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Introduction

The global impetus to care for cultural heritage has never been as important as it is today. Cultural heritage as an area of concern – vital as it is for global peace,[1] sustainable development[2] and respecting the identities of peoples[3] – has been recognised by international organisations such as UNESCO since the 1950s. In recent years cultural heritage has had an augmented role on the international political and legal stages; it has been the subject of UN Security Council Resolutions,[4] the first G7 Meeting on Culture took place in 2017,[5] UNESCO's #Unite4Heritage initiative[6] and 2018 saw the EU's European Year of Cultural Heritage.[7]

The need to respond to the modern-day destruction of cultural heritage objects and places during times of conflict and to stop the circulation of decontextualised objects has been a leitmotiv of the twenty-first century. Museums in possession of cultural heritage objects, of which the original owners lost possession during dark historical events, face difficult questions about justice across the generations. In times of austerity, some publicly owned cultural heritage may be at risk of sale to the highest bidder – with an attendant loss to communities for whom it is important. The continued

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[1] Constitution of the United Nations Educational, Scientific and Cultural Organization (16 November 1945), Preamble and art. 1(1).

[2] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (A/RES/70/1), Goal 11.4 – 'Strengthen efforts to protect and safeguard the world's cultural and natural heritage'. In the context of Wales, sustainable development includes improving the cultural well-being of Wales: Well-being of Future Generations (Wales) Act 2015, s. 2. Cultural heritage was included in the Final Declaration of the UNESCO World Conference on Cultural Policies and Sustainable Development – MONDIACULT 2022.

[3] E.g. Universal Declaration on Cultural Diversity UNESCO 2001, art. 8, which describes cultural goods and services as 'vectors of identity, values and meaning'.

[4] Both in response to specific problems caused in wartime (UN Security Council Resolution 1483 (2003) and UN Security Council Resolution 2139 (2014) relating to Iraq and Syria respectively) but also more generally (UN Security Council Resolution 2347 (2017)).

[5] *Joint Declaration of the Ministers of Culture of G7 on the Occasion of the Meeting: Culture as an Instrument of Dialogue Among Peoples* (Florence, 30 March 2017): www.g7.utoronto.ca/culture/culture-2017-en.html (last accessed 15 May 2023).

[6] UNESCO, #Unite4heritage.

[7] Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018) OJ 2017 No. L131 20 May 2017, p. 1.

public display of statues commemorating historical figures may harm modern-day communities. These different areas of concern and contestation illustrate just some of the problems with which national and international legal systems must grapple.

As individuals, groups, as a nation or as humanity, there are strong feelings towards cultural heritage due to the links with these communities' history, religion or culture, often because it forms part of their identity. Harm to these objects, places and practices can cause harm to the community for whom they are important. However, harm can also be felt across borders, impacting communities or individuals further afield. International norms provide support for each individual's right to take part in cultural life. However, decisions about the appropriate course of action, particularly where conflicting views exist about why cultural heritage is important to different communities, pose challenges for domestic legal and non-law regulatory initiatives.

This book is not simply about the monumental or the prized possessions of the internationally renowned museum, but rather it is about all types of cultural heritage within the UK, which may be important to communities for often very different reasons.[8] In some circumstances the law seeks to protect cultural heritage from harm, facilitates it being passed down the generations or provides access to it, but on other occasions the law passes by without affecting how it is cared for. Instead, policy guidance from government or non-governmental organisations, ethical obligations agreed by professional bodies and imposed on their members, or other civil society initiatives may ensure that objects, places or practices are cared for, and memories are not forgotten. It is for this reason that this book adopts an integrated approach. It examines the variety of initiatives, nested within each other as practices of care, which deal with cultural heritage. The book thus provides a window on the way in which the UK, as a community, a network of communities and as part of the international community, cares for cultural heritage.

1.1 Scope of Enquiry

Often the very different and difficult questions about cultural heritage are dealt with in disparate ways and form the focus of different enquiries.[9] The way in which the UK cares for cultural heritage through formalised mechanisms has, on occasions, been separated along artificial lines.[10] Yet, at the

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[8] Cultural heritage is 'based on the diversity of the individual contributions of all human beings': Jukka Jokilehto, 'Human Rights and Cultural Heritage: Observations on the Recognition of Human Rights in the International Doctrine' (2012) 18 *International Journal of Heritage Studies* 226.

[9] In the context of international cultural heritage law, Lixinski has described these as 'sub-niches': Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford: Oxford University Press, 2019), p. 3.

[10] As to which, see Section 1.7.

heart of all of these difficult questions is a desire to care *for* cultural heritage because we care *about* it.[11] By approaching all cultural heritage through the lens of assessing how it is *cared for*, one can see how communities (local, national or international) recognise its importance, how they enjoy it and how they fulfil any responsibilities to current and future generations.

This book will show how, by focusing on the multivocality of decision-making[12] about how cultural heritage is cared for – through the multiple layers of law, formal guidance, ethical principles and civil society solutions representing nested practices of care – it is possible to navigate dissonance, in particular between conflicting viewpoints. By translating cultural heritage and its importance to different people into and out of legal language and engaging with how the instruments and decision-makers create communities of care, one can better understand the extent to which a community cares about cultural heritage and, in turn, cares for it. A central argument of the book is that the most appropriate way to analyse the extent to which cultural heritage is cared for is to focus on how legal and non-law (ethical) initiatives[13] provide the space to hear the different voices of the communities who care about cultural heritage – not only in decision-making in heritage management (following consultation), but also when resolving disputes about cultural heritage (when balancing different viewpoints) and seeking to resolve dissonance. These different activities of care, undertaken by varied communities of care, are analysed to determine whether the care provided by these nested practices of care is appropriate. Here, appropriate care is recognised as empathetic, respectful and dialogic. The book therefore seeks out the translations of the notion of cultural heritage and how its importance is imagined through embedding the human dimension[14] of cultural heritage into decision-making by creating communities of care. This book therefore takes an

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[11] See Ian Russell, 'Heritage, Identities, and Roots: A Critique of Arborescent Models of Heritage and Identity' in George S. Smith, Phyllis Mauch Messenger and Hilary A. Soderland (eds.), *Heritage Values in Contemporary Society* (Walnut Creek: Left Coast Press, 2010), p. 30 who suggests these as the two aspects of heritage.

[12] As to multivocality, see James Boyd White , 'Law and Literature: "No Manifesto"' (1987–8) 39 *Mercer Law Review* 739, 746.

[13] Use of the phrase 'ethical initiatives' in the title of the book was chosen to indicate the approaches found outside law which do not have a legally binding effect, but which detail how communities *ought* to act. These ethical initiatives can take a variety of different forms, beyond what might traditionally be considered as 'soft law'. Therefore, in addition to guidance and instruments with an obvious ethical basis, such as codes of ethics, the term 'ethical initiatives' also includes civil society initiatives and public participation initiatives (discussed in Section 1.5.3). To distinguish between these different elements, the rather ineloquent terminology of 'non-law instruments' will be used to encompass such guidance, ethical codes and other non-legally binding documents, whereas the terminology of civil society initiatives and public participation initiatives will be used for those more practical measures, as defined in Section 1.5.3.

[14] As to the human dimension of cultural heritage, see Section 1.2.

interdisciplinary approach in the manner entreated by the Council of Europe's Faro Convention on the Value of Cultural Heritage for Society of 2005.[15]

1.1.1 The Centrality of Care

The justifications for approaching cultural heritage through the framework of care are set out in the next chapter, along with the particular definition of care and its central elements. However, here is an opportune place to explain why the concept of care, specifically within the context of the ethics of care, is an appropriate lens through which to examine cultural heritage.

Unlike Continental systems of law, some of which have heritage codes,[16] the UK's system is multi-layered. It comprises commitments made in international law, national law (in the form of legislation, case law and local byelaws), and statutory and non-statutory codes of conduct and guidance, which all form nested practices of care. However, rather than adopting a regulatory approach investigating how the state and other institutions mandate appropriate treatment of cultural heritage, taking an approach based on care recognises the assumption of responsibility to look after something, particularly when it is at risk of harm. It therefore can take account of how people use the law and non-law processes as instruments to prevent harm to cultural heritage or to continue its use. Care, as an active process, which focuses on relationships and communities assuming responsibilities, provides an invaluable way of drawing together these varied systems.

The terminology of care is frequently used to refer to institutions having cultural heritage in their care.[17] However, the approach to care adopted in this book uses the term more widely to include how different viewpoints and needs are taken into account and how contested areas involving cultural heritage are navigated. These include grappling with issues of justice, memory and historical record, specifically responses to requests for restitution and the way in which cultural heritage is displayed and presented to the public.[18]

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[15] Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, Faro, entered into 1 June 2011) CETS 199.

[16] E.g. the French *Code du patrimoine* and the Italian Decreto Legislativo 22 gennaio 2004, m. 42 'Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137'.

[17] E.g. ICOM, *Code of Ethics for Museums* (revised 2004), in which 'Care of collections' is a subheading of principle II: 'Museums that maintain collections hold them in trust for the benefit of society and its development'. The National Trust for Scotland has 'Caring' as the first of its five values: www.nts.org.uk/our-work/our-manifesto-and-values (last accessed 20 December 2022). An early use of 'care' was the *Report of the Trustees and Director of the National Gallery on Requirements as regards the care and exhibition of the pictures and the additional space to be provided in the proposed enlargement of the gallery* (Presented pursuant to an Address of the House of Lords, dated 21 June 1869).

[18] This includes statues of those involved in the slave trade. See Section 9.8.

Care therefore extends beyond preservation, truth and access[19] and provides a dynamic framework which draws on law and other instruments to provide an holistic overview. Rather than pitting one person against another, the framework of communities of care set out here envisages respectful decision-making with participation and empathy, seeking to resolve dissonance.[20]

1.1.2 Cultural Heritage Rather than Cultural Property

'Cultural heritage' is the subject matter of this book, in preference to 'cultural property'. Adopting the terminology of 'cultural heritage' rather than 'cultural property' has several advantages. First, 'cultural property' frequently suggests the monumental[21] – what might be described as 'high culture'[22] – or those objects or places that a nation considers of vital importance.[23] It is infrequently used to refer to practices.[24] By contrast, 'cultural heritage' more fully reflects the varied ways in which cultural heritage is experienced and used. It therefore encompasses a greater variety of categories of objects, places and practices which a community might identify as cultural heritage[25] and which might not naturally fall within the categories of property.[26]

A second advantage of using the language of cultural heritage is that 'heritage' incorporates the notion of inheritance or passing cultural heritage

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[19] Which is what Merryman identified as the three elements of a cultural property policy: John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 *California Law Review* 339, 355.

[20] See Chapter 2.

[21] Certainly in the context of museums, it tends to be 'reserved for things whose loss would be felt most profoundly': Peter H. Welsh, 'The Power of Possessions: The Case Against Property' (1997) 21 *Museum Anthropology* 12, 15.

[22] Katya S. Ziegler, 'Cultural Heritage and Human Rights' in Giuffrè Milano (ed.), *Alberico Gentili: La Salvaguardia Dei Beni Culturali Nel Diritto Internazionale*, Working Paper No. 26/2007 (Oxford Legal Studies Research Paper Series, Faculty of Law, University of Oxford, 2007), p. 2: http://ssrn.com/abstract=1002620 (last accessed 20 December 2022).

[23] Lostal suggests that cultural property is used in international conventions to refer to objects important to one state, whereas cultural heritage is used to refer to those things of universal importance (nevertheless usually the importance of cultural property is linked to the 'cultural heritage' of the particular state party (e.g. UNESCO 1970): Marina Lostal, *International Cultural Heritage Law in Armed Conflict* (Cambridge: Cambridge University Press, 2017), p. 60; Sarah Harding, 'Value, Obligation and Cultural Heritage' (1999) 31 *Arizona State Law Journal* 292, 345.

[24] Usually traditional knowledge, traditional practices and genetic knowledge are categorised as intangible cultural heritage: see Noriko Aikawa-Faure, 'From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage' in Laurajane Smith and Natsuko Akagawa (eds.), *Intangible Cultural Heritage* (Key Issues in Cultural Heritage, London: Routledge, 2009), p. 15.

[25] See Abdulqaqwi Yusef, 'Cult of Cultural Heritage' in Francesco Francioni and Federico Lenzerini (eds.), *The 1972 World Heritage Convention: A Commentary* (Oxford: Oxford University Press, 2008), p. 31.

[26] E.g. folklore: Lyndel V. Prott and Patrick J. O'Keefe, '"Cultural Heritage" or "Cultural Property"?' (1992) 1 *International Journal of Cultural Property* 307, 319.

on to future generations.[27] This is 'central to the force of the term cultural heritage'[28] and is reflected in UNESCO's Declaration on the Responsibilities of the Present Generations Towards Future Generations under which present generations have the responsibility of transmitting our common heritage to future generations[29] and avoiding 'compromising it irreversibly'.[30]

Thirdly, to some people the term 'cultural property' has political connotations[31] which can side-track the debate by focusing on a nation's appropriation of objects, places or practices for its own ends. It also has a strong legal meaning[32] and its incorporation of 'property' demonstrates disciplinary imperialism,[33] often revealing the author to be a lawyer; it is thus a 'synthetic construction'.[34] Cultural heritage objects or places will often have the legal characteristic of being property, but that particular legal characteristic should not define the subject matter. It is putting the cart before the horse to call it cultural *property*. It may be that recourse is had to property rights and often it is difficult to avoid the property characteristic of cultural heritage (particularly when individual property rights are at odds with the public interest or communities' views). Indeed, Lixinski argues that a shift away from property to heritage 'has also had the (unintended) consequence of disassociating communities from heritage they live with or around, and for whose survival they are necessary'.[35] Whilst 'heritage' has a legal etymology in

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27 See Section 3.2.
28 Janet Blake, 'On Defining the Cultural Heritage' (2000) 49 *International and Comparative Law Quarterly* 61, 69.
29 Declaration on the Responsibilities of the Present Generations Towards Future Generations, UNESCO, Paris, 12 November 1997, art. 7 (Volume 1, Records of the General Conference, 29th session, Paris, 21 October to 12 November 1997). Note Lixinski's observation that whilst the 1997 Declaration focuses on the present and the future generations, it is silent about the past: Lixinski, *International Heritage Law for Communities*, p. 110. As Besterman observes, 'Museums are the custodians of an intergenerational equity which may extend well beyond local or even national boundaries': Tristram Besterman, 'Museum Ethics' in Sharon Macdonald (ed.), *A Companion to Museum Studies* (Oxford: Blackwell, 2006), p. 435; 'heritage should be cared for in order to hand on things that are valued to future generations': Deborah Mattinson, 'The Value of Heritage: What Does the Public Think?' in Kate Clark (ed.), *Capturing the Public Value of Heritage: The Proceedings of the London Conference* (London: English Heritage, 2006), p. 89.
30 Declaration on the Responsibilities of the Present Generations, art. 8; 'The fundamental policy behind cultural heritage law is protection of the heritage for the enjoyment of present and later generations'. Prott and O'Keefe, '"Cultural Heritage" or "Cultural Property"?', 309.
31 James Cuno, *Who Owns Antiquity? Museums and the Battle over Our Ancient Heritage* (Oxford: Princeton University Press, 2008), p. 9.
32 Charlotte Woodhead, 'A Critical Analysis of the Legal and Quasi-Legal Recognition of the Underlying Principles and Norms of Cultural Heritage' (thesis submitted for the degree of Doctor of Philosophy at the University of Leicester, April 2014).
33 See Section 3.4.2.
34 Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 *European Journal of International Law* 9, 10.
35 Lixinski, *International Heritage Law for Communities*, p. 27.

terms of inheritance,[36] and is indeed a term used to refer to land in Scots law,[37] the link with inheritance and passing down the generations is more closely aligned to the very characteristic which makes it cultural heritage – its inter-generational nature. It therefore avoids demonstrating a disciplinary imperialism to the same extent that referring to property does.[38] Certainly by using the word 'property' the focus of discussion frequently shifts to ownership, possession and allocation of resources, which can be unhelpful, leading to a dichotomy between, on the one hand, possessing or owning something, and on the other hand, not being able to do so. Cultural heritage, as a term, therefore 'has less ideological baggage in tow'.[39] Labelling something as cultural property can unhelpfully give the impression of possessive individualism,[40] which again has implications where long-term decisions are made where custodians other than the originating communities have possession. Much ill feeling has been caused by institutions relying on their strict legal rights as property owners or lawful possessors to avoid addressing challenges to their continued retention of objects.[41] For that reason it is helpful to refocus attention on the subject matter itself rather than its legal status. It is clear that the notion of property within the concept of 'cultural property' has on occasions been interpreted in a restrictive, and sometimes unhelpful way, without acknowledging the varied types of property relationships that can exist.[42] It should be acknowledged that some works have attempted to focus on the more varied types of property including stewardship and property for personhood[43] (as well as peoplehood[44] and grouphood[45]). Despite these valiant attempts to reframe the subject matter within more creative forms of property rights, the term 'cultural heritage' still provides far more advantages for the reasons given here. The fourth reason for preferring the terminology of

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[36]   Tim Murphy, 'Legal Fabrications and the Case of "Cultural Property"' in Alain Pottage, Martha Mundy and Chris Arup (eds.), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (Cambridge: Cambridge University Press, 2004), p. 132; Derek Gillman, *The Idea of Cultural Heritage* (Revised ed., Cambridge: Cambridge University Press, 2010), pp. 82–3; Ryan Trimm, 'Heritage as Trope: Conceptual Etymologies and Alternative Trajectories' (2018) 24 *International Journal of Heritage Studies* 465, 467.

[37]   The Law Society of Scotland, *Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: Butterworths, 1993). col. 18, Pt I, para. 56.

[38]   As to disciplinary imperialism, see Section 3.4.2.

[39]   Prott and O'Keefe, '"Cultural Heritage" or "Cultural Property"?', 309.

[40]   See Michael F Brown, 'Can Culture Be Copyrighted?' (1998) 39 *Current Anthropology* 193, 203.

[41]   This is explored in the discussion of areas of contestation in Sections 1.3 and 3.4 in the context of the uneasy relationship between law and heritage and challenges to the *status quo* by claimants.

[42]   For a refreshing approach see Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley, 'In Defense of Property' (2009) 118 *Yale Law Journal* 1022.

[43]   Jeffrey Douglas Jones, 'Property and Personhood Revisited' (2011) 1 *Wake Forest Journal of Law & Policy* 93, 120, 135.

[44]   John Lie, *Modern Peoplehood* (Cambridge, MA: Harvard University Press, 2004) p. 13; Carpenter et al., 'In Defense of Property', 1028.

[45]   See John Moustakas, 'Group Rights in Cultural Property: Justifying Strict Inalienability' (1989) 74 *Cornell Law Review* 1179.

cultural heritage is that it also avoids what has been described as the 'paradox' of cultural property.[46] This refers to the paradox of combining the static nature of property – which assumes that something 'belongs' to a particular group – with the more dynamic nature of culture.[47] This, in turn, results in real difficulties in recognising the diverse nature of those forms of cultural heritage which evolve over time, on occasions with contributions from people from different cultures.[48]

1.1.3 Cultural Heritage Rather than Heritage

At times reference is made to heritage in this book where the particular instrument or academic article uses the term, but the broad scope is concerned with cultural heritage, as distinguished from natural heritage.[49] At times there may be an artificial or indistinguishable difference between natural and cultural heritage, for example in the context of cultural landscapes,[50] but the primary discussion of this book will be cultural heritage and for that reason this terminology will be adopted.

1.2 The Importance of Cultural Heritage

Heritage, in its broader sense, has been described as 'an influential force in society'[51] which is 'deeply entwined with other aspects of our lives whether at an individual or a group level'.[52] It is 'not something to dispose of as a commodity but integral to our lives'.[53] Cultural heritage is something beyond the ordinary. It is acknowledged that at its simplest it may be property – a place,

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[46] Naomi Mezey, 'Paradoxes of Cultural Property' (2007) 107 *Columbia Law Review* 2004, 2005.

[47] ibid., p. 2005.

[48] ibid., p. 2005; Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (London: Penguin, 2006), p. 129. For the problems relating to hybrid works see Fiona Macmillan, 'Copyright, Creativity and Cultural Property Rights: The Case of Arts Festivals', Cultivate Working Paper No. 1 (2010) (HERA Joint Research Programme on Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property) 17.

[49] See generally David Lowenthal, 'Natural and Cultural Heritage' (2005) 11 *International Journal of Heritage Studies* 81. Cf. Lixinski, who adopts the terminology of heritage in preference to cultural heritage: Lixinski, *International Heritage Law for Communities*, p. 22.

[50] In the UK St Kilda in the Hebrides, the Blaenavon Industrial Landscape in Wales as well as the English Lake District, the Cornwall and West Devon Mining Landscape and the Royal Botanic Gardens, Kew are examples of cultural landscapes recognised through designation as such on the World Heritage List: https://whc.unesco.org/en/culturallandscape/ (last accessed 22 May 2023).

[51] Marie Louise Stig Sørensen and John Carman, 'Introduction' in Marie Louise Stig Sørensen and John Carman (eds.), *Heritage Studies: Methods and Approaches* (London: Routledge, 2009), p. 3.

[52] ibid., p. 23.

[53] David Lowenthal, 'Stewarding the Past in a Perplexing Present' in Erica Avrami, Randall Mason and Marta de la Torre (eds.), *Values and Heritage Conservation: Research Report* (Los Angeles: The Getty Conservation Institute, 2000), p. 23.

an object – or it may be a practice. Yet, it has characteristics which make it much more difficult to treat it simply as property.[54] It has been described as 'the contents of humanity's social portfolio'.[55] Cultural heritage has a further role, specifically the importance that it represents to certain people.[56] This may be because of its importance for the individual, community, nation or humanity's identity,[57] or there may be a significant link between cultural heritage and a place.[58] Cultural heritage is often said to have a significance which comprises different types of value.[59] It is therefore clear that cultural heritage has a significant human dimension[60] which 'brings to life community aspirations'.[61] The relevant community may be local, national, or international; cultural heritage can have a universal value which is recognised as a common heritage.[62] Even if communities have no first-hand experience of the cultural heritage, there may be a feeling of common concern for the heritage and a feeling of shared loss if that heritage is at risk of harm or is

[54] 'In all, viewing cultural property and cultural heritage as a distinct, more worthy form of property, whose transmission must be assured, is the particular feature that, along with its specific discrete principles, defines the set of international laws concerning cultural heritage as international cultural heritage law and distinguishes it from other branches of international law': Lostal, *Armed Conflict*, p. 63.

[55] Susan B. Bruning, 'Articulating Culture in the Legal Sphere: Heritage Values, Native Americans and the Law' in George S. Smith, Phyllis Mauch Messenger and Hilary A. Soderland (eds.), *Heritage Values in Contemporary Society* (London: Routledge, 2016), p. 223.

[56] See James Leach, 'Owning Creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea' (2003) 8 *Journal of Material Culture* 123, 136.

[57] David Lowenthal, *The Past is a Foreign Country* (Cambridge: Cambridge University Press, 1985), p. 41; Bruning, 'Articulating Culture in the Legal Sphere', p. 221; James O. Young, 'The Values of the Past' in Geoffrey Scarre and Robin Coningham (eds.), *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology* (Cambridge: Cambridge University Press, 2013), p. 34; Fiona Macmillan, 'The Protection of Cultural Heritage: Common Heritage of Mankind, National Cultural "Patrimony" or Private Property?' (2013) 64 *Northern Ireland Legal Quarterly* 351, 363; Blake, 'On Defining the Cultural Heritage', 77; Lisanne Gibson and John Pendlebury, 'Introduction: Valuing Historic Environments' in Lisanne Gibson and John Pendlebury (eds.), *Valuing Historic Environments* (Farnham: Ashgate, 2009), p. 2.

[58] There is also a close link between identity, community and place – see Rosemary Coombe, 'Possessing Culture: Political Economies of Community Subjects and their Properties' in Veronica Strang and Mark Busse (eds.), *Ownership and Appropriation* (Oxford: ASA Monographs, Berg, 2011), p. 111. The relationship between Indigenous Peoples and place is recognised in the United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007)) 61/295 2008, art. 12.

[59] These are explored at Section 4.3.1.

[60] See generally Francioni, 'The Human Dimension of International Cultural Heritage Law', 9; Francesco Francioni and Lucas Lixinski, 'Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage' in Andrea Durbach and Lucas Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses* (Oxford: Hart, 2017), p. 17.

[61] Francioni and Lixinski, 'Opening the Toolbox', p. 34.

[62] Christopher C. Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) 35 *International & Comparative Law Quarterly* 190, 199. Note Macmillan's caution that 'History shows us that it is not possible to decouple cultural heritage from particular identities, national, communal or otherwise': Macmillan, 'The Protection of Cultural Heritage', 363.

destroyed.[63] The Nubian campaign of 1959–1980 shows this. The active response from around the world, in an age without rolling news or social media to rally support to save cultural heritage from physical destruction,[64] showed the importance of the cultural heritage to others, even though these places and monuments may never have been viewed first-hand by those stepping forward to help. Due to the strong human dimension, it is therefore essential that the people(s) for whom cultural heritage is important are central to decision-making about cultural heritage.[65] The concern of those who care about and care for cultural heritage (and, in turn, cultural heritage law) is therefore not only the physical *thing* itself (most usually the object or place) but also the practice and the intangible element of cultural heritage.

1.2.1 As an Intangible Concept

Increasingly cultural heritage is treated as an intangible concept[66] in the form of a 'cultural practice, involved in the construction and regulation of a range of values and understandings' rather than something promoting 'a certain set of Western elite cultural values'.[67] It is 'less of an objective, physical existence than the range of associations which accompany an object or monument and which provide the sense of being part of a group'.[68] 'Cultural heritage is value' rather than the object, place or practice. It is thus ' . . . the importance itself'[69] and legal regimes aim to protect this importance. In essence 'it is the significance of the expression in the social life of a community that is, or should be, the policy focus of heritage protection, according to contemporary wisdom'.[70] For it is the human response to objects, places or practices which justifies our particular treatment of them and thus the intangible dimension of them[71] and in particular the desire to protect them from harm, which can be understood as

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[63] Darvill refers to this as the existence value: Timothy Darvill, 'Value Systems in Archaeology' in Malcolm A. Cooper, Anthony Firth, John Carman and David Wheatley (eds.), *Managing Archaeology* (London: Routledge, 1995), p. 43.

[64] This co-ordinated effort to salvage and to save from physical destruction key elements of the Nubia culture has been hailed as 'a defining example of international solidarity when countries understood the universal nature of heritage and the universal importance of its conservation': UNESCO Press release, *50th Anniversary of Nubia Campaign* (31 March 2009): https://whc .unesco.org/en/news/497/ (last accessed 20 December 2022).

[65] See Section 5.3.   [66] Laurajane Smith, *Uses of Heritage* (London: Routledge, 2008), p. 11.

[67] ibid., p. 11.   [68] Blake, 'On Defining the Cultural Heritage', 84.

[69] Craig Forrest, *International Law and the Protection of Cultural Heritage* (London: Routledge, 2010), p. 3.

[70] Rosemary J. Coombe and Joseph F. Turcotte, 'Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy' in Christopher B. Graber, Karolina Kuprecht and Jessica C. Lai (eds.), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham: Edward Elgar, 2012), p. 275.

[71] Artefacts can 'often provoke memories' and are 'sensed through our bodies': John Urry, 'How Societies Remember the Past' in Sharon Macdonald and Gordon Fyfe (eds.), *Theorizing Museums* (Sociological Review Monograph Series, Blackwell, 1996), p. 50 and 'seeing certain . . . artefacts functions to reawaken repressed desires and thereby to connect past and present': ibid., p. 55.