# The Administration of Culture in International Law since the 19th Century
## A New Historical Narrative

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### Contents



## I. Introduction: A New Conceptual Framework: "Administering Culture"

When writing the history of legal concepts such as "world cultural heritage" or "cultural property" in international law, one faces interesting theoretical challenges today. The traditional narratives of this legal area have hardly integrated the colonial legacy and imperial ambitions that characterized the development of these legal concepts so far. The current debates about the restitution of cultural artefacts acquired in colonial contexts does not fit in the historiography of

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University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 121-153, https://doi.org/10.25365/vlr-2021-5-1-121.

this legal field. The controversies about the Humboldt Forum and the French restitution report by Felwine Sarr and Bénédicte Savoy indicate that there is a significant gap in the historical narrative of this legal field when it comes to the colonial past.[1] This article argues that our understanding of the history of the rules that led to the current system of international cultural heritage law is flawed and excludes important aspect that are left out because of the colonial Eurocentric perspective that mainly shaped this history.

The common history of cultural heritage protection suggests that the development of international legal rules was fundamentally driven by codification efforts of the laws of war and customary international law in Europe beginning in the 19th century.[2] Such a historiography perpetuates a narrative of progress, which portrays history as continued advancement and which leaves international legal doctrine and the (post-)colonial constellation of international law aside. The latest research in the field of the history of international law, however, contextualizes the development of legal doctrines in various ways.[3] It is against the background of these insights that this article aims to construct a new narrative of the legal history of cultural heritage protection.

In contrast to norm-centered approaches to the history of international law, the main argument of this paper is that regulations concerning cultural heritage emerged in a complex relation to the discourse of "civilization" in international law – with all its colonial implications.[4] "Civilization" was used as criterion to include and exclude countries or peoples from holding international legal rights in 19th and early-20th century international law. It was treated as a legal category, discussed in legal treatises and seen as a fundament of international relations. The legal protection of cultural heritage was embedded in this context of civilization (or culture, "Kultur") and its administration in international law. The principal purpose of this approach is to put the emphasis on the interdependence of the "standard of civilization" and (the legal understanding of) cultural heritage. This aims to adjust and reassess the current historiography of the legal field and highlight the importance of the colonial context in the development of legal norms.

The modern legal historiography of "cultural heritage protection" or "cultural property protection" is shaped by the legal concept of "protection". The often paternalizing idea of protection in cultural heritage law encompasses two different aspects that are sometimes also called "conservation": the prohibition of destruction and the regulation of exports, transfer, and

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[1] Felwine Sarr, Bénédicte Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics* (2018); the report can be accessed via http://restitutionreport2018.com/sarr_savoy_en.pdf.

[2] See e.g. John Henry Merryman, 'Two Ways of Thinking About Cultural Property' AJIL 80, 4 (1986), 831-53. Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford: Oxford University Press, 2007).

[3] For an overview, see Frederik Dhondt, 'Recent Research in the History of International Law' (2016) LHR 84, 313-34; Andreas von Arnauld (ed.), *Völkerrechtsgeschichte(n). Historische Narrative und Konzepte im Wandel* (Berlin: Duncker & Humblot, 2017).

[4] See e.g. the monographs of Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Oxford University Press, 1984); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Marc Pauka, *Kultur, Fortschritt und Reziprozität. Die Begriffsgeschichte des zivilisierten Staates im Völkerrecht* (Baden-Baden: Nomos, 2012); Ntina Tzouvala, *Capitalism As Civilisation. A History of International Law* (Cambridge: Cambridge University Press, 2020).



University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 121-153, https://doi.org/10.25365/vlr-2021-5-1-121.

trafficking of such items. The notions of "protection" and "world heritage" or "cultural property" itself are historical concepts. They developed in a certain theoretical and political context.[5] These words are not neutral and "protection" as well as "cultural heritage" are both terms that are used in the current discourse; using them for historical situations might lead to anachronisms. In contrast to focusing on "protection", I propose "administering culture" as a new perspective in thinking about the history of this legal area. It also aims at a more global approach by looking not just on "protection" and the Eurocentric international legal norms that were adopted for this aim. Therefore, the concept of "administering culture" also focuses on encounters between the global north with the south regarding cultural heritage and aims to include these phenomena in a new narrative for the legal field.

A legal justification for using the term "administration" instead of protection can be found in the usage of the word "administration" in international legal texts that have described the asymmetrical situation between polities or states in colonial situations for more than 100 years. The Covenant of the League of Nations mentioned it in its notorious article 22, which addressed the relation between the mandate powers and the mandate territories. After the First World War, the mandate powers, particularly France and Great Britain, were responsible for the administration of the former colonies of Germany but also territories that formerly belonged to the Ottoman Empire:

"Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the *administration* of the territory [...]. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council. The degree of authority, control, or *administration* to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council."[6]

After the Second World War, these provisions transformed into the trusteeship system of the UN Charter. The crucial provision was article 75, which stated: "The United Nations shall establish under its authority an international trusteeship system for the *administration* and supervision of such territories as may be placed thereunder by subsequent individual agreements."[7]

The term "administration" was used to describe the asymmetrical relation between an empire and a (former) colony in the context of the League of Nations and the United Nations. This terminology was also used in later times, for example in the so-called Friendly Relations Declaration, to describe the relation between the colonial power and the colony: "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and

[5] For further elaborations on this topic s. Sebastian M. Spitra, *Die Verwaltung von Kultur im Völkerrecht. Eine postkoloniale Geschichte* (Baden-Baden: Nomos, 2021).

[6] Covenant of the League of Nations, (accepted 28/06/1919, in force 10/01/1920) 225 CTS 195 [my italics].

[7] Charter of the United Nations, (accepted 26/06/1945, in force 24/10/1945) 1 UNTS XVI [my italics].



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distinct from the territory of the State *administering* it; [...].[8] The repeated usage of this term in the context of asymmetrical relationships that were initially based on the discriminatory "standard of civilization" justifies its adoption for the purpose of this project. There are similar patterns of administration with relation to cultural heritage.[9] Consequently, the legal sources also suggest the adoption of this new terminology when talking about phenomena concerning the administration of culture.

The use of the term "culture" instead of "cultural heritage" or "cultural property" emphasizes the fact that it was only in the second half of the 20th century that those terms were increasingly used in international legal discourse.[10] In addition, the language of "culture" refers to the connection between the hegemonic "standard of civilization" ("Kulturstandard") in international law and the development of legal concepts that refer to objects that were and are considered worthy of protection.[11]

## II. Repression and Emancipation in the Long 19th Century

The theoretical framework of administering culture can be applied particularly effectively to the long 19th century. It was a time in which international legal discourses became more sophisticated and their links to normative notions of culture and civilization became more distinct. What these international legal debates show is that since the 19th century, law has formed an important framework for the articulation of claims to cultural objects and the organization of their administration in colonial relationships. Although the laws were not always clear and legal relations were not at all times distinctly defined, the importance of the legal discourse for the debates around cultural assets persists until today.

The first major international legal discourses that entangled the standard of civilization and cultural or artistic objects can be traced back to the French Revolution of 1789. The narrative of civilization became important in attempts to legitimize the French appropriations of cultural and artistic assets from different countries, such as Belgium, the Netherlands, Italy, Egypt and several

[8] UNGA, Declaration on Principles of International Law Concerning Friendly Relations, A/RES/2625(XXV), Annex (24/10/1970) [my italics].

[9] It should also be stressed that the "standard of civilization" was also criticized by contemporaries, see e.g. Andrew Fitzmaurice, 'Scepticism of the Civilizing Mission in International Law', in Martti Koskenniemi, Walter Rech, Manuel Jiménez Fonseca (eds.), *International Law and Empire. Historical Explorations* (Cambridge: Cambridge University Press, 2017), 359-84.

[10] For the term cultural property (Kulturgut), see Sebastian Spitra, 'Recht und Metapher. Die treuhänderische Verwaltung von Kulturgut mit NS-Provenienz', in Olivia Kaiser, Christina Köstner-Pemsel, Markus Stumpf (eds.), *Treuhänderische Übernahme und Verwahrung - international und interdisziplinär betrachtet* (Göttingen: Vandenhoeck & Ruprecht, 2018), 55-69.

[11] See further Jörg Fisch, 'Zivilisation, Kultur', in Otto Brunner, Werner Conze, Reinhart Koselleck (eds.), *Geschichtliche Grundbegriffe*, vol. 8 (Stuttgart: Klett, 1992), 679-774.


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German states.[12] During the so-called Coalition Wars, the French term "barbaries" was created to distinguish the own "civilization" from the ones of the conquered states.[13] This reinforced their conviction in the superiority of their own civilization and legitimized the acquisition of cultural assets.[14] It is also not a coincidence that the Louvre was founded during that time and filled with masterpieces from several regions of the world.[15]

These acquisitions were based on the contemporary law of nations and sometimes on treaty provisions that were included in armistice or peace agreements.[16] However, criticism of these practices was also couched in a language of "civilization". The most eminent contemporary to formulate criticism of this kind was the French art historian Quatremère de Quincy, who is therefore sometimes referred to as the father of the world heritage idea.[17] He argued that the current public law of France should not fall back into the times of the antique Roman conquests and their *droit des gens*.[18] He instead implied that the "civilized" international law of Europe might exempt monuments and artworks of other countries from the right of the victor. However,

[12] For a good overview, see Edouard Pommier, *L'art de la liberté. Doctrines et débats de la Révolution française* (Paris: Gallimard, 1991).

[13] Pierre Michel, 'Barbarie, Civilisation, Vandalisme', in Rolf Reichardt, Eberhard Schmitt, Gerd van den Heuvel, Anette Höfer (eds.), *Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680-1820* (München: R. Oldenbourg Verlag, 1988), 7-50, p. 33.

[14] Elisabeth Fehrenbach, 'Nation', in Rolf Reichardt, Eberhard Schmitt, Gerd van den Heuvel, Anette Höfer (eds), *Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680-1820* (München: R. Oldenbourg Verlag, 1988), 75-107.

[15] Andrea Meyer, Bénédicte Savoy (eds.), *The Museum is Open. Towards a Transnational History of Museums 1750-1940* (Berlin: De Gruyter, 2014).

[16] See e.g. Treaty of Tolentino 19/02/1797, Article 8: „Le Pape livrera à la République Française cent tableaux, bustes, vases, ou statues, au choix des commissaires qui seront envoyés à Rome; parmi lesquels objets seront notamment compris le buste de bronze de Junius Brutus & celui en marbre de Marcus Brutus, tous les deux placés au capitole; & cinq cens manuscrits au choix des mêmes commissaires." See Georg Friedrich Martens, *Recueil des Principaux Traites d'Alliance, de Paix, d Trêuve, de Neutralité, de commerce, de limites, d'échange etc. conclus par les Puissances de l'Europe tant entre elles qu'avec les puissances et etats dans d'autres parties du monde depuis 1761 jusqu'à present*, vol. 6 (Göttingen: Dieterich, 1800), p. 640; and Friedrich Schoell, Christophe Koch, *Histoire Abrégée Des Traités de Paix Entre Les Puissances de l'Europe, Depuis La Paix de Westphalie*, vol. 4 (Paris: Gide, 1817), p. 355.

[17] See e.g. Barbara Genius-Devime, *Bedeutung und Grenzen des Erbes der Menschheit im völkerrechtlichen Kulturgüterschutz* (Baden-Baden: Nomos, 1996), p. 169; Christoff Jenschke, *Der völkerrechtliche Rückgabeanspruch auf in Kriegszeiten widerrechtlich verbrachte Kulturgüter* (Berlin: Duncker & Humblot, 2005), p. 121. Bénédicte Savoy, *Kunstraub, Napoleons Konfiszierungen in Deutschland und die europäischen Folgen* (Köln, Wien: Böhlau Verlag, 2011) pp. 205-6.

[18] Antoine-Chrysostôme Quatremère de Quincy, *Lettres sur Le préjudice qu'occasionneroient aux Arts et à la Science, le déplacement des monumens de l'art de l'Italie, le démembrement de ses Ecoles, et la spoliation de ses Collections, Galeries, Musées, &c.* (Paris: Desenne, 1796), p. 7.



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Quincy refrained from articulating a distinct position on this question,[19] but nevertheless his work was quickly translated into German.[20]

This episode marks the first prominent appearance of the "civilization" discourse in relation to the cultural objects and artworks that are considered to belong to one nation. In 1813, the French lawyer Claude-Louis-Samson Michel commented on the evolving debates on these legal questions: "One tends to think that it is easier today to conquer the whole of Europe than to reasonably reflect on the right of the victor."[21] This was, however, not the only encounter between a certain understanding of culture in international law and its relations to cultural objects in the long 19th century, but one of a whole series. The discourse of "civilization" became a venue to discuss questions of cultural objects or artworks in international law and vice-versa. This was particularly the case in the European colonies.

The following chapters illustrate the doctrinal shifts over the 19th century and contextualize this development within the administration of culture in colonial relations. The first chapter studies the change of legal concepts in this period. The legal discussions were intensifying at that time and a first area to observe these shifts was the laws of war. They reflected the rising importance of the concept of civilization and show that the current understanding of cultural heritage was not inevitable. The second chapter embeds the doctrinal developments into the administration of cultural assets in colonial and imperial relations. The legal concept of "civilization" was not only a justification to impose laws regulating cultural assets but also an instrument to take part in the discourse of civilization.

## A. Legal Concepts from the Laws of War: Shifts in Legal Doctrine

At the end of the long 19th century, The Hague conferences settled an agreement on the conduct of armed hostilities between states.[22] The legal debates on the status of cultural or artistic objects and monuments in the case of war were not inevitably leading up to the provisions of The Hague codifications. The discourses were rather diverse, which is also telling for the general history of international law at that time. This chapter focuses on two aspects of this "pre-history". On the one hand, it explores the shifts in legal doctrines and justifications for sparing or not sparing cultural objects and artworks in times of war. This also gives evidence of how the object was constructed and perceived in this period. On the other hand, these developments are embedded in the broader discourse and changing understandings of the laws of war at the time.

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[19] Quincy, *Lettres*, p. 32.

[20] Antoine Chrysostôme Quatremère de Quincy, 'Ueber den nachtheiligen Einfluß der Versetzung der Monumente aus Italien auf Künste und Wissenschaften' (1796) *Minerva*, 87-120, 271-309.

[21] Claude-Louis-Samson Michel, *Considérations nouvelles sur le droit en général, et particulièrement sur le droit de la nature et des gens* (Paris: Delaunay, 1813), p. 5: „[...] on est presque tenté de croire qu'il seroit aujourd'hui plus aisé de conquérir tout l'Europe, que de raisonner sagement sur le droit de conquête."

[22] For an overview over the conferences, see e.g. Jost Dülffer, *Regeln gegen den Krieg? Die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik* (Frankfurt am Main, Berlin, Wien: Ullstein, 1978).


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The first renowned author who addressed the issue of items that have a specific status in times of war and made a lasting impact on the 19th century legal debates was Johann Jacob Moser. He was the main representative of the "Reichspublizistik", which was the name for public law scholarship in the Holy Roman Empire in the 17th and 18th century.[23] Moser derived the status of cultural assets as inviolable from their status as property of the monarchic sovereign.[24] This understanding included not only residences, palaces or other sites, but likewise artworks and other cultural artefacts. His thoughts on monarchic sovereignty formed the point of departure for important German lawyers in the early 19th century, such as Johann Ludwig Klüber[25], Georg Friedrich von Martens[26] and Julius Schmelzing.[27] All three authors echoed the same justification for protecting cultural assets, emanating from the sovereignty of the emperor, as Moser had done before. This special position for items belonging to the monarch played a role in some treatises until the end of the 19th century, particularly in Karl Lueder's contribution to the important "Handbuch des Völkerrechts".[28]

The status of cultural objects – this term was not yet used at that time – was often discussed under the "right of the victor" at the time. Such a discussion on which objects can be acquired by the victor of a war can be found in the works of the French writers Malepeyre[29], Cotelle[30] and the German Kamptz.[31] A short while later, international legal discourse on this issue shifted to the right of booty in warfare. Jurists and international lawyers, such as the already mentioned Klüber[32],

[23] Stephan Wendehorst, 'Johann Jacob Moser: Der Reichspublizist als Völkerrechtler', in Stephan Wendehorst (ed.), *Die Anatomie frühneuzeitlicher Imperien. Herrschaftsmanagement jenseits von Staat und Nation: Institutionen, Personal und Techniken* (Berlin, München, Boston: De Gruyter, 2015), 303-24.

[24] Johann Jacob Moser, *Versuch des neuesten Europäischen Völker=Rechts in Kriegszeiten; vornehmlich aus denen Staatshandlungen derer Europäischen Mächten, auch andern Begebenheiten, so sich seit dem Tode Caiser Carls VI. im Jahr 1740. zugetragen haben*, part 9, vol. 1 (Frankfurt am Mayn: Barrentrapp Sohn und Wenner, 1779), p. 159.

[25] Jean Louis Klüber, *Droit des gens moderne de l'Europe*, vol. 2 (Stuttgart: J. G. Cotta, 1819), p. 397.

[26] Georg Friedrich Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage*, 3rd edn. (Göttingen: Dieterich, 1821), p. 478.

[27] Julius Schmelzing, *Systematischer Grundriß des praktischen Europäischen Völker=Rechtes*, vol. 3 (Rudolfstadt: Hof=Buch= und Kunsthandlung, 1820), p. 181.

[28] Karl Lueder, 'Das Landkriegsrecht im Besonderen', Franz Holtzendorff (ed.), *Handbuch des Völkerrechts. Auf Grundlage europäischer Staatspraxis*, vol. 4 (Hamburg: Verlagsanstalt und Druckerei A.-G., 1889) 369-544, p. 490.

[29] Léopold Malepeyre, *Précis de la science du droit naturel et du droit des gens* (Paris: Bachelier, 1829), p. 196.

[30] Toussaint Ange Cotelle, *Abrégé du cours élémentaire du droit de la nature et des gens* (Paris: Gobelet, 1820), p. 380.

[31] Karl Christoph Albert Heinrich Kamptz, *Beitrage zum Staats = und Völkerrecht*, vol. 1 (Berlin: Nicolaische Buchhandlung, 1815), p. 110.

[32] Klüber, *Droit des gens*, p. 397.


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G. F. v. Martens,[33] but also in following years Mohl,[34] Neumann,[35] Twiss,[36] Halleck,[37] Field,[38] Fiore[39] and Marqués de Olivart[40] placed doctrinal questions about cultural objects under the right of booty in their textbooks. Even the so-called Lieber Code 1863 was speaking about the booty on the battlefield when it regulated this legal question.[41]

In the course of the century, cultural assets were not only identified with their status as monarchic goods, but their doctrinal characterization changed several times. One of these modifications came around the middle of the century from Latin-American international lawyers.[42] The Chilean-Venezuelan jurist and diplomat Andrés Bello[43] and after him the Peruvian-Hispanic politician and diplomat José Maria de Pando firstly introduced the term „monumentos nacionales" in their international law textbooks.[44] With this category, they not only introduced the broader concept of monument in the legal discourse but also referred to the nation as the basis for its protection in war. Subsequently, international lawyers from other countries and continents, consciously or unconsciously, adopted this classification to justify a special legal status. For example, the British lawyer William E. Hall postulated that museums and collections were property of the nation.[45] This would also be the reason why they must not be annexed in war

[33] Martens, *Précis du droit des gens*, p. 478.

[34] Robert Mohl, *Encyklopädie der Staatswissenschaften* (Tübingen: Verlag der H. Laupp'schen Buchhandlung, 1859), p. 487.

[35] Leopold Neumann, *Grundriss des heutigen europäischen Völkerrechtes*, 2nd edn. (Wien: Wilhelm Braumüller, 1877), p. 119.

[36] Travers Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War* (Oxford: Clarendon Press, 1863), pp. 128-132.

[37] Henry Wager Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (New York: D. Van Nostrand, 1861), p. 451.

[38] David Dudley Field, *Outlines of an International Code* (New York: Baker, Voorhis & Company, 1872), p. 533.

[39] Pasquale Fiore, *Nuovo Diritto Internazionale Pubblico secondo i bisogni della civiltà moderna* (Milano: Presso la Casa Editrice e Tipog. degli Autori-Editori, 1865), pp. 417-8.

[40] Marqués de Olivart, *Tratado de Derecho Internacional Público*, vol. 2 (Madrid: Librería General de Victoriano Suárez, 1903), p. 190.

[41] 'Instructions for the Government of Armies of the United States in the Field. Prepared by Francis Lieber, Promulgated as General Orders No. 100 by President Lincoln, 24 April 1863' in Dietrich Schindler, Jiří Toman (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, 3rd edn. (Dordrecht: Martinus Nijhoff, 2004), pp. 3-20.

[42] For the innovative role of international lawyers in the "(semi)peripheries", see Arnulf Becker Lorca, *Mestizo International Law. A Global Intellectual History 1842-1933* (Cambridge: Cambridge University Press, 2014).

[43] For the life and works of Bellos, see Nina Keller-Kemmerer, *Die Mimikry des Völkerrechts. Andrés Bellos ‚Principios de Derecho Internacional'* (Baden-Baden: Nomos, 2018).

[44] Andrés Bello, *Principios de Derecho de Gentes. Nueva Edicion revista y corregida* (Madrid, Lima: Libreria de la Senora Viuda de Calleja é Hijos, Casa de Calleja, 1844), p. 200; José Maria de Pando, *Elementos del derecho internacional* (Valparaiso: Mercurio, 1848), p. 227.

[45] William Edward Hall, *International Law* (Oxford: Clarendon Press, 1880), p. 358.



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times. In his international law treatise, Daniel Gardner formulated this idea concisely as "national seizures of the property and dominion of other nations" are prohibited.[46] A bit later, Thomas Alfred Walker also expressed his thoughts on the topic in a similar manner and stressed the nation as the crucial reason to protect such goods.[47] The German-American Francis Lieber in his earlier writings distinguished different grades of binding cultural objects to the history and emotions of the nation and accordingly argued for different kinds of protection.[48]

In contrast to those authors that put the emphasis on the nation to legitimize the protection of cultural assets in times of war, there was also a number of international lawyers that discussed the universalism of artworks and cultural objects as the doctrinal reason for their safeguarding. This standpoint had already been put forward in 1796 by the above-mentioned Quatremère de Quincy, whose writings were widely read at the time. Particularly in Germany, two lawyers held this view and included it in their textbooks very explicitly. Friedrich Saalfeld limited the right to booty in his treatise by referring to artistic treasures, which he considered as the common property of all peoples ("Gemeingut aller Völker").[49] This also prohibits a plunder of such objects during war. Karl Salomo Zachariä extended this idea even further and wrote that a state having such an item on its territory holds it in trust for all peoples.[50] Such formulations of trusteeship are also discussed in international legal scholarship today.[51]

Another shift occurred in the last quarter of the 19th century. It was a modification in international legal discourse that has its lasting effects until today. Instead of national or universal cultural assets, the divide between public and private property was introduced into international legal discussions and was also substantiated in further codification efforts of the laws of war. As article 8 of the Brussels Declaration concerning the laws and customs of war from 1874 shows, the treatment of private property in war times emerged as the standard for those objects and monuments that are today considered cultural property: „The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property."[52] This differentiation between private and public property created a tension.

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[46] Daniel Gardner, *A Treatise on International Law* (Troy: N. Tuttle, 1844), p. 172.

[47] Thomas Alfred Walker, *A Manual of Public International Law* (Cambridge: Cambridge University Press, 1895), p. 144.

[48] Francis Lieber, *Manual of Political Ethics*, vol. 2 (Boston: Charles C. Little and James Brown, 1839), p. 663.

[49] Friedrich Saalfeld, *Handbuch des positiven Völkerrechts* (Tübingen: Verlag von E.F. Osiander, 1833), p. 223.

[50] Karl Salomo Zachariä, *Vierzig Bücher vom Staate*, vol. 5 (Heidelberg: akademische Verlagsbuchhandlung von C. F. Winter, 1841), p. 114.

[51] E.g. Sabine von Schorlemer, *Internationaler Kulturgüterschutz. Ansätze zur Prävention im Frieden sowie im bewaffneten Konflikt* (Berlin: Duncker and Humblot, 1992) p. 564; Craig Forrest, 'Cultural Heritage as the Common Heritage of Humankind: A Critical Re-Evaluation' (2007) *Comparative and International Law Journal of Southern Africa* 40, 1, 124-51; Francesco Francioni, Ana Filipa Vrdoljak. 'Introduction', in Francesco Francioni, Ana Filipa Vrdoljak (eds.). *The Oxford Handbook of International Cultural Heritage Law* (Oxford: Oxford University Press, 2020) pp. 1-9.

[52] 'Brussels Conference of 1874. Final Protocol. Signed at Brussels, 27 August 1874. Project of an International Declaration Concerning the Laws and Customs of War', in Dietrich Schindler, Jiří Toman, (eds.), *The Laws of*



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Private property was used as the reference point and was seen as the paradigm for the handling of these specific kinds of public property.

At the same time, the "right of the victor" to systematize the legal doctrinal debates declined and other classifications evolved during the 19th century. One important change in international legal discussions was the introduction of the more general concept of "rights of the belligerents against the enemy". Henry Bonfils termed it „Droits d'un belligérant contre l'Etat ennemi et sur le territoire ennemi"[53], while Johann Caspar Bluntschli chose to address questions regarding cultural objects under the title "rights of the war powers over hostile property and the property of peaceful persons in the enemy's territory" („Recht der Kriegsgewalt über das feindliche Vermögen und das Vermögen der friedlichen Personen im Feindesland").[54] Along similar lines, Karl Salomo Zachariä spoke of "rights in the course of war" ("Rechte während eines Kriegs").[55] Andrés Bello introduced the term „Of hostilities against the enemy's things in land warfare"[56] and Cushman Kellog Davis used „Of the nature and conduct of war – Effect on enemy's property"[57] to describe the rights and limits of the belligerents.

Although the titles and headlines under which the topic was discussed suggest far reaching powers for the belligerents, this was not necessarily the case. Even if authors placed such questions under telling rubrics, for example the "right of the victor", this did not automatically mean that an appropriation was allowed according to the law. However, the terms also encapsulated general viewpoints and provided a framework.

A paradigmatic change came at the end of the 19th century, when rights and duties of the occupant were introduced into the laws of war. The Brussels Declaration 1874 and the Oxford Manual 1880 contributed to this shift by introducing the category „On military authority over hostile territory"[58], which was several years later replaced in the Oxford Manual by merely „occupied territory".[59] These classifications were soon adopted by international lawyers from different

*Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, 3. edn. (Dordrecht: Martinus Nijhoff, 2004), pp. 21-8.

[53] Henry Bonfils, *Manuel de Droit International Public* (Paris: Arthur Rousseau,1894), p. 641.

[54] Johann Caspar Bluntschli, *Das moderne Kriegsrecht der civilsirten Staten* (Nördlingen: C.H. Beck, 1866), p. 27; Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (Nördlingen: C.H. Beck, 1868), pp. 351-2.

[55] Zachariä. *Vierzig Bücher vom Staat*, p. 111.

[56] Bello, *Principios de Derecho de Gentes*, p. 196: „De las hostilidades contra las cosas de enemigo en la guerra terrestre".

[57] Cushman Kellog Davis, *A Treatise on International Law including American Diplomacy* (St. Paul: Keefe-Davidson Law Book Co., 1901), p. 144ff.

[58] 'Brussels Conference of 1874. Final Protocol. Signed at Brussels, 27 August 1874. Project of an International Declaration Concerning the Laws and Customs of War', in Dietrich Schindler, Jiří Toman, (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, 3. edn. (Dordrecht: Martinus Nijhoff, 2004), pp. 21-8.

[59] 'The Laws of War on Land. Manual Published by the Institute of International Law (Oxford Manual). Adopted by the Institute of International Law at Oxford, 9 September 1880', in Dietrich Schindler, Jiří Toman, (eds.), *The*


University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 121-153, https://doi.org/10.25365/vlr-2021-5-1-121.

corners of the globe in the late 19th century, such as Lentner,[60] De Olivart,[61] Calvo,[62] Merignhac,[63] Oppenheim,[64] Ullmann[65] and Stockton.[66] This emerging new consensus in the doctrine of international law disseminated further over time. However, the entire 19th century's discourse had an enduring effect on the way of thinking about the subject and on the reasons for protecting cultural objects in international law.

Various topics that were first expressed during these times are recurring in current legal debates, such as the trusteeship concept or the global commons debates.[67] At the same time, the purpose of a special status for cultural objects also to a certain extent defined the scope of protection. National, universal or monarchic objects were always related to the historical understanding and could each just be certain items. The global legal discourse about these questions in the long 19th century was vibrant. Eventually, The Hague rules on the laws of war codified the latest understanding already expressed earlier in the Oxford Manual and as a result also canonized the academic discourses.[68] The legal conceptualization clarifies that private property was considered to form the protection standard which should be applied to these cultural objects. Something rather illustrative for the way the "civilization" discourse was framed and understood at that time.

## B. The Two Sides of "Civilization"

The special legal status of national collections, cultural objects and artworks materialized not only in international law but also in domestic legal codifications during the second half of the 19th

*Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, 3. edn. (Dordrecht: Martinus Nijhoff, 2004), pp. 29-40.

[60] Ferdinand Lentner, *Grundriss des Völkerrechtes der Gegenwart*, 2. edn. (Wien: Verlag von L. W. Seidel & Sohn, 1889), p. 78.

[61] Olivart, *Tratado de Derecho Internacional Público,* p. 190.

[62] Carlos Calvo, *Derecho Internacional téorico y práctico de Europa y América*, vol. 2 (Paris: Durand et Pedne-Lauriel, 1868), pp. 26-7.

[63] Alexandre Merignhac, *Les Lois et Coutumes de la Guerre sur Terre d'après le Droit International Moderne et la Codification de la Conférence de la Haye de 1899* (Paris: Librairie Marescq, 1903), p. 299; Alexandre Merignhac, *Traité de Droit Public International*, vol. 1/3 (Paris: Librairie Generale de Droit et de Jurisprudence, 1912), p. 466.

[64] Lassa Francis Lawrence Oppenheim, *International Law. A Treatise*, vol. 2 (London, New York, Bombay: Longmans, Green, and Co, 1906), p. 140.

[65] Emanuel Ullmann, *Völkerrecht* (Tübingen: J. C. B. Mohr (Paul Siebeck), 1908), p. 497.

[66] Charles Stockton, *Outlines of International Law* (New York, Chicago, Boston: Charles Scribner's Sons, 1914), p. 372.

[67] Rüdiger Wolfrum, 'Common Heritage of Mankind' Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009); the encyclopedia can be accessed via mpepil.com; Francesco Francioni, Ana Filipa Vrdoljak. 'Introduction' Francesco Francioni, Ana Filipa Vrdoljak (eds.). *The Oxford Handbook of International Cultural Heritage Law* (Oxford: Oxford University Press, 2020) pp. 1-9.

[68] Convention concerning the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, (adopted 18.10.1907, in force 26.01.1910) 205 CTS 277.


University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 121-153, https://doi.org/10.25365/vlr-2021-5-1-121.

century.[69] It was also at this time that the European empires were very active in imposing administration regimes concerning the cultural objects in their colonies. The colonial legal instruments were often an amalgam of public and private law norms that regulated the treatment of cultural assets. The enforcement of these laws varied and depended on different factors.

In the British crown colony of India, the Treasure Trove Act of 1878 intended to bring legal certainty on the property of treasures.[70] As the term already suggests, the word treasure did not refer to the cultural but the monetary value of these items. At the same time, the Archaeological Survey of India was founded to oversee and administer archaeological excavations and monuments.[71] Similarly to India, the French Governor General of the French colony Indochina established the archaeological mission *École française d'Extrême-Orient* to explore the territory.[72] The director of the *École* did not hold back when he justified the interest in Cambodian archaeological sites in terms of civilization: "it has risen to an eminent degree of civilization".[73]

It was the following year that the governor of Indochina issued a directive to regulate the conservation of the monuments in the colony.[74] The French authorities were responsible for classifying sites and movables if their protection lies in a (largely unspecified) public interest. This included the possibility of expropriating owners of property that was considered a site of archaeological value. In addition, French officials of the *École* took over the control of granting export licenses for cultural objects to individuals. In article 17 of the codification, it was made clear that as-yet undiscovered cultural objects were part of the French "domaine national en Indochine". Before this legal code, a directive already divided the French possessions into public and private domains and subdivided the latter into different categories, but all of them were considered national domains of France.[75] In fact, the French authorities thereby claimed the power to regulate all movable and immovable cultural objects of their colony in Indochina.

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[69] For an early overview, see Charles de Visscher, 'La Protection Internationale des Objets d'Art et des Monuments Historique' (1935) RDILC 16, 32-74, 246-88, pp. 36-46.

[70] Mudit Trivedi, 'On Taking from Others: History and Sensibility in Archaeologists' Arguments for Treasure Trove Legislations' (2019) *Public Archaeology* 17, pp. 110-36.

[71] Tapati Guha-Thakurta, *Monuments, Objects, Histories. Institutions of Art in Colonial and Postcolonial India* (New York: Columbia University Press, 2004), p. 4.

[72] 'Arrête du Gouverneur Général de l'Indochine portant règlement pour la Mission Archéologique d'Indo-Chine, 15/12/1898', (1899) *Journal Officiel de l'Indochine Française* 1, 99.

[73] Louis Finot, 'Rapport annuel du Directeur de l'École Francaise d'Extrême-Orient au Gouverneur général sur les travaux de l'École pendant l'année 1899', (1900) *Bulletin de l'École française d'Extrême-Orient*, 169-76, p. 169: "il s'est élevé à un degré eminent de civilization."

[74] 'Arrête du Gouverneur Général de l'Indochine sur la Conservation des Monuments et Objets ayant un Intérêt Historique ou Artistique', (1900) *Bulletin de l'École française d'Extrême-Orient* 1, 76-8.

[75] 'Arrêté portant définition et réglementation du domaine en Indo-Chine, 22/12/1899', (1900) *Bulletin officiel de l'Indochine française*, 47-52.

In a similar vein, in non-European empires such as Japan the standard of civilization was associated with the cultural objects in their colonies on the Korean peninsula.[76] Already in 1895, the colonial army of Japan in Korea received permission to start archaeological expeditions in its colony. This enterprise was important for Japan to ensure and give evidence of its "civilizational" superiority over the colonized.[77] This was also set up as a broader project to secure Japan's place in the imperial world hierarchy.[78]

At the same time, different states also used the tactics of imposing legal regulations for culture to take their share in the "discourse of civilization". This was mainly achieved by enacting new antiquity laws for administering the ancient past, by establishing national cultural institutions such as museums or libraries, and by concluding co-operations with European states on a cultural level. These states saw in those efforts a contribution to prove their status in the disputed discourse of civilization in international law.

Such establishments were founded in this spirit in Colombia[79], Costa Rica[80], Nicaragua[81], and Honduras[82] at that time. In addition, archaeological sites and ruins were declared national property in some of these countries. Bolivia declared the Inca sites at the Titicaca Lake national property and installed a specific excavation regime for such sites.[83] The Dominican Republic made the Alcázar de Colón, the palace built in the early 16th century under Diego Columbus, a national property.[84]

Reviewing these histories shows that the administration of culture was situated at the intersection of the "standard of civilization" and legal regimes for cultural objects and works of art. On the one hand, the domestic norms were directed at the international level and had its addressees not only within the respective state. On the other hand, the legitimation for the imposition of such norms on the side of the colonizing state was found in the international realm and the civilization

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[76] Hyung Il Pai, 'Resurrecting the Ruins of Japan's Mythical Homeland: Colonial Archaeological Surveys in the Korean Peninsula and Heritage Tourism', in Jane Lydon, Uzma Z. Rizvi (eds.), *Handbook of Postcolonial Archaeology* (Walnut Creek: Left Coast Press, 2010), 93-112.

[77] Koji Mizoguchi, 'Self-Identification in the Modern and Post-Modern World and Archaeological Research: A Case Study from Japan', in Miriam T Stark (ed.), *Archaeology of Asia* (Malden: Blackwell Publishing, 2006), 55-73.

[78] Hyung Il Pai, *Heritage Management in Korea and Japan. The Politics of Antiquity & Identity* (Seattle: University of Washington Press, 2013), p. 95.

[79] Colombia, Ley 34, 19/09/1892; the law can be accessed via https://en.unesco.org/cultnatlaws/list.

[80] Costa Rica, Decreto No. XXV, 23/07/1881; the law can be accessed via https://en.unesco.org/cultnatlaws/list.

[81] Nicaragua, Decreto se crea un archivo general, 07/07/1896; Nicaragua. Decreto se establece un museo industrial, 21/08/1897; the laws can be accessed via https://en.unesco.org/cultnatlaws/list.

[82] Honduras, Acuerdo por la fundacion de un museo nacional en Copan, 24/07/1889; the law can be accessed via https://en.unesco.org/cultnatlaws/list.

[83] Bolivia, Regimen legal de las ruinas de Tiahuanaco, 28/09/1906; Bolivia. Regimes de Excavaciones en Tiahuanaco, 11/11/1909; the laws can be accessed via https://en.unesco.org/cultnatlaws/list.

[84] Dominican Republic, Decree No. 4347, 03/12/1903, *Official Gazette* Nr. 1522.



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narrative of international law. These patterns persisted during the interwar period but experienced a first internationalization by the creation of the League of Nations and its related institutions.

## III. The First Internationalization in the Interwar Period

In the period between the two World Wars, the administration of culture in international law experienced its first phase of institutional internationalization. The mandate system of the League of Nations with its Permanent Mandates Commission installed a soft review and accountability mechanism for those states that were administering the mandate territories.[85] At first sight, these legal techniques in international law might not be deemed very effective, however, they led to new laws and more sophisticated regulations for those territories by the mandate powers. In addition, international legal discourse intensified within the new international institutions at the time.[86] Matters of legal regulation and conservation were discussed and resulted in new instruments, such as the Final Act of the Cairo Conference 1937.[87] At the same time, this period also saw some new codifications for the administration of culture by the colonial powers. It becomes clear that an imperialist mindset prevailed among the colonial administrators. In general, it was an ambivalent time for this field of law, which at the same time had high ambitions and experienced serious backlash.

### A. New Discourses and Institutions

The mandates system of the League of Nations and whether it was rather a means of colonization or decolonization is still assessed ambivalently today.[88] Also for the administration of culture at that time, such questions are not easy to answer. This study will focus primarily on the A-mandates and their administration. The international legal foundation for the regimes was the above-mentioned article 22 Covenant of the League of Nations.[89] The territories under the rule of the mandate powers were often described as a trust of civilization[90], a trusteeship relation[91] or an

[85] For an overview over the mandate system, see Susan Pedersen, *The Guardians. The League of Nations and the Crisis of Empire* (Oxford: Oxford University Press, 2015).

[86] Jean-Jacques Renoliet, *L'Unesco oubliée. La Société des nations et la coopération intellectuelle (1919-1946)* (Paris: Publications de la Sorbonne, 1999).

[87] Office International des Musées & Institut International de Coopération Intellectuelle, *Acte Final de La Conference Internationale Des Fouilles / Final Act of the International Conference on Excavations* (Paris: Office International des Musées, 1937).

[88] Cyrus Schayegh, 'The Mandates and/as Decolonization', in Cyrus Schayegh, Andrew Arsan (eds.), *The Routledge Handbook of the History of the Middle East Mandates* (London, New York: Routledge, 2015), pp. 412-9.

[89] Covenant of the League of Nations, (accepted 28/06/1919, in force 10/01/1920) 225 CTS 195.

[90] Quincy Wright, *Mandates under the League of Nations* (Chicago: The University of Chicago Press, 1930), p. 10.

[91] Daniel François Willem van Rees, *Les Mandats Internationaux. Le Contrôle International de l'Administration Mandataire* (Paris: Rousseau & Co, 1927), p. 8.; Fritz Bleiber, *Der Völkerbund. Die Entstehung der Völkerbundsatzung* (Stuttgart: Verlag von W. Kohlhammer, 1939), pp. 138, 167, 174.


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international collaboration ("internationale Arbeitsgemeinschaft").[92] The cultural and civilizational aspects of this relation were emphasized in these texts; however, a responsibility against the peoples under the mandate rule was strictly rejected by most international lawyers.[93]

It is therefore not surprising that the mandate treaties that were concluded between the League of Nations and the mandate powers were designed to ensure that other states that might have a cultural interest in the mandate would be treated equally as regards the administration of culture rather than to shield the cultural assets from foreign appropriation. A provision in the French mandate over Syria-Lebanon gives an illustrative example of that: „This law shall ensure equality of treatment in the matter of excavations and archaeological research to the nationals of all states members of the League of Nations."[94] The cultural heritage should be made available to all members of the League of Nations on equal terms. Other mandate treaties, such as the treaty of alliance between Great Britain and Iraq that was later recognized as mandate treaty, functioned in a similar way.[95]

The interrelation between "civilizational discourse" and the administration of culture within the permanent mandates commission was probably best demonstrated by the discussions following the bombing of Damascus during the interwar years. In 1925, French air force and troops struck down an insurgency in its mandate territory.[96] This was a humanitarian tragedy and the bombings also destroyed important ancient parts of the biblical city. The meeting of the permanent mandates commission in 1926 was devoted particularly to this incident.[97] Susan Pedersen stressed that the "standard of civilization" was invoked after these incidents by the mandate power and the commission to reassure the legitimacy of French rule in Syria.[98] This opinion is also supported by the contemporary commentary of US lawyer Quincy Wright.[99] Although he acknowledged the broad power of France to administrate the territory, Wright also argued that France had exceeded its authority in this case.

Therefore, Arnulf Becker Lorca focused his description of the events on the Syrian petitioners' effort to delegitimize the mandate rule by invoking the standard of civilization.[100] In addition to

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[92] Walter Schücking, Hans Wehberg, *Die Satzung des Völkerbundes* (Berlin: Verlag von Franz Vahlen, 1921), p. 53.

[93] See e.g. Schücking, Wehberg, *Die Satzung des Völkerbundes*, p. 434.

[94] League of Nations, Mandate pour la Syrie et le Liban, 12/08/1922, O.528.M.313.1922vi.

[95] Treaty of Alliance between Great Britain and Iraq, 10/10/1922, XXXV LNTS 14.

[96] For an overview of the events in the mandate, see Michael Provence, 'French Mandate Counterinsurgency and the Repression of the Great Syrian Revolt', in Cyrus Schayegh, Andrew Arsan (eds.), *The Routledge Handbook of the History of the Middle East Mandates* (London, New York: Routledge, 2015), 136-51.

[97] Permanent Mandates Commission, Minutes of the 8th Session (Extraordinary) including the Report of the Commission to the Council, 08/03/1926, C.174.M.65.1926.VI.

[98] Pedersen, *The Guardians*, p. 162.

[99] Quincy Wright, 'The Bombardment of Damascus', (1926) AJIL 20, No. 2, 263-80.

[100] Becker Lorca, *Mestizo International Law*, p. 296



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the destruction of important parts of Damascus, the petitioners brought up mismanagement of the antiquities and other failures and omissions of the French administration.[101] Either way, the discourse of civilization and its connection to the administration of culture was a crucial characteristic of legal claims at the time.

However, the mandate system was not the only forum that addressed the administration of culture within the League of Nations. The International Committee for Intellectual Co-operation was another organ that committed itself to matters of cultural heritage. After its establishment in 1922, the second session was chaired by Henri Bergson, the famous French philosopher, in the following year. It was suggested that an international convention concerning archaeological research and the publication of its results should be created.[102] The language of "civilization" was omnipresent in those debates. Bergson considered, for instance, whether the different "civilizational stages" among states would make it necessary to find differentiated security guarantees for their cultural heritage.[103]

Many more examples could be quoted, but the lesson from all this is that international institutions and regulations became an important forum for communicating and interpreting recent events and expressing an international consensus. It is also evident from the previously mentioned examples that the relationship in these debates was asymmetrical. The discourses were integrated in the contemporary international legal system with all its colonial and discriminatory aspects. The next chapter illustrates that this development of juridifying cultural administration was not only an international legal phenomenon, but also continued in the administration by colonial empires during the interbellum.

### B. Juridifications Outside International Institutions

In the year of the bombing of Damascus, Édouard Daladier, the colonial minister of France, wrote a report to the French president about Indochina in 1925:

> "In French Indochina, and subject to the rights of the sovereigns of the protected States, the buildings whose conservation presents, from the point of view of history or art, a public interest, are classified as historical monuments, in whole or in part, by the Governor General, on the proposal of the Director of the French School of the Far East. The protection of these treasures is a duty which is imperatively imposed on the French authority, not only in the territories of direct sovereignty, but also in those of protectorate."[104]

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[101] Permanent Mandates Commission, Minutes of the 8th Session, pp. 174-86.

[102] International Committee on Intellectual Co-Operation, Minutes of the 2nd Session, 01/09/1923, C.570.M.224.1923.XII., pp. 28-9.

[103] Ibid., p. 65.

[104] Le Ministre des Colonies, 'Rapport au Président de la République française, 23/12/1924', (1926) *Bulletin de l'Ecole francaise d'Extrême-Orient* 26, 526-7: "En Indochine française, et sous réserve des droits des souverains des Etats protégés, les immeubles dont la conservation présente, au point de vue de l'histoire ou de l'art, un intérêt



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These few lines contain the typical spirit that pervaded the administration of culture in the interwar period. Colonial empires were in some cases willing to accept certain responsibilities in relation to the colonies and even honored them rhetorically; however, the implementation depended on the goodwill and utility of the colonizing state. Still, this prompted the creation and refinement of legal frameworks for the administration of culture. In the Indochinese case, the emphasis on the sovereign rights of the protected states is noteworthy and reflected the French rules that were introduced in 1924. The basis for this new legal codification was the French law on historical monuments that was passed in 1913; the new law opened the way to extend its application from the mainland also to the colonies.[105] This was realized by a new order (*arrêt*). Articles 4 and 5 declared the sites and items national domains[106], another law transferred the property of seven important cultural sites to France, among them the famous temple site of Ângkôr.[107] Furthermore, the temple site of Ângkôr was transformed into an archaeological park by a new law to host tourists coming to the French colony.[108]

The juridification also continued in colonies whose cultural value might at first sight not have been considered significant. Sri Lanka, the former British colony Ceylon, received a so-called antiquity law to regulate the classification of monuments and archaeological explorations on the island in 1940.[109] In addition, with Senarath Paranavithanas, the first Sri Lankan was appointed as archaeological director to oversee the administration of the island's cultural heritage. In other British colonies, similar laws were introduced to administer the historical monuments of those countries. This was also done in small colonies such as in Mauritius, where an ordinance gave vast authorities to classify and acquire ancient monuments and also created guardianships for these objects.[110] Furthermore, other colonial powers applied similar instruments of regulation. In the Dutch colony of Indonesia, a statute to administer „goods which have to be deemed of great

public, sont classés comme monuments historiques, en totalité ou en partie, par les soins du Gouverneur général, sur la proposition du Directeur de l'École Française d'Extrême-Orient. La protection de ces richesses est un devoir qui s'impose impérieusement à l'autorité française, non seulement dans les territoires de souveraineté directe, mais également dans ceux de protectorat."

[105] Loi du 31 décembre 1913 sur les monuments historiques, (04/01/1914) *Journal Officiel de la République Francaise* 3, 129-32.

[106] Décret du Président de la Republique française, 23/12/1924, (1926) *Bulletin de l'Ecole française d'Extrême-Orient* 26, 529.

[107] Le Gouverneur général de l'Indochine, 'Arrêté classant parmi les monuments historiques de l'Indochine certains immeubles et objets mobiliers divers appartenant à l'État français, 15/04/1925', (1926) *Bulletin de l'Ecole française d'Extrême-Orient* 26, 546.

[108] Le Gouverneur général de l'Indochine, 'Arrêté créant le Parc Archéologique d'Angkor, 30/10/1925', (1926) *Bulletin de l'Ecole française d'Extrême-Orient* 26, 677.

[109] Antiquities Ordinance, No. 9 of 1940, (23/12/1940) *Ceylon Government Gazette* No. 8698, 1–3.

[110] Mauritius, Ancient Monuments Ordinance, 16.03.1944, the law can be accessed via https://en.unesco.org/cultnatlaws/list.


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interest for prehistory, history, art or palaeontology" was introduced in 1930.[111] According to the law, all export or excavation licenses were to be granted by Dutch authorities.

Impulses to juridify the cultural administration were not only promoted by the international institutions of that time but also by the colonial powers. In all these codifications, the conviction that it was only the culturally "advanced" state which could properly take care of the monuments in the colonies was inscribed into law. The "civilizational standard" was the legitimation for the legislation imposed on the colonies at that time.

## IV. The Second Internationalization After the Second World War

After the World War Two, the administration of culture in international law experienced a second internationalization on an institutional and juridical level. The United Nations Educational, Scientific and Cultural Organization (UNESCO) were founded in 1945 and international conventions concluded, such as The Hague convention on the protection of cultural property in armed conflicts 1954[112], the convention to prevent illicit import and export of cultural property 1970[113], the world heritage conventions 1972[114] or the convention on cultural diversity 2005.[115] But also the recently established United Nations Organization (UNO), the successor of the League of Nations, was used as a forum to discuss matters of the administration of culture, in particular restitutions. The decolonization and the increased membership of newly independent countries to this international institutions did not only open these venues for these issues, but international legal doctrine also started to increasingly reject the formal "standard of civilization" in international law.[116] Although these positive developments led to an international legal framework that is more apt to fulfill expectations of global justice, they did not erase all problematic structures. The following two chapters firstly focus on the world heritage convention and international governance mechanisms designed to curb criticism of this legal instrument. Secondly, the debates about the Humboldt Museum in Berlin and the French restitution efforts have triggered new legal and ethical discourses on the global justice of cultural heritage.

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[111] Indonesia, Statute 1931 No. 238, Decree of the Governor General No. 19 'Monuments Ordinance', 13/06/1931, the law can be accessed via https://en.unesco.org/cultnatlaws/list.

[112] Convention for the Protection of Cultural Property in the Event of Armed Conflict, (adopted 14/05/1954, in force 07/08/1956) 249 UNTS 240.

[113] Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, (adopted 14/11/1970, in force 24/04/1972) 823 UNTS 231.

[114] Convention concerning the Protection of the World Cultural and Natural Heritage, (adopted 16/11/1972, in force 17/12/1975) 1037 UNTS 151; Convention for the Safeguarding of the Intangible Cultural Heritage, (adopted 17/10/2003, in force 20/04/2006) 2368 UNTS 3.

[115] UNESCO Convention on the Protection and Promotion of the Diversity in Cultural Expressions, (adopted 20/10/2005, in force 18/03/2007) 2440 UNTS 311.

[116] For one of the most prominent formulations of that claim, see Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), p. 31.



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## A. Governing Culture in a Post-Colonial World: The Case of the World Heritage Convention

The world heritage convention is the flagship program of UNESCO. The history of its formation is ambivalent and illustrative of the transformative potential of international law at that time. The regulatory need for such a convention was explained in the *travaux préparatoires*. The frequently repeated historical narrative takes the rescue of Abu Simbel in Egypt from the threats created by the Aswan Dam project as the starting point for this international legal instrument.[117] This was considered to pave the way towards a new "international solidarity" that was intended to be codified by such a treaty.[118] However, the bargaining during the drafting process of the treaty let the project swing for a while between minimum interference in the national sovereignty of the state parties and the ambitious rhetoric of a duty of the international community towards the universal heritage.[119]

The different standpoints also materialized in three different convention drafts that were still open to discussion one year before the treaty was supposed to be adopted.[120] The International Union for the Conservation of Nature (IUCN) authored one draft for the UN Conference on the Human Environment in 1972 that mainly dealt with natural heritage, the UNESCO prepared one draft that principally addressed cultural heritage but also partly natural sites, and the U.S. submitted their own draft proposal. It was mainly after suggestions of the U.S. and the U.K. that the UNESCO became the only venue for the project.[121]

The three drafts all suggested different levels of interference with the sovereignty of the potential member states. The provisions of the IUCN were particularly far reaching and would have enabled the organs of the convention to award world heritage status even without the consent of the member state, formulate standards for it and withdraw the status in case these standards were not fulfilled.[122] The U.S. draft also allowed for some interference in the sovereignty of the states,

[117] UNESCO, Meeting of Experts to co-ordinate, with a view to their international adoption, Principles and scientific, technical and legal criteria applicable to the protection of cultural property, monuments and sites, 31/12/1968, SHC/CS/27, p. 18; UNESCO, Meeting of Experts to establish an international system for the protection of monuments, groups of buildings and sites of universal interest, 10/11/1969, SHC/MD/4, p. 15; UNESCO, Possible International Instrument for the Protection of Monuments and Sites of Universal Value, 22/04/1970, 84EX/14, p. 6.

[118] UNESCO, International Instruments for the Protection of Monuments, Groups of Buildings and Sites. 30/06/1971, SHC/MD/17, p. 6.

[119] UNESCO Possible International Instrument for the Protection of Monuments and Sites of Universal Value, 22/04/1970, 84EX/14, p. 18.

[120] UNESCO, International Regulations for the Protection of Monuments, Groups of Buildings and Sites – Final Report, 10/03/1972, SHC/MD/18 Add.1.

[121] UNESCO, International Regulations for the Protection of Monuments, Groups of Buildings and Sites – Final Report, 21/02/1972, SHC/MD/18, Annex 1, pp. 12-8.

[122] Draft Convention on the Preservation of the World Heritage, A/Conf.48/IWGC.I/3, 14/09/1971, pp. 2-4 (Article 2, 3).


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but it was more limited than the one by the IUCN.[123] It was also this preparatory text that initiated the grouping of natural and cultural heritage under one single convention.

Under the auspices of UNESCO, the interventionist drafts of the IUCN and the less invasive one of the U.S. were watered down to an international legal instrument that was very respectful of state sovereignty and gave great latitude to member states. For example, the world heritage committee did not get the right to award the world heritage status on its own but was made dependent on nominations by the member states.[124]

Although this system was very deferential to member states and was supposed to cushion claims of neo-colonial aspirations, postcolonial criticism against the system arose after it had been in place for a while.[125] Particularly, the world heritage inventory was accused of reflecting a Eurocentrism that resulted in a high overrepresentation of this continent on the world heritage list.[126] In numbers, this means that there are only 195 sites from the African continent (including the Arabic states) on the world heritage list, which comprises 1121 items in total. In comparison, 560 sites on the list are located in European countries.[127] Therefore, the structure of the legal instrument and its respect for state sovereignty transformed the postcolonial challenge into another form. Within its range, the world heritage committee tried to regulate the problem by applying the governance mechanisms that it had at its disposal as the principal institutional organ of the world heritage convention. As a consequence, the *Global Strategy for a balanced, representative and credible world heritage list* was elaborated.[128]

The change introduced different strategies for coping with the problem. This concerned foremost the bureaucratic process within the world heritage committee and the revision of the *Operational Guidelines*, which contain the criteria that sites have to fulfill in order to be awarded the world heritage status.[129] The procedural adaptations included a reformulation of the role of the tentative list. It now functions as an intermediate step before a site can be added to the world heritage list.[130] In addition, the maximum number of applications that were to be considered during a session of

[123] UNESCO, International Regulations for the Protection of Monuments, Groups of Buildings and Sites – Final Report, 10/03/1972, SHC/MD/18 Add.1, pp. 3-4.

[124] Convention concerning the Protection of the World Cultural and Natural Heritage, Article 11.

[125] See e.g. World Commission on Culture and Development, *Our Creative Diversity. Report of the World Commission for Culture and Development* (Paris: UNESCO, 1995), p. 178.

[126] For empirical studies on the world heritage list, see Sophia Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value. Value-Based Analyses of the World Heritage and Intangible Cultural Heritage Conventions* (Walnut Creek: Altamira Press, 2012); Bruno S. Frey, Paolo Pamini, Lasse Steiner, 'Explaining the World Heritage List: An Empirical Study', (2013) *International Review of Economics* 30, 1-19.

[127] See https://whc.unesco.org/en/list/ (as of June 2021).

[128] World Heritage Committee, Expert Meeting on the 'Global Strategy' and Thematic Studies for a Representative World Heritage List, 13/10/1994, WHC-94/CONF.003/INF.6.

[129] See e.g. Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, Operational Guidelines for the Implementation of the World Heritage Convention (1994), WHC.94/2/Revised.

[130] World Heritage Committee, *Report of the 24th Session*, 16/02/2001, WHC-2000/CONF.204/21.



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the world heritage committee was cut down to a total of 45 and a maximum of two for each state.[131] Moreover, a priority rule should allow a preferential treatment for the applications of states that have few or no world heritage sites within their territory. Another venue for revisions was the concept of "authenticity" in the Operational Guidelines that formed a crucial condition for being added to the world heritage list. After the Nara conference on authenticity in Japan, several changes were made to the text of the guidelines that aim for more sensitivity towards the context of heritage.[132]

The example of the world heritage convention shows that the international legal mechanisms are responsive to the criticisms and demands of non-western states; however, the evaluation of their efforts remains ambivalent. The new instruments of the world heritage convention have not been successful in mitigating the Eurocentrism of the heritage list. This has led to more regional efforts being taken to address cultural heritage issues.[133] Moreover, the world heritage convention did not prove suitable for addressing the colonial injustice of cultural property seizures. Although there have been repeated efforts within the United Nations to address this issue, no legal framework has yet emerged to mitigate this problem. The next chapter addresses the recent restitution debates and highlights the limits of law in addressing this matter.

### B. Restitutions and the Standard of Civilization

The restitutions debate was first placed on the agenda of international forums by the newly independent states during the period of decolonization. As Bénédicte Savoy points out in her recent book on the restitution efforts of African states for their cultural heritage, the West has mostly met the demands of the former colonial states with restraint.[134] At the same time, the increased legal debates in the former empires and colonized states give evidence of a changed awareness of colonial looted art. The public debate is a key driver for reforms and new legal constructions.

However, the current legal discourse about restitutions is still characterized by several uncertainties: First, there is uncertainty about the legal basis for restitution.[135] A plurality of potential legal foundations for the return of cultural heritage is discussed in the academic

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[131] World Heritage Committee, *Decisions Adopted at the 28th Session (Suzhou, China)*, 2004, WHC-04/28 COM/26.

[132] World Heritage Committee, The Nara Document on Authenticity, 21/11/1994, WHC-94/CONF.003/INF.008; Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, Operational Guidelines for the Implementation of the World Heritage Convention, 02/02/2005, WHC.05/2.

[133] Tim Winter, 'Beyond Eurocentrism? Heritage Conservation and the Politics of Difference', (2004) IJHS 20, No. 2, 123-37.

[134] Bénédicte Savoy, *Afrikas Kampf um seine Kunst. Geschichte einer postkolonialen Niederlage* (München: C.H. Beck, 2021).

[135] See e.g. Sebastian M. Spitra. 'Rechtsdiskurse um die Restitution von Kulturerbe mit kolonialer Provenienz', in Philipp Dann, Isabel Feichtner, Jochen von Bernstorff (eds.), *(Post-)Koloniale Rechtswissenschaft* (Tübingen: Mohr Siebeck, im Erscheinen).


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literature. Customary international legal arguments are advanced, as are human rights obligations, which are invoked to claim restitutions. Over the past decades, a broad canon of potential legal bases for the return of cultural heritage has been developed in scholarly writings.[136] This multitude of different legal possibilities, however, also shows that a clear legal definition of norms for restitution has not yet been established in the legal discourse.

Second, there is uncertainty to whom the objects should be returned.[137] This is particularly the case in multi-ethnic states that consist of indigenous peoples and minorities. The state and the indigenous population, which also directly holds certain rights under international law, might have conflicting interests regarding the cultural property. There are hardly any international legal instruments to remedy such conflicts. Moreover, in several cases it might also be an individual that requests the restitution of such objects.

Third, and connected with the last point, it is uncertain if such objects can be only claimed from public or also from private collections. As colonialism was not merely a state enterprise but also mainly largely sustained by private individuals, it is not only the state to whom restitution claims might be addressed. Addressing claims to private individuals comes with a lot of problems and difficulties within the current legal framework of private (international) law.

All these ambiguities are not resolved by the current approach to the history of cultural heritage law. The synopsis of the concept of civilization with the development of norms and the administrative regime, which has already been pointed out throughout the text, complicates the present historiography but also shows a way to consider today's ambiguities and uncertainties about the legal issues of restitution.

Historical research in recent years has shown that the legal assessment of acquisition contexts is often problematic. The uncertainties in today's legal questions around restitutions are reflections of the ambiguous past of this legal area. For example, the treatment of sovereignty and numerous related questions, such as the relationship between empire and colonized state, have in many cases not been clearly explicated by contemporaries. However, these points might be important for the evaluation of legal claims. Therefore, scholars, such as Matthias Goldmann, try to reconstruct the legal environment of the appropriations to formulate restitution claims. This research is referred to as legal provenance research.[138] It starts from the intertemporal character

[136] See e.g. Jeanette Greenfield, *The Return of Cultural Treasures* (Cambridge: Cambridge University Press, 2007); Matthias Goldmann, Beatriz v. Loebenstein, 'Alles nur geklaut? Zur Rolle juristischer Provenienzforschung bei der Restitution kolonialer Kulturgüter', in Thomas Sandkühler, Angelika Epple, Jürgen Zimmerer (eds.), Geschichtskultur durch Restitution? - Ein Kunst-Historikerstreit (Köln: Böhlau, 2021), 347-85.

[137] Jochen von Bernstorff, Jakob Schuler, 'Wer spricht für die Kolonisierten? Eine völkerrechtliche Analyse der Passivlegitimation in Restitutionsverhandlungen' (2019) ZaöRV 79, 553-77.

[138] Matthias Goldmann, Beatriz v. Loebenstein, 'Alles nur geklaut? Zur Rolle juristischer Provenienzforschung bei der Restitution kolonialer Kulturgüter', in Thomas Sandkühler, Angelika Epple, Jürgen Zimmerer (eds.), *Geschichtskultur durch Restitution? - Ein Kunst-Historikerstreit* (Köln: Böhlau, 2021), 347-85.


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of international law and focuses on the ambiguity of the contemporary legal situation.[139] The legal uncertainties should be filled with historically sensitive interpretation and foster a postcolonial perspective that unlocks legal claims for restitutions.

However, such an approach struggles to rectify the historical structural discrimination of non-European states and peoples by seemingly universal legal order. For this reason, the new approaches to the historiography of the administration of culture may translate into new legal instruments. In the past, restitutions were carried out based on bilateral contracts, on diplomatic negotiations or unilateral determination. The efforts to establish a global legal order of restituting cultural heritage that was transferred during colonialism did not lead to substantial outcomes in the past. Although this issue has been on the international agenda for a long time, the recurring claims and efforts by decolonized states did not materialize in international legal norms. These current constellations illustrate the ongoing deficiencies of the contemporary legal system in the administration of culture within which the restitution debates are a particular sensitive and contested issue. There are different domestic laws that obstruct practical solutions and international treaties that do not help to overcome the problematic condition of this legal field. Therefore, the language of ethics and global justice is today invoked as alternative normativity to deal with these situations. The last chapter elaborates on this point with the help of global justice studies.

## V. Conclusion: The Global Justice of Cultural Heritage Today

The administration of culture in international law was profoundly transformed in the course of the last century. The first and the second internationalization changed the legal framework and the understanding of cultural heritage. Recently, scholarship in global history and postcolonial studies have brought a better understanding of the ambivalences of this history.[140] Some of these aspects are even broadly discussed in the media today and the restitution of colonial plundered artworks and artefacts is probably one of the most debated topics relating to cultural objects nowadays.[141] It also becomes apparent that the legal framework is not sufficient to mitigate the perceived deficiencies of the present situation. This suggests a questioning of the ethics behind

[139] On the intertemporal character, see also Tania Fabricus, *Aufarbeitung von in Kolonialkriegen begangenem Unrecht Anwendbarkeit und Anwendung internationaler Regeln des bewaffneten Konflikts und nationalen Militärrechts auf Geschehnisse in europäischen Kolonialgebieten in Afrika* (Berlin: Duncker & Humblot, 2017).

[140] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000).

[141] Brigitta Hauser-Schäublin, Lyndel V. Prott, 'Introduction: Changing Concepts of Ownership, Culture and Property', in Brigitta Hauser-Schäublin and Lyndel V. Prott (eds.), *Cultural Property and Contested Ownership. The Trafficking of Artefacts and the Quest for Restitution* (London, New York: Routledge, 2016), 1-20.


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the existing norms and standards for the administration of culture in international law that is also spurred by a recent philosophical discourse on heritage ethics in a broad sense.[142]

The claims for repatriation come together with the demand to acknowledge the past colonial wrongs and sufferings of colonized peoples.[143] Recently, particularly with regard to Africa, such claims have been brought by several countries from this continent and by European scholars. In the eminent report of Bénédicte Savoy and Felwine Sarr for the French government, the authors argue for a return of more than 100 000 objects looted in Africa during colonial times.[144] Their assessment is combined with the claim for a new relational ethics in cultural heritage matters that emphasizes the shared history that culminates in the objects and its transfers in the past, presence and future. In light of this approach, the assertion of a nationality or origin of a cultural objects becomes secondary.

As it becomes evident from the example of Sarr and Savoy, there are several different values in the realm of heritage ethics that need to be measured and balanced against each other. Among them are values such as the universality and particularity (nationality) of cultural objects and their creators, the unity of collections, the accessibility and cultural continuity of these objects. The ethics of cultural heritage discuss and identify such values and principles, define the addressee of norms and consider its practical application. This helps to de-essentialize the common sense and assumptions about cultural heritage enshrined in legal norms, which are mostly shaped by Western understandings. Embedding the history of the administration of culture in the post-colonial context to promote a new critical narrative may lead to new "narrative norms" regarding the colonial past of cultural heritage.[145] These are norms that do not necessarily have to regulate technical details of restitutions or other critical fields of the administration of culture but enjoy public international authority and also provide a moral orientation for new domestic legislation. Starting from new narratives, the values and ethics of cultural heritage that take into account the postcolonial situation will hopefully find their way into law as well.

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[142] For a recent overview of the expanding field, see Erich Hatala Matthes, 'The Ethics of Cultural Heritage', 2018, Stanford Encyclopedia of Philosophy; the encyclopedia can be accessed via https://plato.stanford.edu/entries/ethics-cultural-heritage.

[143] Anna Krueger, *Die Bindung der Dritten Welt an das postkoloniale Völkerrecht. Die Völkerrechtskommission, das Recht der Verträge und das Recht der Staatennachfolge in der Dekolonialisierung* (Heidelberg: Springer Verlag, 2018); Matthew Craven, *The Decolonization of International Law. State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2007).

[144] Felwine Sarr, Bénédicte Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics* (2018); the report can be accessed via http://restitutionreport2018.com/sarr_savoy_en.pdf.

[145] Erik Jayme, 'Narrative Norms in Private International Law – The Example of Art Law', in *Collected Courses of the Hague Academy of International Law*, vol. 375 (Leiden, Bosten: Brill Nijhoff, 2014).



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