Cultural Heritage as Intergenerational Equity in International Law

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Around the world there are myriad peoples and cultures with each enjoying its own specific slot in the cultural jungle we call the planet Earth. These cultures contribute their own unique perspective to the global discourse and just like how all humans are innately equal, each distinctive way of life with all of its customs and traditions merits equal contribution the global heritage. In this paper I will first present the notion of cultural heritage and provide a review of the various legal doctrines that have been created with the intent of clearly defining the various forms of cultural heritage. Then I shall review the various protective measures in place for the safeguarding of cultural heritage and follow with an analysis of these doctrines as they relate to cultural heritage within the framework of the notion Intergenerational Equity (IGE). Last, I will conclude by offering novel interpretations of international law that suggest more effective means to protect the priceless value that cultural heritage adds to the Global Commons.

History and Definition of Cultural Heritage

The notion of the protection of cultural property is not a new idea. The father of International law, Hugo de Groot (Grotius) believed, "that reason compelled the sparing of 'those things which, if destroyed, do not weaken the enemy, nor bring gain to the one who destroys them,' such as 'colonnades, statues, and the like,'" which we now know are defined as cultural heritage. [1, p. 6] In conjunction with the evolution over centuries of "international diplomatic and humanitarian law, both the international community and international law began to accept

the concept that in times of armed conflict, important immovable cultural property - such as works of art, as well as museum, library and archive collections and the institutions caring for these items - were entitled to respect and protection from both direct acts of war, and associated risks, particularly looting and acts of vandalism." [2, p. 1]

The first formal conference addressing the specific need for protection of cultural property during periods of armed conflict convened at The Hague in 1954. The result was the adoption of *The Convention for the Protection of Cultural Property in the Event of Armed Conflict*. The 1954 Hague Convention defines cultural property as "movable or immovable property of great importance to the cultural heritage of every people." More specifically, the Convention includes protections for archaeological sites, archives, museums, large libraries, historic city centers, religious or secular monuments, individual works of art, books, scientific collections, and other objects of artistic, historical or archaeological interest." [3] This definition presents a good example of the awareness of the present's responsibility to the future, or the present owing a certain cultural equity to future generations.

Moving forward in time from 1954, at the 1972 World Heritage Convention, "the predominant concepts within the framework of international instruments that dealt with culture or the protection of cultural heritage, was the concept of cultural property. (This) basically implied the existence of private property rights as compared to the notion of cultural heritage, which we could say involved the need to preserve an historical inherited asset for future generations." [4] So what began as the recognition of a need to protect groups of specific "monuments, groups of buildings and sites" evolved, through the intergovernmental committee of experts, and through the confluence of several instruments including the protection of natural resources - defined as natural features, geological and physiographic formations, and natural sites

- into one international umbrella concept of cultural heritage. [5] These elements are considered to be inseparable from the definition of cultural heritage within the Convention.

Furthermore, this notion of one single instrument to cover natural and cultural heritage was a break from previous United Nations Educational, Scientific and Cultural Organization (UNESCO) doctrines, which to that point, had only dealt with the concept of moveable cultural objects. It also had several forward-looking properties. The first was linguistic where "the word heritage implies the need to preserve an historical asset for future generations and the obligation of present generations to safeguard and protect such as asset," again revisiting the notion of intergenerational obligations. The second is more functional in which "the use of the word heritage widens the scope of the subject matter to be protected, opening it to the possibility of encompassing not only physical elements of culture but also intangible elements as well as the relationship of humans to cultural objects." With the third forward-looking property of the 1972 World Heritage Convention, there is the creation of a value judgment where, as opposed to property, the notion of heritage implies the existence of a value which potentially transcends national boundaries and may, as a consequence, be of interest to humanity as a whole and deserve protection on the international level." [4] Moreover, it is this notion of cultural heritage which transcends it's original use in the Convention of 1972 that has become the 'expression of choice' employed in "all conventions dealing with cultural heritage." [id.]

This brings us to the notion of *outstanding universal value* which is used as a qualifier with respect to "all the elements that compose the notion of cultural heritage," which helps to understand what constitutes an object of *outstanding universal value* and should therefore be protected under the Convention." [id.] Once an object - previously defined as either an item of natural heritage or cultural heritage - is identified by a country as meriting consideration as an

object of World Heritage, it is the concept of *outstanding universal value* that shapes the determination by the international World Heritage Committee as to whether or not said object should be inscribed to the list of World Heritage sites. Moreover, through various scientific learnings within different domains (archaeology, anthropology, ethnology, and others) since the 1972 Convention, the notion of cultural heritage not only applied to individual objects in isolation, but rather on multidimensional groupings "which demonstrated in spatial terms the social structure, ways of life, beliefs, systems of knowledge, and representations of different past and present cultures in the world." [id.] This widened global strategy, which enriched the notion of cultural heritage, was then integrated into the assessment of properties considered for the World Heritage list.

The expanded scope enabled the evaluation of "temporal, spatial, and social dimensions of cultural heritage" establishing the globally recognized authenticity and integrity of a "representative, balanced and credible World Heritage list" worthy of collective protection. The strategy was to enshrine more value in and be more reflective of the manifestations of *outstanding universal value* found in myriad cultures. [id.] Over time the application of these definitions ultimately led to the development of additional conventions designed to protect other intangible elements of cultural heritage (2003 UNESCO Convention for the Safeguard of the Intangible Cultural Heritage) such as cultural diversity (October 2005, UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions) and underwater natural heritage (2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage). [5]

Protection of Cultural Heritage

Why do we have an obligation to protect cultural heritage? To answer this question, one only need look to the diverse manifestations of cultural heritage and their variability over time

and space, which has led to the emergence of a more solid link between the universal values attached to cultural heritage and the need to protect and promote cultural diversity. One can find a clear expression of this link in several articles of the UNESCO Universal Declaration on Cultural Diversity. [20] Article Three mentions how "cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence." Moreover, in Article Four of the same, "the defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity," and Article Seven refers to the fact that "creation draws on the roots of cultural tradition, but only flourishes in contact with other cultures." This is the reason why cultural heritage in all its forms must be preserved, enhanced, and handed on the future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire a genuine dialogue among cultures. But the most critical piece of this Convention is found in Article Five, which mentions that "cultural rights as an enabling environment for cultural diversity Cultural rights are *an integral part of human rights, which are universal, indivisible and interdependent*." (emphasis added). [id.]

What policies, then, are required of a state in regards to the protection of cultural heritage? International declarations, resolutions, conventions and other doctrines abound with considerations for the needs and rights of future generations. In the preamble to the *Declaration on the Responsibilities of the Present Generations Towards Future Generations* we find that "the responsibilities of the present generation towards future generations have already been referred to in various instruments such as: (1) The Convention for the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of UNESCO on. 16 November 1972;

(2) The United Nations Framework Convention on Climate Change; (3) The Convention on Biological Diversity, adopted in Rio de Janeiro on 5 June 1992; (4) The Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development on 14 June 1992; (5) The Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights on 25 June 1993, and; (6) The United Nations General Assembly resolutions relating to the protection of the global climate for present and future generations adopted since 1990. [6, 5, 7, 8, 9 respectively] Specific to the need to protect cultural heritage and cultural diversity, the Declaration states:

> With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations.

Of particular, and growing, importance was the decision of the 1954 Intergovernmental Conference to follow Common Article 3 of the 1949 Geneva Conventions, and extends the protection of cultural property beyond the traditional definition of 'war' into the difficult area of internal armed conflicts, such as civil wars, 'liberation' wars and armed independence campaigns, and - probably - to major armed terrorist campaigns. In particular, Article Nineteen outlines two important rules: (1) In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to the respect for cultural property; (2) The parties to the conflict shall endeavor to bring

into force, by means of special agreements, all or part of the other provisions of the present Convention. [2]

Moreover, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 offers additional protections in Chapter 3 (10) whereby cultural property may be placed under enhanced protection provided that it meets the following three conditions: (1) It is cultural heritage of the greatest importance for humanity (as defined by the World Heritage Committee); It is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection, and; (3) It is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

What's more, according to Article 11 (9) of the Second Protocol "upon the outbreak of hostilities, a Party to the conflict may request, on an emergency basis, enhanced protection of cultural property under its jurisdiction or control by communicating this request to the Committee." But where The Second Protocol provides for real and effective protection of cultural heritage is in Chapter 4 (Articles 15 & 16). Here we find the definition of violations of the Protocol including the measures a state must take to "establish as criminal offenses under its domestic law the offenses set forth in this Article and to make such offenses punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules of extending individual criminal responsibility to persons other than those who directly commit the act." [10]

Cultural Heritage as Intergenerational Equity

Above, I outlined the history, definition of and protections for cultural heritage. What I propose next is an evolution not just in international law, but specifically within what is understood as Intergeneration Equity (IGE). The majority of law surrounding this notion centers on the environment and the passing on of the planet Earth to future generations in at least the same condition in which the current generation received it. The principle of IGE, developed by Professor Edith Brown Weiss in her 1989 book, *In Fairness to Future Generations,* "holds that presently existing human beings are simultaneously beneficiaries of a Planetary Trust passed down from our ancestors, and trustees of the planet for the benefit of future generations." [11, p. 322] The idea of an intergenerational trust is ancient (with) jurists and scholars tracing it back to the laws of the Abrahamic faiths. Further, Professor Brown Weiss points out that in the Judeo-Christian tradition, "God gave the earth to his people and their offspring as an everlasting possession, to be cared for and passed on to each generation." [12, citing *Genesis* 1:1-31, 17:7-8] Professor Weiss elaborates "that we, the human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations. As members of the present generation, we are both trustees, responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves." [13, p. 20] Within this framework, which necessarily incorporates the needs of future generations, there are several perspectives on how to address IGE, from justice to human rights to politics. These perspectives will be discussed in more detail below.

The premise of IGE gives us three categories of intergenerational obligations for protection of the Planetary Trust: first is the principle of *conservation of options* (defined as conserving the diversity of the natural and cultural resources base), second is the *conservation of quality* (defined as leaving the planet no worse off than received), and third is the *conservation of*

access, (defined as equitable access to the use and benefits of the legacy). [11, p. 322] These principles are derived from each generation's position as part of the intertemporal entity of human society and provide a normative basis for the concept of sustainable development. [13, p. 23] They also satisfy the basic criteria of balance, flexibility, cultural acceptability, and clarity. According to Weiss Brown, "one criterion is to balance the needs of the future generations with those of the present, neither licensing the present generation to consume without attention to the interests of future generations nor require it to sacrifice unreasonable to meet indeterminate future needs." [14, p. 617]

As Weiss Brown mentions, the principles of *options, quality,* and *access* form the set of intergenerational obligations and rights, which one could refer to as planetary rights held by each generation. "Intergenerational rights, or planetary rights, may be regarded as group rights, rather than individual rights" which "exist regardless of the number and identity of individuals making up each generation." [id.] While some critics have argued that these rights can hardly be enforced due to lack of jurisprudential precedence or methodological means of measuring change over time, there are international regimes currently in place that do provide a sound methodology. [15, p.2] Within the issue area of environmental protection, there are several examples of international doctrines that specifically address the notion of IGE, such as the Antarctic Treaty System, developed in 1959, [16] The Aarhus Convention [17], The Villach Conference, The Vienna Convention for the Protection of the Ozone Layer [18], The U.N. Framework Convention on Climate Change [m] and the U.N. Millennium Declaration. [19] Furthermore, the Conventions on Cultural Heritage discussed above provide clear protection and enforcement mechanisms.

How then does International Law provide mechanisms by which cultural heritage can be protected? From a judicial perspective we can look to examples where the principle of IGE has been successfully adjudicated in a court of law. In the Philippines, the Supreme Court ruled on a landmark case based specifically on the protection of cultural heritage – as previously defined to include natural heritage - through the principle of IGE*, Minors Oposa v. Factoran, 1993*, where the Court found that "every generation has a responsibility to the next to preserve that rhythm and harmony." [21] In the decision, JR Davide declared:

"Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for succeeding generations, file a class suit. *Their personality to sue in behalf of succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned* (emphasis added). Such a right, as hereinafter expounded, considers the 'rhythm and harmony of nature.' Nature means the created world in its entirety. Such rhythm and harmony indispensably includes, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's ... resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligations to ensure the protection of that right for the generations to come." [id.]

As ruled above, which echoes Professor Brown Weiss' aforementioned principles, the legal "personality of succeeding generations," alternatively known as intergenerational equity or intergenerational justice, can and is upheld in the highest court of the land in the Philippines. It is from this perspective that I propose a novel approach in the legal basis for the definition of IGE, which stems from the accepted definition of the Precautionary Principle. One version of the Precautionary Principle cited most often in the U.S. can be found in a statement from Wingspread Conference of 1998, namely:

> "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically." [22]

It is this threat of harm to human health that I will focus on here. More specifically, as defined by the Oxford English dictionary, the term 'health' is: (1) the state of being free from illness or injury, or: (2) a person's mental or physical condition. Accordingly, the health of an organism is determined to be free from illness or injury, or even more narrowly defined, as being free from irreparable injury. What's more, as defined in the Convention Concerning the Protection of the World Cultural and Natural Heritage, "Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the World Heritage of mankind as a whole." [5] Moreover, as stated in Article Twenty-Eight of the Universal Declaration of Human Rights, which entitles everyone "to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized." [6] They include the right to equitable and sustainable development, the rights of self-determination movements, and the right to a *healthy environment*, to security, and to peace. The argument

proceeds that it is the sum of the parts that is determined to be the cultural heritage, or equity, owed to future generations and consequently, the premise on which legal personality, as witnessed in the case above, can be established for adjudication in a court of law. Moreover, precedent is found in the myriad cases worldwide where a judge ruled *ex aequo et bono*. Clearly, one may conclude that the concept of equity is a source of international law.

In closing, I propose that the notion of cultural heritage be welcomed into the open arms of the larger global issue of environmental concerns. Whether the ecosystems of the world are being damaged through increasing temperatures, decreasing nutrients in the oceans, encroachment of deserts, recession of glaciers, or any other environmental hazard, the damage done to World Heritage sites should be of equal concern. If the Earth is harmed through mankind's actions, it is not just the natural environment that is being affected. What then can be done? Other legal doctrines have enjoyed a great amount of success at achieving the goal of a broadly written doctrine applying to all states acceding to said doctrine. For example, on the subject of the seas, which are arguably the most important source of intergenerational equity on the planet, the legal process by which the myriad states achieved a working result, namely, a doctrine they could all voluntarily agree to, proceeded in such a way that a consensus could be achieved. Regarding the United Nations Convention on the Law of the Sea (UNCLOS) and the conferences leading up to its adoption, there was a mandate "to achieve one 'package deal,' not a series of separate treaties, and this linkage increased the leverage of developing counties..." [22] Moreover, "the conference was governed by consensus; the search for consensus could be determined to have failed only by a two-thirds vote of those present and voting (with a quorum of a majority of participating states). [23, p. 653] Various "states have agreed on the advantages of adhering to the regime" yet the question remains, if George Scelle's dédoublment fonctionnel

- “the idea that states have accepted that the consequences for undercutting the regime would inure to their detriment, as other states would respond to violations in ways that would hurt the original violators” - is an explanation as to why adherence is so high, why then is there so much difficulty in achieving consensus in other issue areas? [id.] Let us then follow the successful model found in the UNCLOS and ensure a rich and long lasting cultural heritage for all current and future generations to experience and enjoy.

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