look at the impacts that law might have on society and the conscience of people, as Sharp and Leiboff suggest (reference), but also to understand how laws have developed over time (rather than assuming they are almighty, having coming out of nowhere). Law and culture continuously influence each other, while, at the same time, they continuously reject each other's relevance. It is essential to consider the historical and political context in which laws have been written because it pushes us to look at them in a more critical way. They are rarely objective and should not only be assessed according to their impact but also in the context in which they were written. These are also the reasons why cultural materialism has been used as this project's methodology.

Although the thesis began with a substantial legal emphasis, the goal was ultimately to contextualise each thought in its historical and political context. It was an introduction to the need for contextualisation and the first step in understanding the importance of using cultural materialism as our methodology. Moreover, some of these Schools of Jurisprudence seem to have a very non-malleable way of interpreting and analysing law. However, law is a contradiction and more complex than this unilateral way of looking: a command or a sociological consequence. Indeed, even if law is a cultural and societal phenomenon, as the Sociological School of Jurisprudence was defending it, law is also a command, as the Imperative School of Jurisprudence was arguing; this is, the paradox of law. Looking at these Schools of Jurisprudence separately and trying to take apart the arguments of each one, would not bring us forward in the analysis. But by taking the core arguments of each School and try to understand it as a whole might reveal to us more interesting point, and maybe bring us closer, to the nature of legality.

It was important to look at one subject of law, namely the international law of cultural heritage. First, because trying to contextualise the birth and development of the concept of law itself is rather broad, if not overly complicated. It would necessitate looking at each system individually since not even countries in Europe have the same legal system; similar, but not the same. Secondly, making this broad study would be profoundly philosophical and sometimes abstract. Whereas studying a particular branch of law would allow to have concrete examples and look for specific moments in history, making it more accessible for people to read as they can relate to the given historical and political illustrations. Therefore, doing studies of several branches, to then compare them, would be quicker and more precise than doing a broad research of the concept of law, which would take a lifetime.

By choosing to focus on the international law of cultural heritage, we were able to look at how society and power have developed this law, but also how this law impacts culture. For example, not only can law impact some behaviour but it also consequently, physically allowed the preserving or/and reconstruction of some buildings and artefacts. However, it also created a new narrative around the importance of preserving, of having a cultural identity and even giving its definition of what is culture.

The primary goals of this thesis were to propose a different methodology for the Cultural Legal Studies, through cultural materialism. Then, to use, international cultural heritage law as our case study, which would lead us to learn more about the efficiency and impact of this branch of law. Finally, by using this methodology, and the case of international law, we hope to have reinforced the point that law is culture. Because, “while domestic law governs the internal society, international public law is supposed to govern international society; but it stills remains necessary that this society exists” (Ranjeva, 1992:15) (my translation).
The goal of this thesis was not to propose solutions, as we said in the introduction, but merely try to draw attention on the difficulties of having an international legal system by pointing out the apparent link between law and culture.

This thesis has not argued that an international legal system is completely impossible, but that it should be more critically considered and culturally analysed. As we have seen, law is a concept of many paradoxes. It is culturally rooted, yet politically influenced, making laws

powerful tools often used despite the protection and sense of justice that they should provide. If we were to consider having an efficient international legal system, it would be first important to look at the law's relation to power. International law goes in contraction with nationalism and the sovereignty of Nation-States. Indeed, the creation of an international state would defeat the sovereignty of the states, who are in majority nationalists (:20), which would sensibly diminish their power. Also, as we said previously, law is a powerful instrument, that governments are not ready to give up on. Secondly, it would be needed to determine the commonalities, if they exist, between all communities that would be touched by the international legal system. Of course, numerous authors and philosophers have written on what is called the "global problems of the contemporary era" (Koudriavtsev, 1989:418) (my translation).

> "It is becoming clear from the more careful and accurate analysis of the world situation that many problems are common to most countries and peoples, if not all of humanity. (...) (First of all, the ecological problems, then the social and economic problems and, finally, the humanitarian problems (...)" (Koudriavtsev, 1989:418) (my translation).

However, this "global problems" are still debatable, as we do not all live in a similar political and economic system, neither do all communities have the same power of leverage.

In this sense, we could consider this thesis as the skeleton for further and more precise research. Still based on the methodology of cultural materialism, it would be then interesting to deconstruct the different cultural impact on law, to see how much, for example, governments and the capitalistic society have a say in shaping our current legal system. As Jhering wrote, "The life of the law is a struggle,- a struggle of nations, of the state power, of classes, of individuals. All the law in the world has been obtained by strife" (Jhering, 1879:1).

We could, then, look at law, not as culture, but try to understand what culture law is?

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