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Why do archaeologists need international law?

By Leonard de Wit

Dear archaeologists of Europe, I love you all very much, but most of you have no idea of what international law is all about. Although many of you have high - or at least some - expectations on what international law can do for you. Especially in this room, because you showed up for a session called 'A roadmap towards a global convention'.

So I thought, I 'd better start this lecture with some explanation on the very essence of international law. And then move on to the key question what international law can do for us. Then elaborate a bit on what might be a good strategy to undertake some action regarding international cooperation. We might end up with "a road map towards a global convention". But I wouldn't be too optimistic about that. Before drawing such a roadmap it might be wise to give some thoughts on the need of a new global convention. What do we want to achieve?

In order to make you familiar with the principals of international law I chose to highlight three historical events dated in 1648, 1885 and 1946. I start in the 19th century.

In 1884 and 1885, at the invitation of Otto von Bismarck, first Chancellor of a unified Germany, an international conference was held in Berlin. Its outcome, the General Act of the Berlin Conference, can be seen as the formalization of the so called 'scramble for Africa'. The conference was held in a period of heightened colonial activity by European powers, which eliminated most existing forms of African autonomy and self-governance. In 1885 the European powers divided the whole continent, even though in large parts of this continent no European had ever set a foot upon. Still the Berlin-lines became reality soon enough.

And after the period of decolonization we ended up with a fundamentally changed organization of African society. In general: a tribal based order had been replaced by a nation based system.

The recent elections in Kenya show that this is not without problems. Tribal forces are still relevant.

But on the other hand. The Africa football cup shows that the process of national building has become quite vivid.

We are used to it, and we find it quite normal,... but it is only since a relatively short period of time that the world order, our world community, is organized through a nation based system. This being in itself a system territories .

This modern state system was a European invention. When we go back in history this system is more or less invented in 1648 at the peace treaties of Westphalia (hosted by the cities of Munster and Osnabruck), thus ending the devastating 30 year war which raged throughout Europe.

In the literature on the development of international law it is generally accepted that in 1648 European powers agreed upon a new system of political order, later called the Westphalian sovereignty. This being based upon the concept of co-existing sovereign states. Inter-state aggression was to be held in check by a balance of power.

The key principles of the Peace of Westphalia were: acknowledgement of the territorial sovereignty of States and the fundamental right of political self-determination, including the choice of religion. And a norm was established against interference in another state's domestic affairs

As we will see, matters of war and peace have always been the main driver for the making of international law. The bloody 30 year war had such an impact and had such big disadvantages for all parties, that the minds were set and ready for something else. Actually the negotiating parties thought that these principles of non-interfering with each other would prevent us from have these terrible wars. History proved otherwise.

So we are stuck now with this nation based system. And as with all systems. This is not perfect. We have something to

repair. There are certain matters which cannot be dealt with within this system. These repair actions are actually the *raison d'être* of international law. I know there are nationalist movements who deny the necessity of international law. They are wrong. There are things in life you simply cannot deal with, when you want to stick within the borders of some territory. Large or small.

Whenever I ask my students at Leuven University the question why we have international law, they always come up with very fine ideals which help us moving toward a better world. It is a good thing that they react that way. Actually, they should react that way. Certainly at that age. But the truth is much more down to earth.

When you travel from one country to another, when you make a phone call or send a post card, when you buy a foreign product, when you import goods, you should realize, this is possible because there are rules that make it so. In this room right now are many nationalities present. There are rules that facilitate this. In fact that is the first answer to the question "why do archaeologists need international law". Well, because everybody needs international law. You needed it to come to Maastricht, and listen to what I have got to say. The mere existence of national states and international relations, of whatever kind, entails the existence of international law. As the ancient Romans knew, wherever there is a society, there will be law. *Ubi Societas, ibi jus*.

The absence of a single overarching authority is perhaps the most noteworthy characteristic of international law. We don't have a world government.

Okay. Now it's time to switch to another important event in history. It's pretty well known under the name World war II. This war and the postwar period gave a tremendous push to the development of international law. Actually it looks a bit like an explosion of international law. More than we can handle.

As you know the most important international organizations in the field of heritage protection are UNESCO and on a European scale the Council of Europe and the EU. Let's focus on them.

The founding of these international institutions are a reaction to WWII. But it is a different reaction than had been done in previous times. This I find fascinating and spectacular. And unique in history. Think about UNESCO. The *United Nations Educational, Scientific and Cultural Organization*.

Talks about the need for such an organization went on during the war, and it was agreed upon during a conference in San Francisco in the spring of 1945. The world was still in a big turmoil and at that moment in time the allied parties thought of an international organization whose aim is to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through soft values like education, the sciences, culture. Think about that. In the year 1946 the treaty on the founding of UNESCO was signed.

Another event took place in the same year. A well-known British leader of the conservative party held his famous speech to the academic youth of the University of Zurich: "*I wish to speak to you to-day about the tragedy of Europe.... There is a remedy which ... would in a few years make all Europe ... free and ... happy. It is to re-create the European family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe. ... The first step is to form a Council of Europe*

Read this speech. And I assure you...these quotations are not out of context as Mr. Nigel Farage is trying to convince us of.

This idea was brought further through conferences like the one in The Hague 1948, chaired by Churchill (watch his speech on YouTube) and because there was a new kind of political will all over Europe.

Men like Winston Churchill, Konrad Adenauer, Robert Schuman, Alcide de Gasperi, Jean Monnet, Paul Henri Spaak. They chose to overcome differences and feelings of hate and revenge. And

they knew that if they would connect the economies of their nations, that the chance of another war would be less. A first step

The European Coal and Steel Community (ECSC) was an organization of (at first) 6 European countries to regulate their industrial production under a centralized authority. The ECSC was the first international organization to be based on the principles of supra-nationalism, and started the process of formal integration which ultimately led to the Maastricht treaty that we are celebrating today and to the European Union as we know it today. In fact this forms a step away from the non-interfering principles of Westphalia. Voluntary Nations handed over a piece of their sovereign powers to an international organization. For the benefit of all.

The ECSC was first proposed by French foreign minister Robert Schuman as a way to prevent further war between France and Germany. He declared his aim was to *"make war not only unthinkable but materially impossible"*.

So we entered into a long process toward connecting the economies of the European nations, toward a common market.

Churchill's initiative led in 1949 (in London) to the founding of the Council of Europe. Right now this is an international organization whose stated aim is to uphold human rights, democracy, rule of law in Europe and promote European culture. It has 47 member states, and covers approximately 820 million people.

Unlike the EU, the Council of Europe cannot make binding laws (it lacks this supra-national power), but it does have the power to enforce select international agreements reached by European states on various topics. Doing so the council of Europe has been playing a pioneering role in making international agreements on the protection of soft values like nature and heritage. Keep this in mind. The Council of Europe is the home base of the Valletta treaty. As the main objectives of the Council are human rights, democracy and rule of law, we should always ask ourselves how do we connect to these values.

So what our EAA President Felipe Criado-Boado writes in his candidates statement makes sense. He wrote that EAA, amidst the current complex geometry and problems of Europe, must foster the ideal of trans-European values, exchange, solidarity, communication and openness. He is thus making a connection with the ideals of post war Europe. That is where we find the legitimation of our international agreements on archaeology. Let's cherish them. This is one of the reasons that – as a member of EAA, I gave my vote to Felipe Criado-Boado .

I won't bother you too much with the theory of international law, but it is good to know that we see a clustering of 5 reasons for international cooperation and international law. All of them are relevant for us as well.

1. War & peace / use of force / law of armed conflict
2. The seas, the air and outer space
3. Economics / trade
4. Protecting the environment
5. International criminal law / Human rights

The most relevant international treaties on heritage are:

UNESCO conventions:

- Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954)
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970
- Convention concerning the Protection of the World Cultural and Natural Heritage 1972
- Convention on the Protection of the Underwater Cultural Heritage 2001
- Convention for the Safeguarding of the Intangible Cultural Heritage 2003
- Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005

As you can see they more or less all match with the cluster of 5 reasons for international law

Conventions of the Council of Europe:

- Convention for the Protection of the Architectural Heritage of Europe (Granada, 1985)
- European Convention on the Protection of the Archaeological Heritage (Valletta, 1992)
- European Landscape Convention (Florence, 2000)
- Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 2005)
- Convention on Offences relating to Cultural Property (Nicosia, 2017)

As we celebrate 25 years of the Valletta or Malta convention I have to pay some attention to it. Yesterday Jos Bazelmans mentioned that it is the most successful (or most influential) heritage convention of the Council of Europe. I think he is right and I am using the same phrase quite a lot. But this statement is probably more based on feelings than on facts. The truth is that we simply don't know how this piece of international law is working out in the 45 countries which ratified. The Council of Europe has the task to have an eye on this, but they don't have the resources to do so.

A couple of weeks ago I took the trouble in rereading the text of the convention and the explanatory report. I must say at some articles it has gone a little bit out of date. Today we might have used other words. But in general I think it is still pretty good and useful. And you always can read the Faro convention which came on top of it and gave new meaning to the old heritage conventions.

These above mentioned conventions are usually called hard law. This means conventions or treaties that are legally binding between sovereign states.

Next to that we have an overwhelming amount of so called soft law declarations, resolutions, charters, codes of conduct, guidelines, (and yes) roadmaps, agenda's, strategic plans etc. etc. regarding the importance of heritage. The term "soft law" refers to quasi-legal instruments which do not have any legally binding force.

I hope that I am not offending somebody, but the Icomos Lausanne charter for the protection and management of the archaeological heritage (1990) which is mentioned in the introduction text of this session, was new for me.

This illustrates an important point I wanted to make. It is not so much the legal texts which are important but what people do with it. How they are being brought to life. We have a task to perform.

This is as much true for soft law as it is for so called hard law. Who of you is familiar with the Venice Charter and who of you know the Granada Convention? Which document is more influential? The one is hard law the other soft. I think the Venice Charter has been of far more importance within heritage management than the Granada Convention.

As we know it is inevitable that the wording of the conventions for the protection of heritage is pretty soft. It is about soft values and the conventions have to leave a lot of room for nation states to make decisions on how to protect them. To illustrate this I made a first draft on how a global convention for the protection of archaeological heritage might look like.

Article X

To ensure that effective and active measures are taken for the protection, conservation and presentation of the archaeological heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country:

- (a) to adopt a general policy which aims to give the archaeological heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programs;*
- (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the archaeological heritage with an appropriate staff and possessing the means to discharge their functions;*
- (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its archaeological heritage;*

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the archaeological heritage and to encourage scientific research in this field.

Article XX

For the purpose of this Convention, international protection of the world archaeological heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.

Is this a good beginning? What do you think? Well its more than that. Actually...this is a quotation of the articles 5 and 7 of the World Heritage Convention which counts 193 party states at this moment. 193 out of 197 nations have signed and ratified this text. I just replaced the words 'cultural and natural heritage' with 'archaeological heritage'. I think that I am entitled to do so. Archaeological heritage after all surely is a part of cultural heritage. But what do we do with these words. What do these words mean in practice. I have no idea. And what would we gain if we replace these words by other words which might be more specific on the archaeological issue?

And let us not forget about that other UNESCO convention, the Convention on the Protection of the Underwater Cultural Heritage 2001. This is all about archaeology. Until now only 51 one states have joined. Only 2 in Asia.

And how does this work in practice? I am pretty much involved in the ratification and implementation of this convention in The Netherlands. We have a hard time finding good examples of the profitable working of the convention.

I am almost finished. I have just some final remarks to make. Actually it counts up to eight.

1. Realize that international law is there to organize / repair the disadvantages of the modern world order of nations. It is not something you can turn to if you're not having it your way in your own country. Don't go looking for Big Brother abroad.
2. Use the tools you already got (Valletta, World Heritage Convention, Convention for the protection of underwater cultural heritage / make alive what is already agreed upon. There are a lot of dead words waiting for us.
3. Know how the conventions work out in practice. And use that information for appropriate action. Conventions look like hard law, but often they turn out pretty soft. Make them alive. Remember influential people what we have agreed upon.
4. Influence, help and strengthen the international organizations which deal with heritage (UNESCO, Council of Europe), they are understaffed and badly financed. And they are so easy to be criticized. It's better to help them do their job than just putting your wishes and bad temper on their table. And understand why they are dealing with heritage protection. Make a link with these objectives.
5. Use your influence on a national and local scale as well. You can be busy trying to change the course of the European Union. But it might be a lot more effective (and more close at hand) to talk to the government of your municipality. International NGOs can be pretty influential on a national base as well. Let's join forces with other NGOs like Europa Nostra and ICOMOS.
6. Don't expect too much from government or international agreements. People have a tendency to put everything on the plate of government (as is the case with international organizations). But realise that government is formed by people, not by wizards or gods.
7. As you figured it out by now I am rather hesitant to try and go for a new global convention. In the current political climate it is not likely that this will be a success, and even if we get a new convention, then the question remains how to prevent that the words turn out to be dead words (as is the case in so many other conventions). BUT.. if we go for a new convention. Realize that the discussion and

energy of the process of 'the making of ..' are as important as the final result.

8. Dear archaeologists of Europe, I love you all very much, Remember, please remember the ideals of the men and women of the post war period. They tried to do things differently, no... they did things differently, in a way that history has never seen before. And lot of good came from that. We are all profiting. Until this day on. Too often we tend to forget. Well, don't!