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TRANSLATING INTERNATIONAL HERITAGE STANDARDS INTO DOMESTIC LAW

Sophie Starrenburg[*]

It is difficult to imagine contemporary heritage protection without the numerous international heritage conventions which have proliferated over the course of the twentieth century. Although these instruments are governed by the rules of public international law, they are reliant upon the actions of individual states in order to ensure their implementation at the domestic level. It is precisely this process of translation to the domestic legal sphere which remains invisible within many discussions surrounding international heritage law. Yet these modes of translation can facilitate – or, conversely, silence – opportunities for actors other than the state to shape cultural heritage law. As such, they can play a critical role in many of the current debates surrounding heritage governance.

It is thus important that those working and living in, with or around heritage are aware of the legal techniques through which international heritage standards find their expression in domestic law. In order to elucidate these techniques, the first section of the chapter touches upon a range of core legal concepts related to the implementation of international law in domestic legal settings, such as the (purported) distinction between so-called monist and dualist legal systems and the notion of 'self-executing' treaties. The second section briefly discusses developments within international legal scholarship which seek to examine the effects of international law at the national and sub-national levels through the lens of social science methods, rather than purely through a doctrinal lens. The third section continues by addressing these notions in the context of cultural heritage law. While the focus of the chapter is on the international treaties adopted within the scope of UNESCO, it will also discuss how so-called 'soft law' heritage standards can play a role in domestic legal settings despite their formally non-binding nature (for a discussion, see also the chapter on sources by Francesco Francioni in this volume).[1]

This chapter argues that the apparent universality of rules relating to the protection of cultural heritage at an international level belies the diversity of methods through which they are implemented at the national level, the actors involved in this process, and the interaction of international standards with existing domestic legal traditions aimed at the protection of cultural heritage. Moreover, given that many of the norms established by international heritage conventions do not have a 'self-executing' character, they remain beyond the reach of domestic legal actors. In many cases, it is thus more illuminating to interrogate precisely which elements of cultural heritage law are commonly not translated into domestic law and why.

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1: Monism and Dualism

Orthodox understandings of the field of public international law tend to sketch it as agnostic in relation to the domestic implementation of international rules. The cardinal legal principle of the international legal order reflected in Article 26 of the Vienna Convention on the Law of Treaties – *pacta sunt servanda* ('agreements must be kept') – requires states to fulfil the obligations of the treaty that they have entered into.[2] However, in light of state sovereignty, how states perform these obligations is considered to be a matter of domestic constitutional arrangements. Treaty obligations (and other sources of international law, such as custom – see Francioni in this volume) can be implemented in the domestic legal order as the state sees fit (Van der Vyver 2013, 3–4). Simultaneously, states may not invoke their domestic laws in order to justify a failure to comply with their international legal obligations.[3] Despite the principle of state sovereignty, public international law thus views obligations derived from a state's international commitments as superior to domestic legal obligations in the sense that, on the international plane, an international norm will prevail over a conflicting domestic norm. However, as Morina et al. (2011, 275) note, the matter is very much one of perspective: when viewed through the lens of domestic law, international norms do not always necessarily take precedence over domestic law before national courts: this depends on the domestic law of the state in question and the source of the international legal obligation.

Traditionally, the debate surrounding domestic implementation has been framed in terms of a state's constitutional arrangements, with these systems being categorised as either 'monist' or 'dualist'. Put succinctly, the discussion on the (purported) divide between monism and dualism revolves around the question of whether the international and national legal orders are part of a single legal order, as per the monist position, or are instead self-contained and separate legal orders, as per the dualist outlook (Gaja 2007, 52–53; Shelton 2011, 2).[4] Received wisdom states that international rules can only be applied within the legal order of dualist systems after having been transformed into domestic law, for example through an implementing law; by contrast, monists argue that international law is immediately incorporated within the domestic legal order, without the need for it to first be translated into a corresponding norm of domestic law (Gaja 2007, 59–60; Shelton 2011, 9–10; Björgvinsson 2015).

However, the majority of authors emphasise that state practice cannot easily be placed into the binary mould of monism or dualism: instead, the majority of systems present a mix of both approaches (Verdier and Versteeg 2015, 515–516). Ultimately, both monist and dualist systems require the approval of a domestic legislative body in order to implement international law in the national legal system. The distinction between the two boils down to whether these legislative bodies provide approval for the implementation of the international legal obligation before its adoption by the state – for example by requiring parliamentary approval before the ratification of a treaty at the international level – or only after adoption, in which case the approval takes shape at the domestic level through the transformation of the international norm into domestic law (Shelton 2011, 8; Verdier and Versteeg 2017, 149–150). Furthermore, rules on the domestic implementation of international law will generally differ according to the nature of the international legal norm, such as whether it derives from customary (i.e. unwritten) law or treaty law, or whether the treaty embodies certain fundamental values, such as human rights, and should thus take precedence over conflicting norms (Shelton 2011, 5–6).

The nature of domestic legal systems is thus more complex than simply placing a state into the category of 'monist' or 'dualist', making it difficult to draw general conclusions on the domestic implementation of international law. However, examining the reception of international law in the national legal order remains of great practical importance for the enforcement of international law,

given that it can determine the extent to which a domestic court can consider a state's international obligations in its judgments. In a state where international law is not automatically incorporated, and the norm in question has not been transformed into domestic law through the adoption of legislation, then a court will not necessarily be able to take these obligations into account, thereby frustrating the enforcement of the international norm at the domestic level.

Domestic constitutional arrangements also determine whether international law is considered inferior or superior to existing national legal norms. Thus, in the infamous case of the construction of the Waldschlössenbrücke in the Dresden Elbe Valley World Heritage Site, the German *Bundesverfassungsgericht* (Federal Constitutional Court) noted that the World Heritage Convention had not been translated into German domestic law, and thus did not enjoy precedence over the legally binding outcome of the referendum in which the population of Dresden approved the construction of a bridge over the Elbe river. The *Bundesverfassungsgericht* moreover held that even if the World Heritage Convention *had* been translated into German domestic law, that it would not establish absolute obligations for Germany that would take precedence over the state's domestic legal obligations on the national plane.[5]

The reception of international law in the domestic legal order also determines whether and how private actors can invoke international law before domestic courts. It is important in this regard to make a distinction between the question as to whether a given international norm is 'automatically' part of the domestic legal order (also described as 'direct applicability', and, as seen above, this forms the core of the monism/dualism debate) and whether this also means that the norm can be relied upon by legal persons within the domestic legal order – for example by individuals before the domestic courts of their state. In the case of the latter, the treaty in question is said to have 'direct effect' or be 'self-executing' (Nollkaemper 2018, 19–22).[6] If a treaty does not possess direct effect, then actors such as individuals or non-governmental organisations cannot invoke the relevant treaty rule before a domestic court to challenge the actions of the state which run counter to the treaty: instead, they will be forced to base their arguments upon domestic law, or, conversely, they simply might not be able to challenge the action before a domestic court. Legal persons must therefore have standing to rely upon a given international legal norm before a domestic court, which is where matters become more complex: given that many international norms address the relationship between states, and not between states and individuals, domestic courts limit the extent to which these rules can be invoked in the domestic legal context. Broadly speaking, domestic courts that call upon the doctrine of direct effect in order to allow legal persons within the domestic legal sphere to invoke a given international legal obligation before the domestic court 'look for (1) expressions of the intent of the parties, (2) whether or not the agreement creates specific rights in private parties, and (3) whether the provisions of the treaty are capable of being applied directly', that is, 'whether or not the provision is sufficiently precise to be capable of judicial enforcement' (Shelton 2011, 11–12). As a result, even if a domestic court determines that an international legal norm can be considered as part of the domestic legal order – whether as a result of direct applicability (in the case of monist systems) or domestic incorporation (in the case of dualist systems) – it will decline to exercise its jurisdiction if they determine that the rule does not have direct effect (Nollkaemper 7). As such, even a 'monist' state might still require domestic legislation in order to give full effect to an international legal norm in the domestic sphere (Verdier and Versteeg 2015, 522–523). This is of particular importance for cultural heritage treaties, which are generally not considered to have direct effect, as will be discussed in Section 3. This is a complicating factor in determining the compliance of a state with its international obligations, as there is often no international judicial body with jurisdiction to hear disputes concerning compliance with certain norms of international heritage law. In situations where neither a domestic nor an international

court has jurisdiction, a state's compliance with its international obligations thus becomes a matter for extra-legal mechanisms or politics (Van Alstyne 2009, 603–604). Indeed, in the case of international heritage law, many heritage treaties have developed semi-legal compliance mechanisms (Hamman and Hølleland 2023).

However, similarly to the case of the debate surrounding monism and dualism, a word of caution is once again warranted, as state practice relating to the requirements of granting direct effect differs widely across the globe. Forteau, in his analysis of 200 domestic judicial decisions on the notion of direct effect, notes that '[t]he analysis of this practice leads to the conclusion that it is not at all uniform' (Forteau 2016, 105). Similarly, Verdier and Versteeg point out that '[t]he distinction is notoriously imprecise, with the standards used by courts difficult to codify or even formulate, leaving substantial scope for judicial discretion' (2015, 524). Furthermore, while international law might indeed form part of the domestic legal order, this does not always automatically entail that it enjoys precedence over conflicting national laws (Nollkaemper 2018, 22). That being said, in practice, courts often seek to interpret domestic laws in line with a state's international obligations and thereby nonetheless indirectly give effect to these obligations even barring the presence of self-executing norms (Sloss 2009, 7; Verdier and Versteeg 2015, 522–523).

2: Intersections between International and Domestic Law in Practice

Recent decades have seen the growth of fields such as comparative international law and increasing engagement with the effects of international law 'on the ground' (Zimmermann 2017; Roberts et al. 2018). While earlier analyses of domestic implementation tended to focus on the role of domestic courts, these new approaches move beyond a purely doctrinal analysis, seeking to explore 'other state actors, such as legislatures, executives, and administrative bodies, [who] also interpret and apply international legal rules in ways that may help to enforce or create international law' (Roberts et al. 2018, 10). The critical observation in this regard is the acknowledgement that '[l]egislative implementation of an international obligation is often the starting point, not the conclusion, of an inquiry into the domestic operation of international law' (Edgar and Thwaites 2018, 2–3), and that a broad range of actors are involved in the implementation of international law beyond purely judicial actors such as courts (Noortmann et al. 2015; Fraser 2020; Scott et al. 2021).

There are many paths along which the domestic and international legal orders interact with one another, often in ways that might not find their expression in formal legal rules or domestic or international court decisions (Nijman and Nollkaemper 2007b, 341). Thus domestic state actors, such as government legal advisors, might seek to account for international legal rules even if they are not formally incorporated into the domestic legal order or likely to be assessed by domestic or international courts or tribunals (Verdier and Versteeg 2017, 163). Nor is this a one-way street: domestic actors can also act as '[agents] for the critical revision of the international rule of law', and through their interpretations of international law thereby in turn shape the content of the norm at the international level (Kanetake 2016, 13).

This change is underwritten by the increasing deformalisation of the sources of international law (d'Aspremont 2008). While the sources of international law are technically limited to those sources which are formally recognised as legally binding, such as treaties and customary international law, recent decades have seen the proliferation of 'soft law': norms without a formally binding legal character, such as recommendations or declarations adopted by international organisations (Boyle 2018).[7] Even though states emphasise that soft law is not binding, such norms nonetheless exert a growing influence on legal decision-making, for example through their use to

interpret binding norms. Thus, many domestic courts recognise soft law as ' "persuasive" but not legally binding' (Shelton 2011, 15) and rely upon it in their decisions.

More broadly, a number of sociological developments at the national and global scale have influenced the relationship between the domestic and international legal orders. On the one hand, the rise of globalisation has entailed that the boundary between the domestic and international legal order has become more and more permeable. Similarly, 'the state, which has traditionally guarded the door between the international and the domestic sphere, has lost its controlling power' (Nijman and Nollkaemper 2007b, 348), its authority supplemented by a medley of sub- and supranational actors, such as international organisations, armed groups, civil society organisations and transnational corporations. These actors have increasingly gained some measure of international legal personality – although the state remains the only actor to retain full international legal personality; that is to say, the ability not only to be bound by international law, but also to participate in its development (Chinkin 2007, 136; van der Vyver 2013, 3–4). They therefore increasingly exert influence on the international sphere in ways that undercut, transgress against or quite simply supersede the traditional territorial authority of the sovereign state. As such, analyses of the domestic implementation of international law must also take these actors into account.

Simultaneously, the first two decades of the twenty-first century have also seen states guard their sovereignty ever more jealously, with increasing pushback against the growing influence of international law on domestic legal systems: either framed as an infringement of national democratic processes or perhaps more simply as a contravention of domestic values by the 'Other', paired with broader concerns about the legitimacy of international law (Wheatley 2010; Cohen et al. 2018; Wind 2018). Such debates have surfaced in relation to pushback against investor-state dispute settlement mechanisms in treaties such as the Transatlantic Trade and Investment Partnership (TTIP). They are also evident in protests against decisions adopted by domestic judges which are deemed anti-democratic due to their basis in international law, which are seen as a attempts to circumvent national democratic processes (Burgers and Staal 2018).

3: Domestic Implementation of Cultural Heritage Law

The above developments equally hold true for cultural heritage law; the ways that cultural heritage treaties are translated to the domestic level are highly diverse. As Francioni argues, enforcement of these treaties 'entails a continuous interaction and hybridization of different legal orders, private and public, domestic and international, national and regional, and soft and mandatory law. These different legal orders, coexist, interact, and collide' (2013, 9). These issues have been explored by scholars from a wide range of disciplines seeking to engage with cultural heritage law and its effects 'on the ground' (Bendix et al. 2012; Adell et al. 2015; Brumann and Berliner 2016; Larsen 2018) and have also increasingly emerged onto UNESCO's radar.

As noted in Section 1, depending on a state's constitutional arrangements, international law either automatically becomes part of the domestic legal order or must first be implemented through domestic laws. Since 2005, UNESCO has maintained a growing database of the national cultural laws of 188 states; this database forms a useful starting point for research into the domestic implementation of cultural heritage law.[8] In fulfilment of its mandate to provide expert advice to its member states,[9] the organisation also helps states to implement cultural heritage law through the provision of model laws for the various conventions adopted under the aegis of UNESCO, providing a framework for the translation of international cultural heritage conventions into the domestic legal system.[10] Such model laws have also been developed by other regional and international

organisations, such as the Organisation of American States and the International Committee of the Red Cross.[11]

Periodic reporting procedures are one of the main venues through which state parties to the conventions in question can communicate to UNESCO how they implement the conventions in their domestic legal systems; in recent years, many of UNESCO's cultural heritage conventions have sought to regularise these procedures (Blake and Nafziger 2020). The reports submitted illustrate the diversity of state actors involved in the implementation of the conventions, as the authority to implement cultural heritage law is often not necessarily clustered within a single state body for all of UNESCO's cultural heritage conventions. This capacity may thus be delegated across several ministries depending on the convention, such as the Ministry of Culture, Education, Defence, or the Environment.[12] In some states, ad hoc organs under varying degrees of state control might be created to implement the state's obligations, for example, to carry out the inventorying of cultural heritage at the national level (Cornu and Smeets 2020, 193; Martinet 2020, 145–146). This state of affairs is often a complicating factor in the satisfactory implementation of the UNESCO conventions, particularly in cases where a form of heritage might be protected under multiple conventions simultaneously and thereby fall under the authority of multiple ministries.

Despite the improvements in periodic reporting procedures, the outcome of these procedures can sometimes be deceptive with regards to ascertaining the implementation of a given convention: state submissions are often delayed, and for some conventions, a number of state parties have not submitted any reports at all.[13] Perhaps more fundamentally, UNESCO often does not possess the (financial) means to check the veracity of a state's reports (Bortolotto et al. 2020, 72). Moreover, state reporting procedures are less adept at capturing the role of non-state actors in the implementation of cultural heritage law, such as members of international and national civil society organisations. Nevertheless, these actors can also play a critical role in the dissemination of cultural heritage law and calling attention to less-than-ideal implementation of cultural heritage conventions by the state. The current state of affairs thus raises fundamental questions with regard to the possibility of researching the implementation of cultural heritage law in domestic legal systems and reinforces the importance of interdisciplinary cooperation between scholars working in the field of cultural heritage protection.

Periodic reporting procedures, with their tendency to represent the implementation of international law as uniform, regardless of the geographical location in which this implementation takes place, are also not necessarily the most effective tool for capturing the complexity of adapting the implementation of international cultural heritage laws to already existing domestic legal contexts, which differ widely from state to state (Vaivade 2020a; see also Woodhead, this volume). Vaivade and Wagener thus note the 'considerable diversity of legislative experiences' in the field of intangible cultural heritage, seeing the developments brought on by the Intangible Cultural Heritage (ICH) Convention at the international level as a 'process of transformations', in which domestic and international law are in continuous dialogue with one another (2017, 104), as opposed to the one-way street which is at time sketched in reporting procedures. Some states have thus implemented the ICH Convention within the context of existing domestic laws; in the case of countries such as Japan and Korea with particularly long legislative histories of intangible cultural heritage protection, these domestic laws have in turn influenced the development of international law. In other cases, the adoption of the ICH Convention by the state in question led to the emergence of an entirely new category of cultural heritage protection (Deacon 2020, 180–181).

All in all, cultural heritage law needs to strike a delicate balance between state sovereignty and international protection. The initial emergence of rules for the protection of cultural heritage in international law at the end of the nineteenth century – in relation to the protection of cultural

property during armed conflict – largely regulated reciprocal obligations between states. As such, these rules did not necessarily require the piercing of the veil between domestic and international law through the adoption of domestic legal measures in order to fulfil the state's international legal obligations. Since then, however, states have progressively legislated in favour of cultural heritage protection in ways that encroach upon the traditional tasks of the sovereign state, and which require explicit incorporation in domestic legal systems. A range of obligations can thus be identified in the cultural heritage conventions of UNESCO which require some form of domestic implementation, such as the introduction of domestic criminal offences (or other forms of sanctions) and the establishment of jurisdiction over those offences;[14] the prosecution or extradition of those suspected of having committed these offences;[15] the introduction of export certificates;[16] the establishment of national bodies for the protection of cultural heritage, as well as educational programmes;[17] and the forming of national inventories and the safeguarding of protected cultural heritage,[18] amongst others.[19]

However, a close analysis of the majority of UNESCO's cultural heritage conventions demonstrates that they largely establish obligations of best efforts for states parties. In many cases, the goal of these conventions is not to punish states for failing to implement their obligations but to assist them in ensuring the best possible protection of cultural heritage within their territory. (Comparisons can be drawn here with other fields of international law which draw upon similar enforcement mechanisms, such as international environmental law). As such, within cultural heritage law, even the most straightforward obligations – such as requirements to establish inventories at the national level – tend to leave a wide margin of appreciation to each state (Cornu and Vaivade 2020, 2–3; Martinet 2020, 144).

As Deacon notes, the role of the state is thus often determinative in cultural heritage law, particularly for inventory-based conventions such as the World Heritage Convention and ICH Convention: states 'retain discretion regarding the way in which intangible cultural heritage is incorporated into legal frameworks at the national level, and they make final decisions on the inclusion of intangible cultural heritage in inventories (or indeed, final approval of international nominations to the UNESCO lists) and funding of intangible cultural heritage related safeguarding activities' (2020, 189). The strength of this approach is that cultural heritage law allows for the implementation of its obligations in a manner which can take into account local (legal) realities (Ābele 2020).

However, the indeterminacy of many of these norms has meant that cultural heritage law is generally not justiciable domestically, even if cultural heritage law has been incorporated into the domestic legal order. For one, most cultural heritage treaties do not establish what could be viewed as enforceable rights, given that they generally do not address the relationship between the state and individuals and in many cases do not even necessarily concern themselves with reciprocal relationships between states. As such, many of the norms are unlikely to be seen as self-executing by domestic courts, thereby remaining beyond the reach of domestic actors; unlike many other areas of international law, no international judicial body exists through which the implementation of these norms could be subjected to scrutiny (for a discussion of the issue of dispute settlement in cultural heritage law, see Chechi 2014). As such, the possibilities for individuals and other actors to call states to account are significantly curtailed.

This point is borne out in a range of cases decided by domestic courts, particularly in cases in which individuals and associations have sought to contest inventorisation (or the lack thereof) by the state. Hance and Martinet, for example, discuss several cases resulting from the domestic implementation of the ICH Convention in France (2020, 163). One case concerned a legal action brought by an animal welfare organisation seeking to contest the inclusion of bullfighting on the French national inventory of intangible cultural heritage.[20] In the course of the proceedings, the

French Ministry of Culture withdrew the inscription; although this meant that the French courts did not need to decide on the initial claim of the animal welfare organisation, it in turn led to a claim from two organisations promoting bullfighting who sought to contest the withdrawal of the inscription. The latter claim was ultimately denied by the French *Conseil d'État*, which considered that the removal of bullfighting from the inventory did not prejudice the rights of the two bullfighting organisations and that they thus did not have standing (163–164).

A comparable case was heard before the Dutch Council of State concerning the legal effect of the inclusion of the lighting of consumer fireworks on New Year's Eve on the Dutch national inventory of intangible cultural heritage. The applicants contested that a firework ban implemented by the Hilversum city government ran counter to articles 11 and 14 of the ICH Convention. The Council of State noted that, upon ratification of the ICH Convention, the Dutch parliament had considered that the government did not have any obligations to support the implementation of measures to protect ICH solely on the national inventory. More importantly for the present discussion, the Council held that the obligations in the ICH Convention cited by the applicants concerning the safeguarding of the intangible cultural heritage at the national level did not have direct effect in the Dutch domestic legal order.[21]

Standing was similarly denied in the case of *Nulyarimma and ors v. Thompson* before the Federal Court of Australia, in which an individual sought to contest the failure of the Australian government to protect the lands of the Arabunna people through inscription on the World Heritage List. The claim was ultimately considered to be non-justiciable, as the court held that 'the complex policy considerations involved in a decision to nominate a property for inclusion in the World Heritage List resulted in such a decision being non-justiciable'.[22] Moreover, the obligations contained within the World Heritage Convention concerned obligations owed 'by States' under international law, 'and not to or by individuals'.[23]

However, this is not to imply that possibilities for individuals and organisations to invoke cultural heritage law before domestic courts are non-existent. Some states grant direct effect to the provisions of cultural heritage conventions despite their indeterminate nature: thus, the Supreme Court of Justice of the Dominican Republic directly examined the World Heritage Convention in a case concerning the adoption of the 2004 Protected Areas Act by the Dominican government. The petitioners were able to rely upon the World Heritage Convention because it enjoyed direct effect in Dominican law.[24]

Moreover, even if the provisions of the convention in question do not enjoy direct effect – or even if the convention itself is not even incorporated in domestic law – a court might nonetheless take the spirit of the convention into account in its considerations. Thus in *R (Save Stonehenge World Heritage Site Limited) v. Secretary of State for Transport*, the High Court of Justice of England and Wales examined a claim for the judicial review of a decision by the Secretary of State to approve the building of a dual carriageway and tunnel close to the Stonehenge World Heritage Site. The applicant argued *inter alia* that this proposal would breach the World Heritage Convention, which had not been incorporated into domestic law.[25] While the challenge of *Save Stonehenge* was granted on the basis of British law (and its argument concerning a direct breach of the World Heritage Convention denied), the inscription of Stonehenge on the World Heritage List and the disapproval of the plan by the World Heritage Centre, ICOMOS and ICCROM formed one of the considerations of the High Court in its interpretation of British common law.[26] As such, the High Court concluded that the British government had erred in not exploring alternatives to the plan which would have been less harmful to the site.[27]

In another case, this time before the French courts, the Administrative Tribunal of Paris granted standing to an individual who had been responsible for the proposal of the inscription of '*yole*

ronde', a type of Martinican sailing boat, on the national inventory of intangible cultural heritage (Hance and Martinet 2020, 164–165).[28] The individual sought to contest the refusal of the French Ministry of Culture to inscribe the *yole ronde* on the French national inventory; the tribunal granted standing on the grounds that the individual in question had submitted the inscription proposal, and was also 'the addressee of the letter written by the Ministry of Culture rejecting [the proposal]' (164). The Ministry of Culture was ultimately ordered to re-examine the request for inscription, leading to its ultimate inclusion in the French national inventory (165).

This successful contestation of the refusal to inscribe *yole ronde* on the French national inventory can perhaps be traced back to the emphasis placed in the Intangible Heritage Convention on the involvement of communities, groups and individuals in the nomination and inscription process, which 'has given communities in general more leverage in their interactions with state actors and created new opportunities for their involvement' (Deacon 2020, 182). It is precisely this element of the ICH Convention which is likely to lead domestic courts to consider that claims by these actors based on the Convention are justiciable at the national level.

However, it is important to emphasise that such outcomes remain dependent on the degree to which courts are open to interpreting international law within the domestic legal order; it also remains to be seen whether these developments will find their translation in relation to cultural heritage conventions other than the ICH Convention. Moreover, as Deacon acknowledges, '[t]here are limits to community influence even if the principle of participation is acknowledged' (2020, 182), as this participation ultimately remains contingent on the goodwill of the state. As such, the balance in cultural heritage law continues to tip in favour of privileging state discretion, often at the cost of individuals and heritage communities.

4: The (Im)possibilities of Translating Cultural Heritage Law

As Aust notes, 'international law has a difficult relationship with unity and coherence' (2016, 333). One of the central aspirations of the field is the development of a 'common language', of rules of law which are universal in both their geographical scope and normative validity, and apply equally to all states parties (Aust 2016, 334–335; Roberts et al. 2018, 3). This universalist ideal has of course come under increasing scrutiny – from the rise of cultural relativism (American Anthropological Association 1947) and the emergence of postcolonial and critical legal scholarship which has pointed out that the purportedly 'universal' often has a stubborn tendency to represent a very particular view of the world (Anghie 2004; Pahuja 2011). The global uniformity of international law has always been a difficult goal to reach, because the international legal system lacks a central adjudicative body to ensure the consistent interpretation of its rules. Instead, the implementation of international law is the prerogative of individual sovereign states – and, increasingly in recent years, a broad range of other sub- and supra-state actors. While these uncertainties have certainly caused anxieties (Koskenniemi and Leino 2002; Roberts et al. 2018, 27–28), recent turns to empirical legal scholarship have in any event affirmed that 'international law is often understood, interpreted, applied, and approached differently in different settings' (Roberts et al. 2018, 3).

The same holds true for cultural heritage law. While international organisations such as UNESCO aim at the promulgation of universally applicable rules through the adoption of international conventions, the universality of these rules bely the diversity of their implementation in practice. This is partly the result of normative change, as international rules are translated to the domestic legal system and thereby are – in some cases quite literally – transformed. As Bortolotto et al. note specifically in relation to the principle of participation in the ICH Convention, cultural heritage law 'encounters existing understandings of heritage and participation, as well as specific political

and bureaucratic environments that exert direct impact on how the ideal is interpreted and localised' (2020, 70). Nor is this process necessarily a one-way street: cultural heritage law can influence state practice and the practice of other legal persons, even if the norm is not binding in and of itself (as is the case for 'soft law') or if the state has not ratified the convention in question (Cornu and Smeets 2020, 193).

At the same time, the twenty-first century has seen a reassertion by the state of its sovereignty, a trend that is particularly evident in the field of cultural heritage. Recent treaty practice of conventions such as the World Heritage Convention and the ICH Convention have shown that inscription of cultural heritage – particularly culturally contested cultural heritage – is one of the paths through which the state seeks to articulate its sovereignty (Aykan 2015). The relatively large amount of discretion granted to the state in many cultural heritage treaties means that the implementation of these conventions remains heavily dependent on the state and is often not justiciable before domestic courts (Vaivade 2020b, 199). As Hance notes, the state 'sets and controls the cultural and legal framework within which cultural holders evolve . . . the state's legal framework may present hurdles for heritage holders to defend their traditions in court, the first one being to establish their standing' (Hance 2020, 171). This presents particular issues if the state is at odds with certain minority or Indigenous groups whose heritage is protected by international law, raising fundamental questions about who is the ultimate beneficiary of cultural heritage law.

Notes

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1 Cultural heritage laws developed in the context of regional organisations, in particular the Council of Europe and the European Union, are beyond the scope of the present contribution. However, on the Council of Europe see Odendahl (2017); on the European Union, see Jakubowski et al. (2019).

2 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

3 Ibid., art. 27; International Law Commission. 24 October 2001. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*. Fifty-third session. UN Doc. A/56/10, art. 32.

4 That being said, the monism/dualism debate is as much an attempt to categorise the myriad ways that domestic actors receive international law in their day-to-day practice, as it is a normative debate on the possibility of a fully-fledged international legal order. As Nijman and Nollkaemper argue, the discussion surrounding monism and dualism emerged in the twentieth century as an expression of anxieties surrounding the 'proper' place of international law: as an extension of the will of the sovereign state, or as a shield protecting the interests of individuals against the power of the state (2007a, 6–9).

5 Bundesverfassungsgericht, 29 May 2007, ECLI:DE:BVerfG:2007:rk20070529.2bvr069507, para. 35.

6 Cf. Kaiser (2013), who distinguishes between 'direct effect' (to indicate international norms which can be invoked by private parties before domestic courts) and 'self-executing' treaties, which she equates to treaties with direct applicability. Furthermore, the phrase 'non-self-executing' is also sometimes used in strict dualist states to describe all treaties, which, by function of their status as international law automatically require implementing legislation (Hollis and Vázquez 2019, 472–473). As is evident, the precise definition of these terms remains unsettled.

7 The canonical codification of the sources of international can be found in article 38 of the Statute of the International Court of Justice, which mentions international conventions, customary international law, and general principles of law as the primary sources of international law. See: Statute of the International Court of Justice, 26 June 1945, 33 UNTS 933.

8 UNESCO. 2021. 'UNESCO Database of National Cultural Heritage Laws'. *UNESCO*. https://en.unesco.org/cultnatlaws, accessed 31 May 2021. For a similar database specifically focused on predominantly European countries, see: Compendium of Cultural Policies and Trends. 2021. 'Compendium of Cultural Policies & Trends'. *Compendium of Cultural Policies and Trends*. www.culturalpolicies.net, accessed 31 May 2021.

9 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 215, art. 23; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231, art. 17; Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151, chapter V; Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3, chapter V.

10 See e.g.: Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. 1 July 2011. *Model Provisions on State Ownership of Undiscovered Cultural Objects*. CLT-2011/CONF.208/COM.17/5; UNESCO. 2013. 'Model for a National Act on the Protection of Cultural Heritage'. *UNESCO*. https://web.archive.org/web/20210704210212/www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO_MODEL_UNDERWATER_ACT_2013.pdf, accessed 5 November 2023.

11 Inter-American Juridical Committee. 15 March 2013. *Model Legislation on the Protection of Cultural Property in the Event of Armed Conflict*. OEA/Ser. Q. CJI/Doc.403/12 Rev. 5; ICRC. 2015. *The Domestic Implementation of International Humanitarian Law: A Manual*. Geneva: ICRC, Annex XVIII.

12 A useful analogy is to examine the ministry to which the national UNESCO commission of the country in question is associated. In 2009, UNESCO undertook an analysis of all national commissions, finding that '60% of National Commission are affiliated with Ministries of Education; 14% with Ministries of Foreign Affairs; 13% joint Ministries (e.g. a Ministry of Education, Science and Research; a Ministry of Education and Culture; a Ministry of Culture, Youth and Sports; etc.); 7% with Ministries of Culture, and the remaining 6% are attached to various other governmental departments and agencies' (UNESCO 2009, 17). However, the ministry to which the national commission is affiliated is not necessarily also that to which the Permanent Delegation of the country in question is affiliated.

13 See e.g. the overview of the periodic reporting procedure under the 1954 Convention. As can be seen, a number of states have never submitted reports; the majority of other states have only submitted reports sporadically. UNESCO. 2021. 'Periodic Reporting'. *UNESCO*. https://en.unesco.org/node/343239, accessed 5 November 2023.

14 1954 Hague Convention, *supra* note 9, art. 28; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2254 UNTS 172, arts. 15, 21; Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 2562 UNTS 3, art. 17.

15 Second Protocol to the Hague Convention of 1954, *supra* note 14, arts. 16–18.

16 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 9, art. 6.

17 Ibid., art. 5; 1972 World Heritage Convention, *supra* note 9, arts. 5, 27; 2001 Convention on the Protection of the Underwater Cultural Heritage, *supra* note 14, art. 22; 2003 ICH Convention, *supra* note 9, arts. 13–14.

18 2003 ICH Convention, *supra* note 9, arts. 11–12.

19 For a recent overview on the incorporation of the 1970 Convention into domestic law, see: Subsidiary Committee of the Meeting of States Parties to the Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Review of National Reports submitted by the States Parties on the measures taken to implement the 1970 Convention (April 2019) C70/19/7.SC/6, 5–14.

20 Tribunal Administratif de Paris, 3 April 2013, *Fondation Franz Weber et autres*, No. 1115219 and 111577/7-1; Cour Administrative d'appel de Paris, 1 June 2015, No. 13PA02011.

21 Afdeling bestuursrechtspraak van de Raad van State, 14 December 2016, ECLI:NL:RVS:2016:3342, para. 5.3.

22 Federal Court of Australia, 1 September 1999, *Nulyarimma and ors v. Thompson*, [1999] FCA 1192, para. 217.

23 Ibid., para. 220. Similarly, in a case before the Federal Court of Australia concerning the construction of the Carmichael coal mine which would potentially damage the Great Barrier Reef – a World Heritage Site – the Court held that articles 4 and 5 of the World Heritage Convention 'give considerable latitude to State Parties' with regards to their implementation: Federal Court of Australia, 29 August 2016, *Australian Conservation Foundation Incorporated v. Minister for the Environment*, [2016] FCA 1042, para. 199.

24 Ernesto José Féliz De Jesús. 2008. 'Pleno, Sentencia del 9 de febrero de 2005, No 4, Juventud Nacional Comprometida, Inc and ors v. Dominican Republic, Cordero Gómez (Intervening) and ors (Intervening),

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25 High Court of Justice, 30 July 2021, *R (Save Stonehenge World Heritage Site Limited) v. Secretary of State for Transport*, [2021] EWHC 2161 (Admin).

26 See World Heritage Committee, State of Conservation of Properties Inscribe on the World Heritage List (21 June 2021) WHC/21/44.COM/7B.Add, 60–61.

27 *R (Save Stonehenge World Heritage Site Limited) v. Secretary of State for Transport*, *supra* note 25, para. 242 onwards.

28 Tribunal Administratif de Paris, 12 July 2016, No. 1520410/5-1.

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