

Wayne Sandholtz, ***Prohibiting Plunder: How Norms Change***. Oxford: Oxford University Press, 2007. Pp. xi, 338. \$60.00. ISBN: 978-0-19-533723-5.

To apply norms to facts is to interpret – both norms and facts. It is impossible not to interpret. Umberto Eco explained in his *Opera Aperta* that modern art has embraced this thought to turn it into a constitutive element of every work of art.<sup>1</sup> The open work of art leans on its spectator to be completed in the eye of the beholder. The act of interpretation is also a constitutive element of a norm. For Wayne Sandholtz ‘a love of art and a growing appreciation of the centrality of norms in social life, including international relations’ (at p. vii) are the passions behind his book, *Prohibiting Plunder: How Norms Change*. These passions lead him to the corpus of norms against plunder, i.e., the norms of the laws of war providing protection for cultural property.

<sup>1</sup> U. Eco, *The Open Work* (1989).

His vivid narrative starts from the norm prevalent at the time of the Thirty Years' War that 'the spoils go to the victor' and passes through the stage of outlawing and criminalizing plunder. It then arrives at the looting of the Iraqi National Museum in the spring of 2003 and at the question whether there now exists a positive duty of an occupant to protect cultural property. This body of norms serves as an illustration and test for his model of cyclic norm change.<sup>2</sup> Wayne Sandholtz is Professor of Political Science at the University of California, Irvine, and his book is prone to constructivism in international relations scholarship and the theory of transnational legal process.

The first phase in each cycle of norm change is anchored in the normative context of a given time in which actors take decisions and which is shaped by previous events (experience) as well as normative reactions to past events by other actors within a relevant community. This context informs the actors' understanding of the community's current standards for interpreting and applying rules. It describes the background of normative structures in which actors and their choices are embedded. The second phase concerns the disputes which are inevitable in all normative structures for two reasons: normative structures are incomplete, that is they are over- and under-inclusive, and they face internal contradictions. Disputes are triggered by specific events which reveal the gaps and contradictions inherent in every normative structure. The third phase exposes the arguments arising in relation to specific events. Such disputes are at the core of norm change. Sandholtz suggests that in the absence of formalized judicial dispute settlement, disputants must persuade what amounts to a jury of their peers. He notes the similarity to the New Haven School and endorses the view that international rule-

making is a process of continuous demand and response in which the success of interpretive claims rests on acceptance by other actors (at 17). The fourth and last phase of his model of cyclic norm change pictures how the rule has in fact changed. Sandholtz can demonstrate norm change by pointing to protocols, new treaties, and the domestic implementation of international norms, all testifying to a modified rule structure. This completes the cycle, and it provides the normative context for the next round of norm change. The cycle is a 'moving cycle' (at 261); the picture of a spiral, however, might be better suited to capturing this process.<sup>3</sup>

In his application of this model the cycle moves from the normative context generated prior to the Napoleonic Wars to the US occupation of Iraq (Chapters 2–10). Each chapter is dedicated to a turn in the cycle, with two exceptions. The first exception is the second chapter, which sets the scene by portraying how plunder became a normative concern in the first place. Sandholtz holds a growing veneration for art among Europe's elite travelling on the 'Grand Tour' to European, mostly Italian, cities of cultural grandeur and ideas of enlightenment impacting on the conception of the legitimate use of military force to be decisive for the normative context which provides the basis for subsequent arguments about plunder (at 34). Against this background the Napoleonic Wars trigger the first turn of the cycle of norm change (Chapter 3). The second exception is the fourth chapter, starring Francis Lieber, Johan-Casper Bluntschli, and Fyodor de Martens as part of a 'transnational activist network'. Early

<sup>2</sup> This model has already been sketched in his work with Alec Stone Sweet: Sandholtz and Stone Sweet, 'Law, Politics, and International Governance', in C. Reus-Smit (ed.), *The Politics of International Law* (2004), at 238.

<sup>3</sup> As Sandholtz notes, a 'spiral model' had been suggested by Risse and Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction', in T. Risse, S.C. Ropp, and K. Sikkink (eds), *The Power of Human Rights. International Norms and Domestic Change* (1999), at 17ff. These authors' interest, however, was to develop not a model of norm change but of 'norms socialization', that is the diffusion of a given norm.

proposals to codify norms against plunder emanated from this network which gained momentum and succeeded in driving Heads of State to the Hague Peace Conferences of 1899 and 1907. This context, again, provides the basis for subsequent normative disputes. The narrative passes through the First World War and the debate about restitution at Versailles (Chapter 5), and Nazi plunder (Chapter 6), which gave rise to a new round of codification leading to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol (Chapter 7). These codified rules are then put to a test and subjected to a further turn of the cycle in the wars of the 1990s (Chapter 8). His findings prompt a little excursion in support of the theory of transnational legal process. Chapter 9 illustrates the internalization of international norms against plunder in domestic politics as well as private litigation and action. Disputes triggered by the looting of the Iraqi National Museum in the spring of 2003 under US occupation conclude the last cycle but, at the end, leave a question: is there a positive duty to protect cultural property? The author tends to think so, finding support among some of the disputants, and suggests that such a claim would fit the pattern of norm change which started from the premise ‘to the victor go the spoils’, and arrived at a considerable body of norms prohibiting plunder (Chapter 10).

Absence of consensus, Sandholtz writes, ‘leaves the norms in question subject to continuing contestation’ (at 20). He points out three factors which impact on the chances of a particular argument winning in disputes about norms: power, the foundational metanorms of international society, and the quality of precedents in support of a particular argument (at 21–23). It appears pertinent and most interesting to expand briefly on these three factors.

Power is a factor in norm change, but powerful actors cannot dictate norms; they cannot escape the process of argument and persuasion (at 266). Sandholtz reiterates that power alone cannot change rules and, notably, violating a rule is of course not the same as changing it. One may easily follow the argument that the dynamic of norm change cannot simply be

reduced to the exercise of power. However, the impact of power on norm change is probably more involved than Sandholtz suggests. The assent of powerful actors is a prerequisite, but this is an unduly limited qualification which cannot grasp how power is also exercised by way of norms and interpretations. Such argument would easily have been feasible within his theoretical setting and should be considered in further analysis – especially when such an analysis is to be applied, as Sandholtz suggests, to other cases such as humanitarian intervention and norms relating to terrorism (at 268–269). Concerns about the reluctance with which Sandholtz pursues the thought of how norm change can be an expression of actors’ exercise of power are aggravated by the way he treats the two other factors.

An argument’s chance of winning and of changing norms is increased by its conformity with ‘foundational metanorms of international society ... that are at the core of the liberal Western tradition which is increasingly globalized’ (at 21 and 270). Such metanorms include equality, individual dignity, and the fact that international rules should apply universally. There is an uneasy tension within this statement between the universality of such norms – they belong to the international society – and their particular origin, the West. That they are *globalized* indicates a process, a direction, a projection. Sandholtz recognizes this and observes that they often clash with other metanorms such as sovereignty and non-intervention. With regard to norm change in the laws of war, on humanitarian intervention, terrorism, asylum and refugee law, and self-determination, Sandholtz finds a broader underlying trend. All such developments are linked to ‘the emergence of the liberal world’ (at 270). This bears some resemblance to the doubtful proposition of an end of history, in which all competing narratives and value conflicts are glossed over by substantive liberal convictions.<sup>4</sup> An analysis of norm

<sup>4</sup> See Marks, ‘The End of History? Reflections on Some International Legal Theses’, 8 *EJIL* (1997) 449.

change in different fields of international law would have to give greater consideration to the fact that norms also serve to project a particular *Weltanschauung* to the world at large. So far the concept of *the* liberal world appears to illustrate that the less a concept captures experiences, the more its meaning leans on the expectations vested in it.<sup>5</sup> In his *Opera Aperta* Eco argues that the poetics of the open work of art seek to induce interpretive acts of deliberate freedom on the part of the spectator. When analysing norm change one could well appraise interpretations as resting on choices which are also historically and contextually embedded and could then emphasize an actor's boundedness in reasoning. This would lead to thinking about the preconditions for pursuing justice globally – namely institutional structures that provide the basis for carrying out normative conflicts.<sup>6</sup> As a work of art the picture of *the* liberal world is likely to meet the reproach of being nothing but kitsch.<sup>7</sup>

The third factor is how well an argument connects to precedents. Sandholtz' stated interest lies in explaining how informal norms develop into formal (legal) norms. He does not seek to specify when those norms become legal norms (at 9–10). For international lawyers his approach is illuminating, because it provides a broader grasp of the origins of their everyday object of analysis. At this methodological outset of his book, however, lies a limitation which interdisciplinary research could rather easily have overcome. Sandholtz writes that '[i]nternational law, of course, has well-established rules for adding to or changing the stock of international legal norms: the sources of international law. New rules emerge and existing rules evolve through the formal process of treaty creation as well as through the development of customary law' (at 9). In his narrative on the development of norms relating to plun-

der each cycle ends with a new norm text – a new treaty or protocol. Even though Sandholtz does not call them that, these are legislative acts. Ever since the first codification of norms on plunder, it has been safe to say that they are legal norms. The resulting disputes can then be analysed as legal arguments, and in this perspective the observer may well find different principles of transformation. Sandholtz recognizes this when he points to an argument's consistency and refers to precedents as factors of its success. It is one of the distinctions of his work that he takes particularities of legal reasoning into account. A large question which remains is, however, whether the arguments at the heart of norm change also change the law, or whether the law is changed only by codification in the last step of each cycle. This is a task which Sandholtz explicitly does not pursue. Further research could inquire whether Sandholtz' contention that '[w]hen a consensus emerges, the rule is altered' (at 262) also holds for legal norms. This would be a particularly pressing question in other fields of international law where legislative acts are rare. Of course it would have to be discussed in the light of the doctrine of sources. But it is equally clear that the sources of law do not exhaust the issue and provide an insufficient grasp on what the law is. Sandholtz' work is also insightful because it stirs up the thought that legal norms come to life in an interpretive act. To be clear, the norm text does not give away the answer; the dispute would be about 'the interpretive "angle" from which the text was to be seen, and in being seen, made'.<sup>8</sup> Sandholtz' definition of rule and norm as 'a statement that *identifies* standards of conduct' (at 7, my emphasis) stands in the way of seeing the creative and constructive side of interpretations.

In sum, Sandholtz' work makes rewarding reading for political scientists and international lawyers alike for the many thoughts that it provokes. His account of norm change can be read as a response to the somewhat obtrusive calls

<sup>5</sup> R. Koselleck, *Begriffsgeschichten* (2006), at 69.

<sup>6</sup> See A. Hurrell, *On Global Order. Power, Values and the Constitution of International Society* (2007), at 298–319.

<sup>7</sup> Koskenniemi, 'International Law in Europe between Tradition and Renewal', 16 *EJIL* (2005) 113.

<sup>8</sup> S. Fish, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literature and Legal Studies* (1989), at 141–142.

for interdisciplinary scholarship and for a combination of constructivist and instrumentally rational approaches. In the light of entrenched disputes Sandholtz offers a light and convincing theoretical model and an insightful history of the norms prohibiting plunder. When applied to more contentious examples such as humanitarian intervention or norms relating to terrorism, his analytical framework might gain from a refinement of attention given to the exercise of power through norms as well as interpretations and to persistent normative conflicts.

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