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## **Heritage, Imperialism and Commodification: How the West can always do it best**

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### **Introduction**

Disputes involving the sorts of things that are claimed to be the cultural stuff of one community or another mark and tarnish the recorded history of humanity. Then, as now, it is clear that these disputes were primarily generated by the unattractive human propensity to plunder, loot, steal, pillage, (mis)appropriate and destroy. Under these circumstances, there is a certain inevitability in the fact that cultural heritage first became a recognised concept in modern international law at the time of the Vienna Treaty of 1815,<sup>1</sup> which was imposed by the British victors after the conclusion of the Napoleonic Wars. The precise motivations for the British insistence that France atone for the destruction of heritage and return the movable artefacts looted by Napoleon during his campaigns might be reasonably be regarded as being obscured by the passage of time. However, given the context, it seems reasonable to assume that the relevant clause was punitive. More interesting for present purposes is the likelihood that it was influenced by the concurrent rise of a discourse that linked people, territory and cultural objects.<sup>2</sup> That this was an entirely Eurocentric and imperial discourse is hardly a great surprise: at the same time as Britain was championing the return of European cultural artefacts<sup>3</sup> it continued to plunder the cultural artefacts of its colonies with impunity.<sup>4</sup> By the end of the Second World War, however, this colonial free-for-all was coming to an end. Britain had been replaced by America as the dominant world power, the regimes of international law were being remade, and the period of decolonization was commencing.<sup>5</sup> Even though the current international law regime for the protection of cultural heritage was born out of the rupture that marked the end of the British period of world dominance and inaugurated the American one, it

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<sup>1</sup> A F Vrdoljak, *International Law, Museums & the Return of Cultural Objects* (Cambridge, Cambridge University Press, 2008) at 23-29.

<sup>2</sup> Vrdoljak 2008, *ibid.*, Pt 1.

<sup>3</sup> Even if the championing tended to be more rhetorical than anything else: see F Macmillan, 'The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural "Patrimony" or Private Property?' (2013) 64 *Northern Ireland Legal Quarterly* 351 at 356-357.

<sup>4</sup> Special Rapporteur, Mohammed Bedjaoui, who was responsible for the preparation the work that eventually lead to the conclusion of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983) found that the removal of cultural objects during the colonial period was generally not 'in accordance with the canons of justice, morality and law': UN Doc.A/CN.4/292, quoted in Vrdoljak 2008, n 1 above at 202.

<sup>5</sup> G Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (London, Verso, 1994) at 47-74 & ch 3.

is nevertheless marked by both its historical antecedents<sup>6</sup> and by contemporaneous movements in the geo-political order.

Of these contemporaneous geo-political movements, two are particularly important to the argument in this article. First of all, there is the very process of decolonization itself and the political aspirations that accompanied it. At the international law level, this process was managed in a rather *ex post facto* fashion by something that eventually became the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts of 1978. In the current context there are two key (low) points of this treaty. The first of these is its failure to recognise the distinctive position of Indigenous peoples within former colonial subject states. This, of course, is a serious problem with which the international law system continues to struggle. In part, it is a consequence of the strongly state-based thinking that characterized the development of international law in the post-war period. This explanation (the inadequacy and injustice of which needs no elaboration), however, cannot serve to explain the second important aspect of the Vienna Convention, which is the absence of any rules on restitution of works of art or artefacts to the former colonial states. Instead, the question of the return of works of art and artefacts was to be governed by bilateral negotiations under the auspices of a UNESCO Committee, the operation of which has continued up until to the present period.<sup>7</sup> As this article will argue, a significant part of the current political concern with the question of the protection of cultural artefacts is a consequence of the failure of international law properly to address the wrongs of the colonial period.<sup>8</sup>

The second important political current in the post-colonial period was the re-institutionalisation of the concept of free trade along with the remaking of the international law regime after the Second World War. The concept of international free trade had been floating around in international law since the Treaty of Westphalia of 1648.<sup>9</sup> While the economic freedoms of Westphalia were not observed during the Napoleonic Wars, they were restored in the Settlement of Vienna of 1815 and the Congress of Aix-la-Chapelle of 1818.<sup>10</sup> And then these freedoms were restored again, after the cataclysms of the First and Second World Wars, at Bretton Woods, starting the international legal system(s) on a process that lead eventually to the World Trade Organization (WTO).<sup>11</sup> The strength of this discourse, and the political and economic baggage that it has dragged in its wake, has had a particular effect on the way in which the relationship between public, community and private rights has played out in relation to cultural artefacts. This is the case with respect to both tangible and intangible artefacts, although there seems little doubt that the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) as one of the WTO covered agreements has considerably upped the ante in this respect in relation to intangible cultural stuff.

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<sup>6</sup>See also, eg, M M Miles, *Art as Plunder: The Ancient Origins of Debate about Cultural Property* (New York, Cambridge University Press, 2010) at 1-12.

<sup>7</sup> For a critical assessment of the work of this committee, see Vrdoljak, n 1 above at 211-217.

<sup>8</sup> For an argument on the significance of this failure in relation to identity and sovereignty, see Macmillan (Patrimony), n 3 above.

<sup>9</sup> Arrighi 1994, n 5 above at 43-44.

<sup>10</sup> Arrighi, *ibid.* at 52.

<sup>11</sup> See further F Macmillan, 'The World Trade Organization and the Turbulent Legacy of International Economic Law-making in the Long Twentieth Century' in J Faundez & C Tan (eds), *International Law, Economic Globalization and Developing Countries* (Cheltenham, Edward Elgar, 2010).

At the same time as all this was going on, the post Second World War period has also seen the emergence of what Laurajane Smith describes as the authorized heritage discourse.<sup>12</sup> Thanks to both its historical antecedents<sup>13</sup> and its geo-political context the authorised heritage discourse provided a pretty clear idea of what cultural heritage was considered to be. Based on Cartesian dualisms<sup>14</sup> of nature and culture, tangible and intangible, there was a reasonable sense of certainty in the world of international policy and law-making about the objects of the various efforts at protection. Of course, imbricated in that certainty were particular ideas of nation, class and ethnicity.<sup>15</sup> But this could hardly be regarded as a surprise for a concept that was cooked up in the West and embedded in the post-World War Two regime of international policymaking and heritage law, represented by bodies like ICOMOS and UNESCO.<sup>16</sup> Under this regime, and reflecting its Western philosophical roots, the authorized heritage discourse, took on the characteristics of what must have seemed like the only comparable Western legal concept. Consequently, the international legal regime for the protection of cultural heritage came to reflect occidental property law distinctions.<sup>17</sup> One of these is the distinction between things that are said, by law, to be “fixed” to a particular place and those that are said to be moveable. Another, of course, is the distinction between tangible and intangible things.

One consequence of a legal and conceptual order that distinguishes cultural stuff on these bases is that, lacking much in the way of an overarching definition of cultural heritage, there appears to be no common conceptual basis for the protection, including the protection from destruction, of all these different types of things. In fact, the standard discourse around the destruction of cultural heritage is largely confined to a concern about the physical destruction of monumental, and thus immovable, objects and is almost exclusively about tangible things. Because conceiving of cultural heritage as being mainly tangible and monumental has a strongly Western flavour this also means that this discourse is imbricated with an “us and them”, West and the rest, flavour. In the current geo-political situation, understanding the destruction of cultural heritage in these terms focuses upon motivations for destruction that are broadly political and/or indicate the absence of acceptable (Western) values. In this article, I argue that the notion of the destruction of cultural heritage should, rather, be focussed on situations where the inherent nature of something *as heritage* is destroyed. Such a concept might very well include the dynamiting of ancient sites, but my argument is that it is much broader. In order to sustain this argument, the next part of the article reflects on the inherent nature of heritage, movable and immovable, tangible and intangible. The article then moves on to suggest an alternative vision of the destruction of cultural heritage that is rooted, not in some epochal clash between the West and the rest, but rather in the geo-political movements and legal ordering that have emerged in the post-colonial period.

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<sup>12</sup> See L Smith, *Uses of Heritage* (London & New York: Routledge, 2006), from which I draw this expression and concept. As (I hope) a legitimate development of this concept, I place emphasis in this article on the role of the relevant international legal texts as both authorizing, and being authorized by, this discourse.

<sup>13</sup> See also, eg, Miles 2010, n 6 above at 1-12.

<sup>14</sup> On the Cartesian dualisms of the authorized heritage discourse, see R Harrison, *Heritage: Critical Approaches* (London & New York: Routledge, 2013), ch 9.

<sup>15</sup> Smith 2006, n 12 above, 29ff; Macmillan 2013, n 3 above.

<sup>16</sup> For account of the relationship between ICOMOS (International Council on Monuments and Sites) & UNESCO, & its role in relation to the authorized heritage discourse, see Smith 2006, n 12 above, ch 1.

<sup>17</sup> See further F Macmillan, “Cultural Property and Community Rights to Cultural Heritage” in T Xu & J Allain (eds), *Property and Human Rights in a Global Context* (Oxford & Portland, Oregon: Hart Publishing, 2015), at 47, in which I note that the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) & the Convention for the Protection of Underwater Cultural Heritage (2001) stand in some respects outside this classification.

## Between Movement, Monumentality and Materiality

Given the great variety of cultural artefacts that now, thanks to the UNESCO regime, are included within the concept of heritage, perhaps it is no surprise to find that the authorised heritage discourse does not seem to contain an overarching idea of heritage that holds together all its disparate strands. The distinctions between moveable and immovable, and between tangible and intangible, tend to have obscured the development of a uniting concept. This is not only the inevitable result of the theoretical process of division and compartmentalisation but also a consequence of the way in which the authorised heritage discourse has ignored the artificiality, and even meaninglessness, of these distinctions. The history of the looting, sacking and removal of cultural objects makes it abundantly clear that plenty of things that law regards as immovable are, in fact, quite evidently moveable.<sup>18</sup> If the failure of the authorised heritage discourse to appreciate this point seems troubling, then we need to find a much stronger adjective to describe its complete confusion around questions of tangibility and materiality. Until the twenty first century, the distinction between tangible and intangible heritage appears to have given very little trouble to the authorized heritage discourse as embodied in the ICOMOS-UNESCO regime. Its overwhelming focus on tangible stuff, fixed or moveable, denominated as heritage by reference to a set of intangible values, provided a neat way of dealing with the tangible/intangible distinction, without losing the similarly overwhelming occidental focus on the tangible heritage object. This is well demonstrated by both the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, dealing with moveables, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention, as it is popularly known), dealing with legally denominated immovables.

The World Heritage Convention, for example, limits its concept of protected tangibles by reference to obviously occidental concepts such as “outstanding universal value from the point of view of history, art or science” and “outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view”<sup>19</sup> According to both Conventions, which dominated the international legal protection of heritage in the twentieth century, heritage was what the state said it was, or in the case of the World Heritage Convention, what the state said it was as endorsed by a UNESCO listing.<sup>20</sup> And what the state said was heritage was governed by prevailing national discourses that tended, and still tend, to privilege the largely Western ideas that dominant elites have about things that are important to history, art, literature, science, anthropology and ethnology.<sup>21</sup> The possibility that the intangible could take flight on its own account and start to fray this straitjacket may have been raised from time to time in international contexts – and especially by subaltern voices<sup>22</sup> – but for a considerable period it was in little danger of toppling the operation of the authorized heritage discourse. The process

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<sup>18</sup> If an example of this is needed, the so-called “Elgin Marbles”, previously part of various buildings on the Athenian Acropolis would fit nicely, as would the Bruno Schulz wall paintings that have been relocated from Drohobych in the Ukraine to the Yad Vashem Museum in Jerusalem.

<sup>19</sup> World Heritage Convention 1972, Art 1.

<sup>20</sup> Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property 1970, Art 1, which protects “cultural property” falling within a closed list of categories all subject to the prerequisite that it is “on religious or secular grounds ... specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science”; World Heritage Convention 1972, Art 11.

<sup>21</sup> See, eg, Smith 2006, n 12 above; & Harrison 2013, n 14 above.

<sup>22</sup> Smith 2006, n 12 above, at 106-113.

leading to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions started chipping away at all this certainty. Now that both these Conventions have come into force it seems that the limits on the possible expansion of the heritage concept that were imposed by the linkage between the tangible and the intangible have been abandoned.

This, of course, has created some problems in defining the concept of intangible cultural heritage. Strangely, however, the question of what is intangible seems comparatively less problematic than the question of what we mean by heritage. Perhaps the long occidental obsession with the tangible/intangible distinction turns out to be some help after all. This is because, as much as it is true that all tangible heritage is inherently connected with the intangible values that make it heritage and not just a pile of old junk, is also arguably the case that all – or nearly all - intangible heritage is connected to the tangible or material world. The type of intangible practices that likely constitute intangible cultural heritage are, as Harrison argues, “thoroughly embedded in a set of physical relationships with objects, places and other people”.<sup>23</sup> (While forms of cultural heritage that are digital may present some challenges to this characterization, an intangible place - like cyberspace – might nevertheless count as a place.)

So what then do we mean when we talk about (cultural) heritage?<sup>24</sup> Here I want to leave aside the long lists of stuff that UNESCO and the authorised heritage discourse says are cultural heritage and, instead, look for some overarching concept that might hold all those disparate things together. In searching for this concept in the contemporary context it may be helpful to recognise that the idea of heritage, as it is usually employed in current political and cultural contexts, involves a type of *pas de deux* between past and present, which is reflected in modernity’s relationship with time. As Harrison writes of modernity:

[I]t constantly creates the present as “contemporary past” whilst it anticipates the future as embodied within its present. In other words, modernity creates for itself a past that is perceived to be both immanent (contained within) and imminent (impending) in the present ... One important outcome of this rather peculiar relationship with time is that in its obsessive attempts to transcend the present, modernity becomes fixated on the past in several distinctive ways. In the first instance, it is haunted by the idea of decline or decay ... Secondly, in attempting to define itself in opposition to tradition and the past, modernity becomes concerned with defining and categorising it.<sup>25</sup>

The critical point is that this *pas de deux* between past and present is immanent in the very notion of heritage, which is always contemporary and also always past. It is always contemporary because it is only in the present that it is recognised as heritage, but also always past because it has to have already happened, even if it has only just happened, for us to be able to reflect on it and identify it as heritage.<sup>26</sup> This element of reflection is essential to the concept of heritage, which is constituted by those things we select from the past (including the near

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<sup>23</sup> Harrison 2013, n 14 above, at 14.

<sup>24</sup> I am stuck here between my sympathy for the tendency of heritage studies scholars to omit “cultural” and my own tendency as a legal scholar to leave it in on the grounds of its use in international legal discourse. This dilemma remains unresolved.

<sup>25</sup> Harrison 2013, n 14 above, at 25-26 (references omitted).

<sup>26</sup> See also, eg, Harrison 2013, n 14 above, at 14: “heritage is formed *in the present* and reflects inherited and current concerns about the past” (italics as in the original).

past) as having the sort of value that makes them worth passing on to the future.<sup>27</sup> There is, of course, an obvious political element in identifying what is considered to be worth handing on to the future<sup>28</sup> and this carries with it a degree of malleability and slipperiness. Thus, what we understand to be cultural heritage reflects current political concerns. One result is that the idea of heritage has become a rhetorical moving feast that enjoys potency in cultural and political discourse, and which is capable of both affirming or opposing its own authorized discourse. As Smith argues:

Heritage *is* dissonant – it is a constitutive social process that on the one hand is about regulating and legitimizing, and on the other hand is about working out, contesting and challenging a range of cultural and social identities, sense of place, collective memories, values and meanings that prevail in the present and can be passed on to the future”.<sup>29</sup>

The questions of whose identity prevails, whose collective memories survive and who gets to decide what is passed on to the future are all intensely political questions “tied to claims to and expressions of power”<sup>30</sup> by a community. And it is in this mutually constitutive relationship between heritage and community that the particular power and importance of heritage lies. Not only does cultural heritage belong to communities, but it also defines them and confers them with cultural, social and political power.<sup>31</sup>

This mutual relationship between heritage and community tends to reinforce the essentially intangible nature of all heritage.<sup>32</sup> It also means that some understanding of the nature and identity of community is an essential part of any attempt to conceptualise cultural heritage. At the same time, it is precisely at the interface of cultural heritage and community that a particular challenge is flaunted in the face of the authorized heritage discourse as it is contained in the international legal instruments. This is because the authorized heritage discourse understands the cultural heritage community as being national. In order to suppress dissonance, it *often* ignores the fact that community identities are formed at multiple levels and in multiple layers.<sup>33</sup> It *necessarily* ignores the fact that one of the more contentious levels of community identity may be that of the nation.

The assimilation of the idea of community into that of nation is the target of Anderson’s famous critique of nationalism.<sup>34</sup> Anderson proposes that the central foundational concepts around which community rotates are identification and memory, which are reflexively linked to one another. For Anderson, communities are always imagined.<sup>35</sup> By this he means not that they are fake or false, but rather that they are created by the imagination, that is by being imagined. Accordingly, he observes that “[c]ommunities are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined”.<sup>36</sup> These observations do much to enrich the foundational relation of identification and memory. There are three, in

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<sup>27</sup> See also, Blake 2000, n 10 *supra*, 68-69; F Macmillan, “Arts Festivals as Cultural Heritage in a Copyright Saturated World” in H Porsdam (ed), *Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property* (Farnham, Ashgate, 2014); & Macmillan 2015, n 5 *supra*.

<sup>28</sup> See also, J Blake, “On Defining Cultural Heritage” (2000) 49 *International & Comparative Law Quarterly* 61, at 68.

<sup>29</sup> Smith 2006, n 12 above, at 82.

<sup>30</sup> Smith 2006, n 12 above, at 192.

<sup>31</sup> See Smith 2006, n 12 above, at 288.

<sup>32</sup> See also Smith 2006, n 12 above, at eg 3 & 307.

<sup>33</sup> See also Smith 2006, n 12 above, at 53.

<sup>34</sup> B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London & New York: Verso, 2006, first published 1983).

<sup>35</sup> With the possible exception of “primordial villages of face-to-face contact”: Anderson 2006, n 34 above, at 6.

<sup>36</sup> Anderson 2006, n 34 above, at 6.

particular, that go to the heart of how community is imagined. First, Anderson notes the “deep horizontal comradeship”<sup>37</sup> that characterizes the imagined community – something that might also be referred to as solidarity. Secondly, he places emphasis on the temporal aspect of community, “this sense of parallelism or simultaneity”.<sup>38</sup> The temporal dimensions here are both horizontal and vertical. They are horizontal because comradeship and solidarity carry with them some notion of a shared temporal space. And they are vertical because if memory is critical to the imagined community then this implies a shared concept of the community’s history and its temporal progression. Following on from this, the third aspect of Anderson’s study that has particular resonance is exactly this question of how a community imagines its relationship with its own past. Thus we arrive at the critical question of the reflexive relationship between community and memory. The process of remembering and forgetting things is the way in which the heritage community forms its identity, selecting those things from the past – including the very recent past – that it wants to celebrate and pass on to the future. This process of remembering and forgetting lies at the heart of the discourse of the imagined community<sup>39</sup> and, at the same time, it is the key to identifying that community’s cultural heritage. Accordingly, as Smith argues, heritage is best understood as “a constitutive cultural process that identifies those things and places that can be given meaning and value as ‘heritage’ reflecting contemporary cultural and social values, debates and aspirations”.<sup>40</sup>

As all this suggests, the concept of community that is in play here is a subjective one. Accepting that communities can be formed by less than the public at large in any given nation-state, the question of their subjectivity is an important one. When we talk about the reflexive relationship between identification and memory in the context of community formation, whose identification are we talking about? Whose memory? In particular, if the narrative of community built on collective memory is also about forgetting, who is remembering and who is forgetting? It is in relation to questions of this sort that Anderson’s insight that communities are imagined is particularly useful. This is because it is clear from his focus on comradeship-solidarity, and his focus on common perceptions of time and history, that the communities he is talking about are imagined *from the inside out* rather than the other way around. This suggests, of course, that not only is community a subjective concept, but also that the identification of oneself as a member of a community is subjective both for the individual and the community. The complication here is that a community may, and often does, impose objective requirements for community membership. But such requirements cannot work to change the essential nature of community formation. As Christodoulidis argues, community comes about “around a political/ethical understanding both capable of upholding a commitment, and dynamic, always potentially disruptable internally; and with no measure of authority, force, persuasion and violence capable of upholding it externally”.<sup>41</sup>

It should be evident from the foregoing that the importance of the concept of community in relation to the identification of cultural heritage of all types cannot be overstated. Community and heritage are mutually constitutive. If heritage belongs to a community, then it is also true that a community only exists and identifies itself through a common process of remembering and forgetting those things and practices that are essential to its identity. Cultural heritage, therefore, is drawn from a current and ongoing process of selection and identification, which

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<sup>37</sup> Anderson 2006, n 34 above, at 7; see also Smith 2006, n 12 above, at 303.

<sup>38</sup> Anderson 2006, n 34 above, at 188.

<sup>39</sup> Anderson 2006, n 34 above, ch 11; E Hobsbawm, *Fractured Times: Culture and Society in the Twentieth Century*, (London: Little, Brown, 2013), at 150-151.

<sup>40</sup> Smith 2006, n 12 above, at 3.

<sup>41</sup> E Christodoulidis, *Law and Reflexive Politics* (Dordrecht: Springer, 1998), at 237, citing R Cover, “Nomos and Narrative” (1983) 97 *Harvard Law Review* 4-68, on the “hermeneutic of principle”.

reflects contemporary concerns and values.<sup>42</sup> And because cultural heritage is reflexive it changes with community practice.<sup>43</sup> Cultural objects, artefacts and practices that no longer reflect the values and practices of a contemporary community are not heritage. Similarly, cultural objects, artefacts and practices that have lost their link to community are no longer heritage because their essential quality as heritage has been destroyed. The next two sections of this article examine two processes, both fundamental to Western legal culture, by which the link between community and heritage has been destroyed, depriving the cultural objects, artefacts and practices in question of their character as heritage, and thus destroying them as heritage.

## Imperial Destruction

As was noted at the beginning of this article, history furnishes us with endless examples of the physical destruction, looting and appropriation of cultural objects and artefacts. However, the colonial period and its current post-colonial sequel offer a particular perspective from which to examine not only the destruction of heritage through the severing of its links with community, but also the complicity of law in this process. That the colonial free-for-all resulted in the movement of large amounts of cultural objects and artefacts from the colonial “periphery” to the imperial “centres” hardly seems to be a contentious claim. Not only do we have a significant number of celebrated cases where return of such objects has been sought, the scale of relocation in the colonial period is evident from a brief walk around the museums and major cities of the former imperial centres. It is frequently the case that the physical integrity of these items has been preserved. Indeed, the “privileging of preservation”<sup>44</sup> at the expense of a dynamic relationship with identity<sup>45</sup> is a Western obsession<sup>46</sup> that has often been used to justify retaining misappropriated cultural objects and artefacts. One of the former directors of the British Museum, for example, claimed that it was in the best position to conserve the artefacts it holds and to present them as part of its “encyclopaedic collection”<sup>47</sup> There is a *faux* naivety in this idea: as if this “encyclopaedic collection” could somehow free itself of the circumstances in which it was formed, and as though all the components of the collection would be exactly the same from wherever they are viewed. Observations made by Slaughter when addressing the concept of “the centre” in the intangible cultural heritage of world literature seem apposite here:

[T]he core defines the norms and forms that make it the core; it defines itself as center ... We should remember, here at the center, that the core is the core not because it is the *source* of things, but because it is a collection of things ... [T]he center absorbs

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<sup>42</sup> Smith 2006, n 12 above, at 3; see also Harrison 2013, n 14 above, at 14, quoted in n 26 above.

<sup>43</sup> P Fitzpatrick P. & R Joyce, “Copying Right: Cultural Property and the Limits of (Occidental) Law” in F. Macmillan (ed), *New Directions in Copyright Law: Volume 4* (Cheltenham: Edward Elgar, 2007).

<sup>44</sup> T Flessas, “Cultural Property Defined and Redefined as Nietzschean Aphorism” (2003) 24 *Cardozo Law Review* 1067, at 1091.

<sup>45</sup> Cf L V Prott & P J O’Keefe, “Cultural Heritage” or “Cultural Property” (1992) 1 *International Journal of Cultural Property* 307, esp at 311.

<sup>46</sup> See, eg, Flessas 2003, n 44 above; T Flessas, ‘The Ends of the Museum’ *Law Society & Economy Working Papers* 14/2013 (London, London School of Economics, 2013); Macmillan 2013, n 3 above, at 354-355; M D Simpson, *Making Representations: Museums in the Post-Colonial Era* (London, Routledge, 2001); P Yu, ‘Cultural Relics, Intellectual Property and Intangible Heritage’ (2008) 81 *Temple Law Review* 433 at 471-473.

<sup>47</sup> N MacGregor, “Preface” in K Sloan (ed), *Enlightenment: Discovering the World in the Eighteenth Century* (British Museum Press, 2004), at 6. See also, N MacGregor, “To Shape the Citizens of ‘that great city, the world’” in J Cuno (ed), *Whose Culture? The Promise of Museums & the Debate over Antiquities* (Princeton University Press, 2009), at 39-54.

everything; it ... treats everywhere else and everything else as raw materials to be extracted, exploited, accumulated, and privatized ...[T]he center is never simply a given or merely an object; it is the effect of a certain way of seeing and speaking, of gathering an analyzing data.<sup>48</sup>

Despite attempts by many museums and collections to present objects in a way that is in sympathy with the object's cultural origins and history, the symbolic significance of an article that has been decontextualized and severed from its community is always changed.

Understanding the complicity of law in this state of affairs requires an engagement not only with the specific international regime for the protection of cultural heritage, but also with the shape of international law more generally in the post-colonial period. At this most general level we are faced with two problems. The first is that the post Second World War international law system was made by the former imperial powers. This may well be regarded as explaining, for example, why the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts of 1983 contains no rules on the restitution of works of art or artefacts to the former colonial states. But at least these states are recognised as actors in international law. The less good news is that since some of them are artificial constructs of the post-colonial period they do not necessarily reflect the structure of the pre-colonial communities, the heritage of which was freely appropriated in the colonial period. This observation is linked to the second general problem that the international law system presents with respect to the protection of cultural heritage. This problem is the failure of international law to recognise any concept of community other than that represented by the nation state.

While the exact nature of the relationship between the nation state and the constitution of international law is a matter of debate,<sup>49</sup> there is little real hope of escaping from the conclusion that the juridical actors of international law are the states themselves and the supranational, international and intergovernmental organisations created through the mutually interdependent process of international law-making. Communities, despite being recognised in political theory as constituting the common political identity that forms the basis of the nation, and perhaps also the common cultural identity that precedes a common political identity, have traditionally received little formal attention in international law precisely because their identity has been submerged into that of the nation-state. This concept of international law and of international law-making is clearly exclusionary. One of its consequences is that in the post-colonial context Indigenous Peoples, not constituting a state in international law, have found themselves without a voice at the international law-making table. In the specific context of the protection of cultural heritage this also means that the concept of a community, which I have argued is a critical counterpart to that of cultural heritage, can mostly only be understood in the relevant international law instruments as being a nation state. In other words, in most of these instruments, the concept of community – if it exists at all – must be considered to be co-extensive with the nation state. It is true that more recent conventions, notably the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the 2003 Convention for the Protection of the Intangible Cultural Heritage appear recognise the critical connection between cultural heritage and community, where community is understood as something different from the nation state. However, neither of these conventions give us much

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<sup>48</sup> J R Slaughter, "Form & Informality: An Unliterary Look at World Literature" in R. Warhol (ed), *The Work of Genre: Selected Essays from the English Institute*, (New York: English Institute in Collaboration with the American Council of Learned Societies, 2011), at 196.

<sup>49</sup> Cf A Carty, "Myths of international legal order: Past and present", (1997) 10 *Cambridge Review of International Affairs* 3-22 & P Fitzpatrick, "'The new constitutionalism': The global, the postcolonial and the constitution of nations" (2006) 10(2) *Law, Democracy and Development* 1-20.

to go by in trying to identify such a community.<sup>50</sup> Even more importantly, the ability of communities that are not nation states to vindicate rights to their cultural heritage using these conventions is extremely limited.

So far as the specifics of the international legal regime for the protection of cultural heritage are concerned, the story only gets worse. This is mainly because of the non-retroactive effect of the conventions, which means that they do not apply to items moved during the colonial period. The irony of this is particularly marked in relation to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Article 2 of which provides:

The States Parties to this Convention recognize that the illicit import, export and transfer of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.

The fact that the Convention, and its more recent partner the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995,<sup>51</sup> apply to moveable tangible artefacts and that both Conventions clearly envisage that such artefacts are national in nature would seem to give them a role here. However, these Conventions only apply to activities undertaken from the time they came into force,<sup>52</sup> which means they are more or less irrelevant, in a strictly legal sense, to the claims of post-colonial states for the restitution of objects removed during the colonial period. On the other hand, symbolically they might be regarded as stating an ethical position that should be recognised by the international community,<sup>53</sup> but is not.

Then, of course, there is also the problem that non-state community claims to cultural heritage are mostly ignored in the conventions. Representing some changes in political awareness, the 1995 UNIDROIT Convention recognises the existence of “national, tribal, indigenous or other communities” and introduces some procedural rules about claims in the light of this. Its applicability is, of course, limited by the problem of retrospectivity. However, given that Indigenous peoples lack the protection of statehood and are still at the whim of the nation states in which they live, the Convention might be regarded as having slightly more utility in a temporal sense because their cultural property is still at considerable risk of misappropriation. Running counter to this suggestion are the facts that: first, the Convention envisages the need for a co-operative relationship between these groups and the state or states in which they live in relation to the international claims for return with which it is concerned; and, secondly, the

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<sup>50</sup> See further F Macmillan, “Contemporary Intangible Cultural Heritage: Between Community and Market” in C Waelde, M Pavis and H Enright (eds), *Intangible Cultural Heritage and Contemporary Culture* (Edward Elgar 2017).

<sup>51</sup> Which introduces a more complex legal architecture in order to support the UNESCO Convention on the Means of Prohibiting & Preventing the Illicit Import, Export & Transfer of Ownership of Cultural Property.

<sup>52</sup> UNESCO Convention on the Means of Prohibiting & Preventing the Illicit Import, Export & Transfer of Ownership of Cultural Property, Art 7; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, Art 10.

<sup>53</sup> Although the Convention on the Means of Prohibiting & Preventing the Illicit Import, Export & Transfer of Ownership of Cultural Property, Art 4, makes cultural property that has been removed with the consent of the competent authorities (paras (c) & (e) or “been the subject of a freely agreed exchange” part of the patrimony of the state in which it is located. The application of this provision to artefacts taken during the colonial period would be the source of endless conflicts about what was “looted” & what was not. In the post-colonial context this is not only difficult to substantiate, but more importantly beside the point.

fact that it only deals with international claims means that it says nothing about claims by Indigenous Peoples against the states in which they live.

Overall, the international legal regime appears to have been constructed in order to avoid the obligation to return objects and artefacts misappropriated in the colonial period to the communities whose symbolic connection to those objects and artefacts has made them into cultural heritage in the first place. Of course, over time such artefacts and objects can acquire symbolic significance as cultural heritage to different communities. The famous horses of *Piazza San Marco*, one of the symbols of Venice, were looted by Napoleon and subsequently returned to Venice under terms imposed for the return of looted heritage by the Vienna Treaty of 1815. No-one much mentions, then or now, that the Venetians had looted them from Corinth several centuries earlier. The reason for this must be that after spending a few centuries in Venice they acquired a second, but not necessarily secondary, significance as Venetian cultural heritage. Applying the same sort of reasoning, perhaps objects looted in the colonial period, which in many cases have spent well over a human lifetime in the display cases of the former imperial powers, have also become part of the cultural heritage of those former imperial powers. Similarly, the confused symbolic claims of colonial settler states, such as Australia,<sup>54</sup> to the cultural property of its (pre-existing) Indigenous Peoples, might be read as a claim to some sort of jointly held cultural heritage. Perhaps, however, one of the things that makes these cases different to the horses of *Piazza San Marco* is the very existence of current competing claims, which make a compelling case for the vindication of a connection between the object in question and an existing community. The denial of these claims is a form of destruction of cultural heritage by a refusal to remedy the severing of the link between community and heritage.

### **Destruction by Commodification**

The failure of the international law governing cultural heritage to address the severing of the link between artefacts and community in relation to tangibles misappropriated during the colonial period might be understood as a sort of failure by omission. That is, it might be understood as a failure to correct an existing wrong. In some senses we could say that the system has refused to engage with the assertion to some type of property rights, created at the time of their misappropriation, over those tangibles. Such a failure to engage is a failure after the event. That is, it is a failure to remedy a historic wrong. When, however, we turn to the question of the failure of international heritage law to prevent the severing of the link between intangibles and community, achieved through the process of commodification of those intangibles, we are faced with a more complicated legal landscape. Part of this complication, of course, arises from the questionable distinction between intangible and tangible heritage.<sup>55</sup> Certainly, we could find plenty of examples where the misappropriation of tangible heritage also implicated the misappropriation of intangible heritage. And, it is also clearly the case, that the sort of things that the international legal regime now describes as intangible heritage were subject to much misappropriation in the period prior to their recognition by this regime. All this means that, again, the regime sins by omission, that is, by its failure to redress historic wrongs. However, the question of the commodification of intangibles also raises issues about the current relationship between heritage law and intellectual property law. This means that

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<sup>54</sup> This is particularly noticeable in Australian Government publications promoting Australia as a tourist destination.

<sup>55</sup> See further Macmillan 2017, n 50 above.

the destruction of cultural heritage by commodification raises wider systemic issues because it involves a clash between currently existing legal concepts. This is a clash that the law refuses to see.

According to Article 2.1 of the 2003 Convention for the Protection of the Intangible Cultural Heritage (ICH Convention), “intangible cultural heritage” means:

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and in some cases, individuals recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

The Convention does not seek to define the concept of community. Nor does it attempt to indicate expressly how a community might be recognised by the law, although perhaps the reflexive relationship between community, types of intangible things (“practices, representations, expressions, knowledge, skills”) and a tangible or spatial dimension (“instruments, objects, artefacts and cultural spaces”) in this definition provide some orientation points.<sup>56</sup> It is clear that what constitutes “practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith” in Article 2.1. of the ICH Convention must be understood to be in a reflexive relationship with the community to which they belong. The risk that we start to enter into an endless circularity of vague uncertainty is mitigated to some extent by Article 2.2 in which specific instances of the sort of stuff that falls within the general definition in Article 2.1 is listed inclusively as follows:

- (a) oral traditions and expressions, including language as the vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

Armed with this guidance on the type of stuff that constitutes intangible cultural heritage, and tactfully avoiding the problem of community identification, we might say that the ICH Convention makes quite a reasonable job of identifying the sorts of intangible things that might be the reasonable object of protection as forms of heritage. This even extends to its acknowledgement of the role of the tangible and spatial dimensions of this type of heritage.<sup>57</sup>

Or, at least, things seem this way until one turns from the gilded cage of the ICH Convention’s text to its real operative life. At this point, things start to look a bit less rosy for three reasons in particular, all of which are part and parcel of the essentially state-based nature and occidental framing of (not only) this Convention (but also all international law). First, the patterns of state adherence to the ICH Convention may reasonably be interpreted as expressing the continuing

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<sup>56</sup> See also L Zagato, “The Notion of ‘Heritage Community’ in the Council of Europe’s Faro Convention. Its Impact on the European Legal Framework” in N Adell, R F Bendix, C Bortolotto & M Tauschek (eds), *Between Imagined Communities and Communities of Practice: Participation, Territory and the Making of Heritage*, Göttingen Studies in Cultural Property, Volume 8 (Göttingen: Göttingen University Press, 2015), at 153; & Macmillan 2017, n 50 above.

<sup>57</sup> But without, of course, challenging the Cartesian dualism that permeates the UNESCO Conventions: see Harrison 2013, n 14 above, at 137.

unease that the authorised heritage discourse has with the concept of intangible cultural heritage.<sup>58</sup> At the time of writing the ICH Convention has 175 states parties,<sup>59</sup> which is a good overall level of adherence. There is a significant level of adherence amongst non-Western states. However, there are some interesting omissions amongst the parties to the Convention, especially if it is compared with other UNESCO conventions pertaining to cultural heritage. Australia, Canada, New Zealand, the United States and the United Kingdom, for example, are not parties to the ICH Convention. Smith notes that for countries such as these, in addition, to unease with the idea of intangible cultural heritage, there is also doubt about its relevance: “one official in a leading government heritage organization in the United Kingdom having asserted the irrelevance of the Convention as the ‘UK has no intangible heritage’”.<sup>60</sup> But even for those occidental states that are parties, it is evident that very little (comparatively speaking) has been listed. Non-Western states have made an overwhelmingly greater use of the provisions to list intangible cultural heritage on the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, which are established under articles 16 and 17, respectively, of the ICH Convention. A comparison with the use made by Western states of the listing facility under the World Heritage Convention, which has been extensive, points up a notable lack of Western interest in intangible cultural heritage even on the part of signatory states to the ICH Convention. This phenomenon Smith suggests “relates to the inability of intangible heritage to ‘speak to’ or find synergy with the dominant sense of historical and social experiences” on which the (Western) authorized heritage discourse is based.<sup>61</sup>

Despite the not unpromising text of the ICH Convention, the reality of its operation suggests substantial flaws in its ability to protect intangible cultural heritage, and this is particularly the case in relation to the sort of intangible heritage that might be described as involving contemporary cultural practices. The more contemporary the practice, the more mutable it is; and the more fluid (or unstable) the community built around it, the less likely it is, in any case, to find its way to a listing under the ICH Convention. Added to this, occidental discourses of heritage, which mostly seem to understand intangible heritage as something that “they” (non-Western states) have,<sup>62</sup> and the state-centric nature of both the ICH Convention and its listing process all militate against such recognition. Does this really matter at all? Do vibrant vital cultural practices need the protection of law? What could law possibly offer that is of use to them? It seems hardly worth lingering over the safeguarding obligations on states with respect to listed intangible cultural heritage that are contained in the ICH Convention. These obligations, according to Article 2.3 require states to put in place “measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission ... as well as the revitalization of the various aspects of such heritage”. The very nature of these obligations tends to emphasize the folkloric and static nature of the things that are likely to be listed, and perhaps also their value in attracting tourism. My suggestion is that the form of legal protection that might conceivably matter for intangible cultural heritage, particularly in relation to some types of contemporary cultural practices, is one that is notably absent from the ICH Convention: protection from the exercise of private intellectual property rights over cultural production.

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<sup>58</sup> Smith 2006, n 12 above, at 55.

<sup>59</sup> <http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E>, accessed 09/10/2017.

<sup>60</sup> Smith 2006, n 12 above, at 109. If there are changes to this position they have not resulted in adherence to the ICH Convention.

<sup>61</sup> Smith 2006, n 12 above, at 109.

<sup>62</sup> Slaughter 2011, n 48 above, at 198-199.

It is clear from the definition of intangible cultural heritage in the ICH Convention, and especially Article 2.2 listing instances of the sort of stuff that falls within the general definition in Article 2.1, that it embraces aspects of contemporary creative arts. In fact, the list in Article 2.2 immediately suggests some sort of relationship between intangible cultural heritage and, at least, copyright law. But even without the aid of this list, it is clear that the association of the creative arts with intangible cultural heritage<sup>63</sup> necessarily brings it into an engagement with copyright. This is because one of the markers of the social acceptance of a practice as part of the creative arts in occidental society seems also to be the fact that the practice then came to be protected as a copyright work.<sup>64</sup>

The question of the relationship between cultural heritage and intellectual property is a particularly fraught one.<sup>65</sup> It is clear that part of what might be considered to be intangible cultural heritage falls outside the copyright net because, even if its “authors” are identifiable, any copyright interest will have disappeared into the mist of the copyright duration rules. However, in the context of at least some things that fall within the idea of contemporary cultural heritage, the conflict between their identity as intangible cultural heritage and their character as a copyright work is alive and well. The central tension here rests on the fact that while cultural heritage is something that “belongs” to a community, intellectual property including copyright is a rivalrous form of private property. The problem is not that the existence of private rights necessarily destroys the link between community and the intangible practice in question. The argument here is a more complex one and turns on the fact that the cultural heritage system and the intellectual property system have different ways of expressing value. And it is the way in which copyright expresses value, especially in the current period, which is the key to understanding how it severs intangibles from community, thus destroying their character as cultural heritage.

In the neo-liberal period there is a tendency for everything to be subjected to what has been described as “total market thinking”.<sup>66</sup> Seeing the world through the spectacles of the neo-liberal framework leads to the conclusion that value can only be expressed through the market, which means that it can only be expressed in the form of a commodity. When we talk about the commodification of artistic works then the relevant instrument of commodification is almost always copyright because it is copyright that turns the relevant creative forms into private property. It is, therefore, critically important to distinguish between the fundamentally different concepts of not only copyright and cultural heritage, but also of the market and the community. This is because these are the two contexts in which copyright and cultural heritage, respectively, express and control the meaning of value. So while copyright as a private property right locates all relationships in the context of the market, the context of cultural heritage relationships is the community, of which the market forms a part but does not (or should not) control the whole.

In the world of total market thinking formal systems of private property rights such as copyright enjoy particular prestige. The more valuable the right in the marketplace the greater the prestige. In terms of the relationship between intellectual property and cultural heritage, it seems clear that cultural property/heritage has suffered from the ensuing prestige deficit, with

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<sup>63</sup> Hobsbawm 2013, n 39 above.

<sup>64</sup> L Bently & B Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2009, 3<sup>rd</sup> ed), ch 2.

<sup>65</sup> See Macmillan 2013, n 3 above; F Macmillan, “Arts Festivals: Property, Heritage or More?” in K Bowrey & M Handler (eds), *Law & Creativity in the Age of the Entertainment Franchise* (Cambridge: Cambridge University Press, 2014); Macmillan 2015, n 17 above.

<sup>66</sup> E Christodoulidis, “The European Court of Justice and ‘total market thinking’” (2013) 14 *German Law Journal* 2005-2020.

a consequent impact on the way it is protected under international law.<sup>67</sup> The concept of cultural heritage, on the other hand, is a way of resisting this reduction of everything to its value in the market, a way of resisting the commodification (and creeping proprietization) of everything. It proposes an alternative basis for expressing and controlling value according to the norms and identity of a community and not according to the market value of private property rights.<sup>68</sup> None of this is to say that copyright is not valuable to individuals working in all areas of creative production to which it applies. Copyright not only allows individuals to gain an economic benefit over their creative labour, it also confers control on them – although that control is considerably diminished if copyright does not remain in the hands of the original creator. However, private property rights like copyright are not a route to building a community of cultural and creative value. Such a community needs to be built by a bottom up commitment to the value of the artistic or cultural practice. Within such a community copyright will have a value for individual authors, but it is a value that should be limited by the rights that other members of the community have in their shared cultural heritage.

What is particularly important to emphasize here is that the private property relations of copyright, which are produced by the law, do not and cannot be regarded as constituting community or controlling all aspects of the relationships within it. As has been argued above, community is produced by a reflexive relationship between identity and memory. It imports, however, a concept of solidarity, of mutual obligation. It is not that property relations cannot have a place in community, but rather that they should be subject to the mutual obligations of community. The proper role of the law here is to give community the means to express its identity and the collective claims that flow from that identity, having reference always to the multiple and overlapping communities that form and give substance to human existence. However, the communities that form around and generate many contemporary cultural forms, some of which might fall within the definition of contemporary cultural heritage, do not exist in a legal environment that looks much like this. The international intellectual property law system, which defines ownership and controls the use of many forms of contemporary cultural production identifies value through a system of total market thinking. Its creation of an extensive system of private property rights over cultural products is designed to make those products into liquid investments. The result is that copyright law, the primary function of which is to protect investment and the accumulation of capital,<sup>69</sup> sustains a system of control of cultural output in the hands of a concentrated group of multinational corporate agglomerations.<sup>70</sup>

There is plenty of evidence that the intellectual property machine has permitted the appropriation and commodification by Western corporate interests of the cultural practices and knowledge of Indigenous Peoples and communities in the global south.<sup>71</sup> But it would be misleading to think that the problem here is only a problem of these communities and so another manifestation of the conflict between the West and the rest. All communities generate intangible heritage. This is the case whether UK heritage organization officials think so or not.<sup>72</sup> The idea that any community does not have intangible heritage probably owes much to the fact that we think of intangibles as being the province of private intellectual property rights.

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<sup>67</sup> See further Slaughter 2011, n 48 above; Macmillan 2013, n 3 above; Macmillan 2015, n 17 above.

<sup>68</sup> See further Macmillan 2013, n 3 above; Macmillan 2015, n 17 above.

<sup>69</sup> See F Macmillan, "Copyright and Cultural Rights" in L Belder & H Porsdam (eds), *Negotiating Cultural Rights* (London: Ashgate, 2017).

<sup>70</sup> A phenomenon that is becoming increasingly evident, see eg Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, *Copyright policy and the right to science and culture* (24 December 2014).

<sup>71</sup> See Macmillan 2013, n 3 above.

<sup>72</sup> See text acc n 60 above.

In this way, while we may have greatly enriched certain Western-based corporate interests in a material sense, we have at the same time degraded our own sense of community in the Western world by allowing private intellectual property rights to sever our communities from their own cultural practices. As Slaughter notes:

[T]he distinction between cultural and intellectual property has generally (once again) been mapped onto the divide between the developing and developed world, trailing behind it a long series of old familiar orientalist oppositions: individual versus collective, personal property vs. group commons, formal versus informal knowledge, and so forth. Accordingly, we in the West produce spontaneous original intellectual property; they in the rest of the world have a rich (though probably burdensome) collective legacy of cultural heritage and traditional knowledge that is, so the logic goes, part of what keeps their societies underdeveloped.<sup>73</sup>

While the idea that all non-Western cultural property is open to private appropriation is unjust and outrageous, it might also be noted that the notion that the West lacks intangible cultural property is socially (and culturally) impoverishing.<sup>74</sup>

The law itself makes no attempt to understand the relationship between the way meaning and value are made in relation to the same cultural practices in the two different systems of intangible cultural heritage protection and intellectual property protection. Consequently, unconstrained by any legally imposed attempt at balance or restraint, the transcendence of total market thinking in the neo-liberal period has prioritised private property rights and their market exploitation over the demands of the contemporary cultural heritage community.<sup>75</sup> Current practices of cultural production - instead of expressing the identity, solidarity and mutual obligations of community - are stymied and constrained by the deadweight of private property rights, often exercised not even by other members of the cultural heritage community but by the media and entertainment corporations who have commodified so much contemporary cultural output. This form of commodification can, perhaps be usefully contrasted, with other forms of commodification or commercialization of cultural heritage. Heritage is, for example, commodified through tourism and I would not be the first to voice the thought that the main function, in reality, of the UNESCO lists of tangible and intangible cultural heritage are as tourist guides. But the difference here is that, whatever the regrettable effects of this form of commodification,<sup>76</sup> at least the fundamental character of the heritage as heritage is retained. While it may not always work out this way, the fact that the cultural heritage community may, itself, control this process of tourist commodification is important. In such a case, perhaps we can understand the market as being embedded in community (or, at least, not completely abandon the hope of this). But no such assertion can be made when cultural heritage becomes private property and its fundamental character as a community artefact is overwhelmed and subsumed into the logic of rivalrous individual ownership.

### **Conclusion: Towards A New Discourse?**

In the end, the argument of this article is a very simple one. It is that cultural heritage is destroyed not just when tangible objects are bombed, dynamited or subjected to some other

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<sup>73</sup> Slaughter, n 48 above at 198-199 (footnote omitted).

<sup>74</sup> See further Macmillan 2014, n 65 above.

<sup>75</sup> See further Macmillan 2015, n 17 above.

<sup>76</sup> See, eg, Smith 2006, n 12 above, at 33-34.

form of physical degradation, but rather when the link between community and its cultural artefacts and practices is severed. Certainly, physical destruction of an object, moveable or immovable can have this severing effect. However, this is only one instance of such destruction. There are other ways of severing this link. In this article I have focussed on two such ways. One is the practice of misappropriation and decontextualization of tangible artefacts, and the other is the privatization of intangible practices and artefacts. I have argued that these are largely Western practices, in both a historic and a legal sense. Of course, misappropriation and decontextualization can happen anywhere, but so far as cultural artefacts are concerned we are currently living with the legacy of systemic misappropriation and decontextualization that occurred in the colonial period. The international legal regime for the protection of cultural heritage, which is rather suspect in any case for its general inability to engage with the concept of community outside nation state formations, may be regarded as tacitly endorsing this state of affairs by its refusal to address it. So far as intangible cultural artefacts and practices are concerned, Western law is perhaps even more deeply implicated. The concept of private ownership of such artefacts and practices, developed into a system of commodification through the Western concept of intellectual property, means that their value is expressed only through the market thus severing them from their communities and destroying their character as heritage.

When it comes to the question of the destruction of heritage the West really has been best at it – and for quite a long time. But why be so strident on this point? The answer to this is also a very simple one. When we talk about the destruction of cultural heritage today, there is a tendency in at least some parts of the discourse to identify this as an East/West, us and them, phenomenon. The famous cases of the *Taliban* dynamiting of the sixth century Buddhas of Bamiyan, the extensive destruction of archeological sites in Syria, especially but not only in Palmyra, are often analysed in these terms. By thinking of the destruction of cultural heritage in this way we, of course, betray the Western obsession with monumentality and tangibility, which has been nurtured at the expense of a concept of cultural heritage as “a constitutive social process”.<sup>77</sup> However, if heritage is understood as being such a process – and not just as a collection of static material artefacts - then Western responsibility for its destruction, and not only in the post-colonial world, is breath taking. What is needed, I suggest, is a different discourse about the destruction of cultural heritage that acknowledges responsibility across the international board and looks for a solution in the light of that responsibility.

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<sup>77</sup> Smith 2006, n 12 above, at 82; & see text acc nn 29 & 40 above.