CHAPTER 1

Cultural Heritage in International Law

> A thing of beauty is a joy for ever:
> Its loveliness increases; it will never
> Pass into nothingness.[1]

1 Introduction

Culture lies at the heart of international law. The international community is made up of culturally diverse countries, and international law governs relations among different civilizations. Therefore, just, peaceful, and prosperous relations among nations depends on respect for cultural diversity and the self-determination of peoples, the latter including their capacity to determine their destiny and model of development. One of the very goals of the United Nations (UN) is to foster international cultural cooperation 'with a view to the conditions of stability and well-being necessary for peaceful and friendly relations among nations' and to settle international conflicts of a cultural character.[2]

Since the aftermath of WWII, UNESCO has highlighted the close linkage between culture and peace:[3] 'since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed.'[4] Only by knowing each other's ways of life and respecting cultural diversity, can mutual trust and peace be built among peoples. In fact, in order to last, peace should not be 'based exclusively on the political and economic arrangements of governments'; rather, peace should be founded upon 'the intellectual and

1 John Keats, *Endymion* [1818] Ernest De Sélincourt (ed.), *The Poems of John Keats* (New York: Dodd, Mead & Company 1905) 53.

2 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 55 and Article 1, para. 3.

3 Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), 16 November 1945.

4 Id.

moral solidarity of [hu]mankind' to secure 'the unanimous, lasting, and sincere support of the peoples of the world'.[5]

The duty to protect cultural heritage is an *erga omnes* obligation, that is, a duty that is 'the concern of all states'; all states have a legal interest in its protection because of 'the importance of the rights involved'.[6] The protection of cultural heritage has been considered to be an *erga omnes* obligation because the protection of cultural heritage is a commonly shared interest.[7] If the protection of cultural heritage was customary international law, this would entail that any State would have the right—whether individually or in concert with other States—to compel a State's performance. Certainly, the safeguarding of cultural heritage is no longer an exclusively domestic concern.[8]

This chapter analyzes the concept of cultural heritage and explores the main features of international law governing the same. In particular, it briefly examines the five different but related categories of cultural heritage: (1) world heritage; (2) underwater cultural heritage; (3) intangible cultural heritage; (4) cultural diversity; and (5) Indigenous heritage. Given their variety, cultural phenomena may well fall within several of these categories; for instance, a cultural landscape may well be a World Heritage Site and include elements of both Indigenous and intangible cultural heritage. While this classification helps the reader and the public at large to identify the main types of cultural heritage, it is rather flexible as it can accommodate cross-cutting themes. Reference is made to the relevant Conventions and declarations adopted by UNESCO as well as other international legal instruments that variously govern cultural heritage. Both primary—for example, treaties and other relevant legal instruments—and secondary sources—that is, scholarly writings and commentaries—are examined.

The chapter highlights the fact that the field of cultural governance is evolving fast, and discusses several recent trends. First, it scrutinizes the move from the static concept of cultural property to the more dynamic concept of cultural heritage, including both tangible and intangible heritage. Second, it examines the gradual democratization and adoption of bottom-up mechanisms in cultural heritage governance. Third, it underlines the perennial dichotomy between some idealism and pragmatism in debates on cultural heritage governance.

---

5 Id.

6 *Barcelona Traction, Light and Power Company, Limited case* (*Belgium v. Spain*), Judgment, 5 February 1970, (1970) ICJ Reports 3.

7 Roger O'Keefe, 'World Cultural Heritage: Obligations To The International Community As A Whole?' (2004) 53 ICLQ 189–209.

8 Joseph P. Fishman, 'Locating the International Interest in Intranational Cultural Property Disputes' (2010) 35 *Yale JIL* 347–404, at 369.

Fourth, the chapter shows that while international cultural heritage law has to a large extent been codified, it mostly lacks compulsory dispute settlement mechanisms, thus demonstrating some substantive overreach and procedural underachievement. Finally, the chapter investigates the move away from heritagization (that is, protecting heritage because it is heritage) toward the humanization of cultural heritage protection (that is, protecting cultural heritage because of its importance to humankind). In particular, contemporary cultural heritage governance emphasizes the human dimension of cultural heritage protection and stresses the human values associated with its use. This discussion paves the way for the contemporary acknowledgment by relevant international bodies that the protection of cultural heritage is a human rights issue.

2 Defining Cultural Heritage

Although cultural heritage is a commonly used term, its content remains elusive.[9] Due to the fact that 'legal norms cannot define [it] without referring to other disciplines,'[10] any definition of cultural heritage remains liminal, placed betwixt and between law and culture. Moreover, several international law instruments provide their own definition of the concept. In order to illuminate the meaning of cultural heritage, this section briefly examines its main components—culture and heritage—before approaching it holistically.

2.1 *Culture*

The term 'culture' derives from the Latin word *cultura* meaning 'cultivation and care.' The Latin verb *colere* means to till and cultivate crops and plants, as well as to inhabit, protect, and nurture, as well as to honour and worship.[11] Therefore, the noun *cultura* originally signified the cultivation and care of the land and complex methods to manage diverse sets of plants: what we now call agriculture.[12] Certainly, while agriculture was a driving force behind the growth of civilizations, it remains a cultural phenomenon.[13]

---

9 Craig Forrest, *International Law and the Protection of Cultural Heritage* (Oxford: Routledge 2010) 1.

10 Lorenzo Casini, 'The Future of (International) Cultural Heritage Law', (2018) 16 *International Journal of Constitutional Law* 1–10.

11 Johan Josefsson and Inga-Lill Aronsson, 'Heritage as Life-Values: A Study of the Cultural Heritage Concept', (2016) 110 *Current Science* 2091–98.

12 Gyorgy Markus, *Culture, Science, Society: the Constitution of Cultural Modernity* (Leiden/Boston: Brill 2011) 309.

13 Antonio Saltini, *I Semi delle Civiltà. Frumento, Riso, e Mais nella Storia della Società Umana* (Bologna: Nuova Terra Antica 2009); Marcel Mazoyer and Laurence Roudart, *A History of*

The figurative sense of culture as the cultivation of the soul (*cultura animi*) through education already appeared in antiquity. In the *Tusculan Disputations* (*Tusculanae Disputationes*), the Roman lawyer, politician, and philosopher, Cicero (106–43 BCE) considered philosophy to be the culture of the soul (*cultura autem animi philosophia est*).[14] After the untimely death of his daughter Tullia following childbirth, in mourning Cicero abandoned all public business and retired to his villa in Tusculum in the Roman countryside, devoting himself to philosophical studies. For Cicero, misfortunes are the common lot of humanity; human beings can bear and overcome pain by cultivating their soul (*excolere animum*).[15] According to Cicero, culture indicates the capability to overcome grief, select one's own companions—be they people, objects, or thoughts—and choose one's own way.[16] According to Cicero, culture is a consoling, empowering, and liberating force, enabling individuals to exercise freedom of choice by gathering the tools to shape their destiny.

This metaphorical use of culture as a symbol of the human condition and cultivation of the mind became common in the sixteenth century among Renaissance humanists. The lawyer, statesman, and noted humanist Thomas More (1478–1535) associated culture with personal growth and refinement to the profit of one's own mind.[17] The philosophers Michel de Montaigne (1533–1592) and Erasmus of Rotterdam (1466–1536) also used the notion of culture as an intellectual endeavor.[18]

By the beginning of the seventeenth century, the notion of culture acquired the meaning of education in its common usage. In fact, the philosopher and statesman Francis Bacon (1561–1626) used the word culture without explicitly indicating the object (that is, the mind) that was to be cultivated. In the 1605 *Advancement of Learning*, Bacon assimilated culture to education noting that 'the culture and [training of the mind] in youth ha[s] such a [powerful] though unseen, operation, as hardly any length of time or [effort] can countervail it

---

Agriculture (New York: Monthly Review Press 2006); Mark Tauger, *Agriculture in World History* (New York: Routledge 2011).

14 Cicero, *Tusculan Disputations* [45 BCE], J.E. King (trans.) (Cambridge, MA: Harvard University Press 1927) Book II, 13.

15 Id. Book III.

16 Hannah Arendt, 'La Crisi della Cultura nella Società e nella Politica', in Hannah Arendt, *Tra Passato e Futuro* [1961] T. Gargiulo (transl.)(Milano: Garzanti 1991) 273.

17 Thomas More, 'Life of John Picus', in *The English Works of Sir Thomas More* (London: Eyre and Spottingwoode 1931) 369.

18 Michel de Montaigne, *Essais* [1580](Paris: Garnier-Flammarion 1969) Book I, Chapter 26 (writing about '*exquise culture*' in the sense of excellent education); Pamela Sticht, *Culture Européenne ou Europe des Cultures?—Les Enjeux Actuels de la Politique Culturelle en Europe* (Paris: L'Harmattan 2000) 16.

afterwards.'[19] For Bacon, humanity would be better if access to education was provided to all; hence, he considered access to arts, letters, and science as a public interest.

Nowadays, culture does not merely include 'the life of the mind'; rather, it is 'a broad and inclusive concept encompassing all manifestations of human existence' such as the beliefs, values, habits, arts, customs, and ways of life that characterize particular groups and are passed from one generation to the next.[20] Culture does not encompass the mere sum of individual practices; rather, it indicates a complex whole through which individuals and communities 'express their humanity', give meaning to their existence, and build their world view.[21] Culture thus has a collective dimension and requires a holistic understanding, presupposing an interaction between individuals and communities. Nowadays, scholars distinguish three components of culture: (1) material culture, such as monuments and artifacts; (2) culture as a process of intellectual and artistic creation; and (3) culture in an anthropological sense, that is, culture as a way of life.[22] While the monumental concept of culture prevailed in the past, nowadays a more comprehensive concept prevails. The concept has been extended beyond high culture (that is, the traditional canons of literature, music, and art) to include popular or mass culture (such as cinema, sports events, and traditional arts and crafts).[23]

2.2 *Heritage*

The noun 'heritage' derives from the Latin word *hereditas* indicating 'something [that] is left behind,' that is 'filled with meanings', and 'that convey[s] values for the next generation.'[24] The concept has a dynamic character, indicating something 'handed down; something to be cared for,' and to be transmitted

19 Francis Bacon, *The Advancement of Learning* [*De Dignitate et Augmentis Scientiarum*, 1605] Book 6, Chapter 4, G.W. Kitchin (ed.) (London: Dent 1973), cited by Adam Muller, 'Introduction—Unity in Diversity' in Adam Muller (ed.), *Concepts of Culture: Art, Politics, and Society* (Calgary: University of Calgary Press 2005) 2–40, 2.

20 UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right of Everyone to Take Part in Cultural Life, Article 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/21, 21 December 2009, para. 11.

21 Id. para. 13.

22 Julie Ringelheim, 'Cultural Rights', in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP 2018) 278–295, 279; Elsa Stamatopoulou, *Cultural Rights in International Law* (Leiden: Brill 2008) 109.

23 Ringelheim, 'Cultural Rights', 281.

24 Josefsson and Aronsson, 'Heritage as Life-Values', at 2092.

to future generations.[25] It 'links the past, the present, and the future as it encompasses things inherited from the past that are considered to be of such value or significance today, that individuals and communities want to transmit them to future generations.'[26]

Since antiquity, heritage has traditionally indicated something—mostly land—that has been inherited. However, it has also had a broader, figurative, and spiritual sense evoking a nostalgia for the past, a sense of history, something reserved for some people and the object of their special care.[27] Heritage includes both tangible objects (such as buildings, land, and places) and intangible practices (such as language, music, and literature). Both tangible and intangible forms of heritage are important in forming people's identity, building their collective memory, and shaping their ideas about their past, present, and future.

2.3 *Cultural Heritage*

The term 'cultural heritage' is more than the sum of its parts. It expresses the customs, practices, and places, as well as artistic expressions and ways of life developed by a community and passed on from generation to generation. It also refers to 'a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge, and traditions.'[28] Any definition of cultural heritage constantly evolves because of changing contexts and societal perceptions.

The term 'cultural heritage' is gradually superseding that of 'cultural property' in international law.[29] While cultural property and cultural heritage 'sometimes are used interchangeably', 'strictly speaking, however, the term property connotes ownership', emphasizes the economic value of cultural

25 Lyndel V. Prott and Patrick J. O'Keefe, 'Cultural Heritage or Cultural Property?' (1992) 1 *International Journal of Cultural Property* 307, 309.

26 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 5.

27 F. Dreyfus, 'Le Thème de l'Héritage dans l'Ancien Testament', (1958) 42 *Revue des Sciences Philosophiques et Théologiques* 3–49.

28 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) 27 October 2005, in force on 1 June 2011, CETS No. 199, Article 2a.

29 Prott and O'Keefe, 'Cultural Heritage or Cultural Property?' 309.

assets, and grants owners the right to prevent others from use and the right to transfer property to others.[30]

Instead, cultural heritage refers to 'the history, traditions, and qualities that a … society has had for many years', that are considered an important part of its identity and worthy of transmission from a generation to another irrespective of their economic value.[31] The term cultural heritage reflects collective identity and intergenerational equity, indicating something that is unique and irreplaceable for individuals, groups, and communities and is worth transmitting to future generations.[32] Its holders can be considered to be trustees of humankind rather than mere property holders. Cultural heritage can thus be read in terms of 'stewardship, which recognizes a broader range of rights and responsibilities' for all. Accordingly, cultural heritage 'does not really belong to anyone'; instead, communities have a duty to preserve it in a sort of 'intergenerational social contract.'[33]

There is no single definition of cultural heritage in international law; rather, various international law instruments provide specific definitions depending on their scope.[34] While traditionally the concept of cultural heritage mainly referred to sites, monuments, and other types of tangible heritage,[35] in the past decades there has been a reconceptualization of heritage as including both tangible and intangible elements.[36] Cultural heritage is seen not only as including tangible artifacts (such as buildings, monuments, and sites) but also intangible

30 James A.R. Nafziger, 'The Present State of Research Carried Out by the English Speaking Section of the Centre for Studies and Research', in James A.R. Nafziger and Tullio Scovazzi (eds), *The Cultural Heritage of Mankind* (Leiden: Brill 2008) 179–236, 180.

31 Makoto Hagino, 'The Legal Concept of "Heritage" in the World Heritage Convention: The Case of Yakushima, Island', (2016) 5 *Journal of Marine and Island Cultures* 11–13, 12.

32 UNESCO Declaration on the Intentional Destruction of Cultural Heritage, Paris, 17 October 2003, preamble (highlighting that 'cultural heritage is an important component of the cultural identity of communities, groups, and individuals.')

33 Erich Hatala Matthes, 'The Ethics of Cultural Heritage', Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Stanford: Stanford University 2018).

34 See e.g. UNESCO Convention concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 UNTS 151, Article 1; Convention for Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 UNTS 1, Article 2; Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, in force 2 January 2009, 41 ILM 37 (2002) Article 1.

35 See e.g. World Heritage Convention, Article 1.

36 See e.g. Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) 27 October 2005, in force on 1 June 2011, CETS No. 199, Article 2(a).

components (such as folklore, cultural practices, and traditional knowledge).[37] Moreover, because the identification of cultural heritage is based on a process of attributing values and meanings, a process that is inherently intangible, all heritage has intangible features.[38]

More importantly, the concept of cultural heritage is not limited to world heritage, namely, heritage that is considered to be of outstanding value to humanity as a whole; rather, it also 'encompasses what is of significance for particular individuals and communities.'[39] In the past decades, there has been a shift from the conservation of cultural heritage based on its outstanding and universal value as well as its monumental character to 'the protection of cultural heritage as being of crucial value for individuals and communities in relation to their cultural identity.'[40]

The notion of cultural heritage is necessarily selective—not every cultural practice is worth protecting. On the contrary, the protection of cultural heritage is qualified, being subject to both internal and external limits. Internal limits require preventing an overprotection of cultural heritage (heritagization), rather considering culture as a fluid concept to be safeguarded, not to be frozen in time. External limits to the protection of cultural heritage are posed by the respect of human rights. Only cultural policies and practices that are respectful of human rights are protected under international law.[41] International instruments clearly state that 'practices contrary to human rights cannot be justified with a plea for the preservation/safeguard of cultural heritage, cultural diversity or cultural rights.'[42] Arguably, such cultural practices do not constitute cultural heritage in the first place, because they are not something to cherish; they may be cultural *practices* but they are not *heritage*.

In contemporary heritage debates, difficult questions have arisen as to whether it is appropriate to safeguard artifacts or sites that, albeit reflective of past history, are perceived to be in conflict with contemporary international

37 Kristin Kuutma, 'Concepts and Contingencies in the Shaping of Heritage Regimes', in Regina Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, II ed. (Göttingen: Göttingen University Press 2017) 21–36, 24.

38 Laurajane Smith, *Uses of Heritage* (New York: Routledge 2006) 54.

39 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 7.

40 Id. para. 20.

41 See e.g. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions Paris, 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. I, at 83, Article 2.1.

42 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 74.

human rights law.[43] In post-conflict societies, heritage conservation can be contested[44] as society strives to address historical injustices.[45] Therefore, the identification of what is heritage worth of being protected can be difficult.[46]

In conclusion, the notion of cultural heritage is complex, multifaceted, and perhaps ultimately irreducible to a single definition. Its intrinsic fuzziness presents both promises and pitfalls. On the one hand, the indeterminacy of the notion of cultural heritage confers on the law the flexibility to change, evolve, and adapt to new needs.[47] On the other hand, such vagueness leaves the field subject to possible abuses. There may be a temptation to opportunistically broaden (or narrow) the scope of the notion of cultural heritage for political aims.[48] An overly inclusive definition of cultural heritage risks diluting the concept itself and weakening international cultural heritage law by jeopardizing its effectiveness. In this regard, some critics argue that the notion of cultural heritage adopted in international instruments is so broad that it is very difficult to identify specific individual entitlements and state obligations.[49] In turn, a too narrow definition of cultural heritage might leave some cultural phenomena outside the scope of protection of international law even though they may be worthy of safeguarding.

3 The Various Categories of Heritage

As cultural heritage is a multifaceted concept, there is no single definition of cultural heritage in international law. Rather, several international law instruments protect various categories of cultural heritage, providing *ad hoc* definitions. In order to provide a nuanced understanding of cultural heritage,

43 E. Perot V Bissell, 'Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law' (2019) 128 *Yale LJ* 1130–1172, 1130.

44 See e.g. Helaine Silverman (ed.) *Contested Cultural Heritage* (London: Routledge 2011).

45 Karen Knop and Annelise Riles, 'Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the Comfort Women Agreement', (2017) 102 *Cornell LR* 853–927.

46 Lucas Lixinski, *Legalized Identities—Cultural Heritage Law and the Shaping of Transitional Justice* (Cambridge: CUP 2021) and Sharon Macdonald, *Difficult Heritage—Negotiating the Nazi Past in Nuremberg and Beyond* (London: Routledge 2009).

47 Marina Lostal, 'The Role of Specific Discipline Principles in International Law: A Parallel Analysis between Environmental and Cultural Heritage Law', (2013) 82 *Nordic JIL* 391–415, 397.

48 Frank Fechner, 'The Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376–394, 377.

49 Céline Romainville, *Le Droit à la Culture, une Réalité Juridique: Le Droit de Participer à la Vie Culturelle en Droit Constitutionnel et International* (Bruxelles: Bruylant 2014) 355–70.

this section briefly explores these categories of the same: (1) world heritage; (2) underwater cultural heritage; (3) intangible cultural heritage; (4) cultural diversity; and (5) Indigenous cultural heritage.

3.1 *World Heritage*

World Heritage refers to both natural and cultural sites of outstanding and universal value that are included in special lists and safeguarded under the UNESCO's 1972 World Heritage Convention (WHC).[50] World Heritage sites include ancient ruins, historical monuments, buildings, and cities, as well as deserts, glaciers, islands, forests, lakes, mountains, or wilderness areas.[51] Their significance is so special as to 'transcend national boundaries and to be of common importance for present and future generations of all humanity.'[52]

Under the WHC, 'the duty of ensuring the identification, protection, … and transmission to future generations' of world heritage 'belongs primarily to th[e] State' on which territory a site is situated.[53] Therefore, the WHC does not replace a state's cultural sovereignty; on the contrary, it aims to support the state's safeguarding of that part of its heritage that is so important to matter to humankind as a whole. The WHC thus establishes a system of international cooperation and assistance that supports States Parties to the Convention in their efforts to conserve that heritage.[54]

The complementarity between state cultural sovereignty and the regime established under the WHC is is particularly evident in the process of identifying and selecting world heritage. After states nominate given sites for inscription on the World Heritage List, the International Council on Monuments and Sites and the World Conservation Union evaluate the nominations and make their recommendations to the World Heritage Committee. The Committee meets once a year to determine whether or not to inscribe each nominated property on the World Heritage List. In the process, the state's nomination of a

50 Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151. As of June 2022, it has been ratified by 194 states parties.

51 WHC, Articles 1 and 2. As of June 2022, a total of 1,154 World Heritage Sites (897 cultural, 218 natural, and 39 mixed properties) exist across 167 states parties. The List is available at <https://whc.unesco.org/en/list/> (last visited on 1 June 2022)

52 Lynn Meskell, 'UNESCO's World Heritage Convention at 40: Challenging the Economic and Political Order of International Heritage Conservation', (2013) 54 *Current Anthropology* 483–494, 483.

53 WHC, Article 4.

54 WHC, preamble and Article 7.

given site is a precondition for their getting the status of world heritage. At the same time, any nomination is subject to international scrutiny and approval.

States are eager to list sites for inscription in the List; a listed site gains international recognition, prestige, and legal protection, and can obtain financial assistance from the World Heritage Fund to facilitate its conservation under certain conditions.[55] Additionally, the local communities living around a site may benefit from heightened public awareness, significantly increased tourism, and economic development.[56]

Anthropologists have cautioned that the notion of world heritage expresses a 'top-down definition of culture' thus 'fail[ing] to address nationalist repressions and neocolonial endeavors', while creating a 'cultural map of the world.'[57] In fact, because it is up to states to propose the nomination of sites on the World Heritage List, the WHC maintains a 'statist power structure'. Non-state actors like Indigenous groups and minorities have historically been marginalized in world heritage listing with severe consequences for the protection of their cultural and natural sites.[58] Moreover, the traditional overrepresentation of *cultural* sites over *natural* sites of outstanding and universal value on the List reflects the early adoption of a monumental vision of heritage that typically characterizes the Western world. UNESCO is now trying to re-balance this disparity and create a more representative inventory by adopting more comprehensive and holistic approaches to sites that are of particular importance to other civilizations.[59]

3.2 *Underwater Cultural Heritage*

In recent times, the advancement of technology has made it possible to find, visit, and remove artifacts from shipwrecks that have remained in the abyss for centuries. The increasing capability to reach these archaeological treasures has intensified the debate on management issues. While private actors have filed admiralty claims for establishing their title to sunken vessels, in turn, states have claimed public property and sovereign immunity on the same wrecks.[60] While private actors generally sell the artifacts to recover expenses and make a

55 WHC, Articles 15–18.

56 Meskell, 'UNESCO 's World Heritage Convention at 40', 483.

57 Id. 484.

58 Id. 485; Valentina Vadi, 'Exploring the Borderlands: The Role of Private Actors in International Cultural Law', in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations—Creation, Evolution and Enforcement* (Leiden: Brill 2018) 109–125.

59 Meskell, 'UNESCO 's World Heritage Convention at 40', 485.

60 See e.g. Valentina Vadi, 'Underwater Cultural Heritage and the Market: The Uncertain Fate of Historic Sunken Warships under International Law', in Valentina Vadi and

profit, the scientific community and the public at large demand the preservation of such underwater cultural heritage (UCH). At the same time, states lack the resources to locate and recover this type of heritage, and input from non-state actors seems necessary in order to find these artifacts in the first place.

In order to address some of the issues raised by the recovery and management of UCH and given the short provisions of, and the legal gaps left open by, the United Nations Convention on the Law of the Sea (UNCLOS),[61] UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage (CPUCH) in 2001.[62] The CPUCH considers UCH to be an 'integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.'[63] While the concept of the common heritage of humanity 'symbolizes the unity of mankind', it does not establish a form of collective property; rather, it affirms the objective of protecting UCH because of its importance to humankind as a whole.[64]

While the UNCLOS does not refer to UCH, and only two of its provisions govern cultural objects found at sea,[65] the CPUCH introduces an apposite definition of UCH and a comprehensive and detailed regime of protection. The CPUCH defines UCH as: '[A]ll traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as … vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context.'[66]

Hildegard Schneider (eds), *Art, Cultural Heritage, and the Market: Ethical and Legal Issues* (Heidelberg: Springer 2014) 221–256.

61 United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 397, in force 1 November 1994.

62 Convention on the Protection of the Underwater Cultural Heritage (CPUCH), 2 November 2001, in force 2 January 2009, 2562 UNTS 3.

63 CPUCH, preamble.

64 Valentina Vadi, 'War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships under International Law', (2012–2013) 37 *Tulane Maritime Law Journal* 333–378, 352.

65 UNCLOS Articles 149 and 303 provide a basic legal framework for protecting underwater cultural heritage. Article 149 provides that '[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.' Article 303 directs States Parties to 'protect objects of an archaeological and historical nature found at sea and cooperate for this purpose'.

66 UCH Convention, Article 1(a)–(a)(II).

This definition is simultaneously broad and narrow. On the one hand, it constitutes a kind of blanket protection for all traces of human existence. This modern and proactive approach goes beyond the listing approach adopted under other UNESCO conventions. On the other hand, such a definition confines the notion of cultural heritage to a certain timeframe. In fact, the CPUCH only governs those artifacts that have been underwater for more than 100 years. The 100-year cut-off point 'has no logic from a scientific viewpoint but was inserted purely for administrative convenience.'[67] This leaves artifacts that have been underwater for less than 100 years outside the scope of the Convention. This gap has been criticized because artifacts from the Second World War are excluded from legal protection under the CPUCH, notwithstanding their significant historical and cultural value.

Substantively, the CPUCH requires States Parties to preserve UCH and take action according to their capabilities. They should consider the preservation of UCH in its original location on the seafloor (*in situ*) as the first option before allowing or engaging in any further activities. The recovery of objects may, however, be authorized for the purpose of making a significant contribution to the protection or knowledge of UCH. The CPUCH provides that UCH should not be commercially exploited for profit, and that it should not be irretrievably dispersed.

3.3 *Intangible Cultural Heritage*

The concept of Intangible Cultural Heritage (ICH) refers to the wealth of cultural traditions, practices, expressions, knowledge, and skills – as well as the instruments, objects, artifacts, and cultural spaces associated therewith – that communities, groups and, in some cases, individuals, recognize as part of their cultural heritage and pass on from one generation to another.[68] ICH is a type of living heritage, which is created, developed, and maintained by given communities, often in response to given environmental conditions and political, economic, and social changes. Being inextricably connected with people's lives, ICH constitutes 'an essential element of the identity of its creators and bearers'[69] and provides them with a sense of identity, belonging, and continuity.[70]

---

67 Vadi, 'War, Memory, and Culture', 362.

68 CSICH Article 2.

69 Federico Lenzerini, 'Intangible Cultural Heritage: The Living Culture of Peoples' (2011) 22 EJIL 101–120, 101.

70 Cristina Amescua, 'Anthropology of Intangible Cultural Heritage', in Lourdes Arizpe and Cristina Amescua (eds), *Anthropological Perspectives on Intangible Cultural Heritage* (Heidelberg: Springer 2013) 107.

Since ICH reflects communities' response to contemporary challenges, the safeguarding of ICH can foster cultural resilience, that is, the capability to adapt quickly to new circumstances using one's own tradition and cultural background. Cultural resilience empowers individuals not only to overcome adversity, but also to evolve and even thrive after stressful events.[71]

Despite the importance of ICH as a key element of the cultural identity of peoples, its protection has long been neglected by international law. Early expressions of such protection were incorporated in peace treaties and—albeit sparingly—surfaced in the jurisprudence of the Permanent Court of International Justice (PCIJ).[72] In the aftermath of WWII, aspects of intangible heritage have been governed and/or touched upon by a number of international law instruments.[73] Nevertheless, most international legal instruments focused on the protection of tangible heritage only.[74] For decades, any safeguarding of ICH has had a merely oblique character. For instance, human rights treaties have indirectly governed aspects of ICH by requiring the protection of human dignity and cultural rights.[75] Cases adjudicated before the International Court of Justice (ICJ) have touched upon the cultural practices of local communities while settling several disputes.[76]

---

71 Caroline Clauss-Ehlers, 'Cultural Resilience', in Caroline Clauss-Ehlers (ed.) *Encyclopedia of Cross-Cultural School Psychology* (Heidelberg: Springer 2015) 324–6.

72 *See generally* Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Leiden: Martinus Nijhoff Publishers 2009).

73 Ana F. Vrdoljak, 'Minorities, Cultural Rights, and the Protection of Intangible Heritage', paper presented at the ESIL Research Forum on International Law Contemporary Issues, held at the Graduate Institute of International Studies in Geneva on 26–28 May 2005, 1.

74 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, 14 May 1954, in force 7 August 1956, 249 UNTS 240; Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

75 See, *inter alia*, International Covenant on Civil and Political Rights (ICCPR) 16 December 1966, in force 23 March 1976, 999 UNTS 171; 6 ILM 368 (1967), Article 27; International Covenant on Economic, Social, and Cultural Rights (ICESCR), 16 December 1966, in force 3 January 1976, 993 UNTS 3, 6 ILM 368 (1967), Article 15.

76 See e.g. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, 21 April 2022 (2022) ICJ Reports para. 15 (examining whether Colombian fishermen had traditional and historic fishing rights); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 54, para. 134 (holding that 'the construction of the wall and its associated régime … impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social, and Cultural Rights and in the United Nations Convention on the Rights of the Child.); *Pulp Mills on the River Uruguay* (*Argen-*

States did not adopt specific international instruments for safeguarding ICH since they believed that local communities would appropriately maintain and develop their cultural practices.[77] They assumed that 'the depositaries of ICH' would 'transmi[t] to future generations the necessary knowledge to preserve and perpetuate their own immaterial heritage', and that there was no need for any international instrument in that respect.[78]

In recent decades, however, it has become evident that ICH demands safeguarding at the international level. Globalization has intensified commerce and intercultural contacts, potentially promoting cultural exchange but also jeopardizing local cultural practices and contributing to the predominance of certain cultural models over others.[79] The diffusion of a global mass culture has raised the fundamental question of whether 'valuable traditions, practices, and forms of knowledge rooted in diverse societies would survive the next generation.'[80]

In response to such trends, UNESCO has adopted specific instruments for safeguarding ICH. In 1989, UNESCO issued a Recommendation on the Safeguarding of Traditional Culture and Folklore, illustrating policies that countries could implement to preserve their ICH.[81] However, the recommendation was a 'soft' international instrument and had little impact due to its 'top-down' and 'state-oriented' approach.[82] Very few states took action in this regard. In 2001, the launch of the Masterpieces of the Oral and Intangible Heritage program—which established three rounds of proclamations of given traditions as representative 'Masterpieces' to raise awareness about intangible heritage—was very well received and paved the way for the elaboration of the Convention on the Safeguarding of the Intangible Cultural Heritage (CSICH).[83]

---

tina v. Uruguay), Judgment, 20 April 2010, ICJ Reports 2010, p. 14, para. 171 (referring to 'pre-existing uses of the river'); *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*) Judgment, 14 June 1993, ICJ Reports 1993, p. 38, para. 73 (referring to the local fishing practices of migratory stocks).

77 Lenzerini, 'Intangible Cultural Heritage: The Living Culture of Peoples', 102.

78 Id.

79 Marilena Alivizatou, 'Intangible Heritage and Erasure: Rethinking Cultural Preservation and Contemporary Museum Practice' (2011) 18 *International Journal of Cultural Property* 37, 54.

80 Richard Kurin, 'Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a Critical Appraisal' (2004) *Museum International* 66, 68.

81 Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989, in UNESCO, *Standard–Setting at UNESCO—Conventions, Recommendations, Declarations and Charters Adopted by UNESCO* (1948–2006), Volume II, 605–609.

82 Kurin, 'Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention', 68.

83 *See generally* 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 Heritage* (Abingdon: Routledge 2009) 13–44.

The CSICH constitutes the principal instrument governing ICH at the international level and has been very successful since its inception.[84] No state voted against its adoption; it rapidly entered into force, and today it boasts an almost universal adhesion.[85] The CSICH considers solely 'such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups, and individuals, and of sustainable development.'[86]

The CSICH requires States Parties to draw inventories of their ICH and to collaborate with local communities on various appropriate means of safeguarding those traditions.[87] The UNESCO Committee established under the CSICH oversees two international lists: (1) the list of 'representative' intangible cultural heritage ('Representative List of the Intangible Cultural Heritage of Humanity')[88] and (2) the list of endangered cultural heritage ('List of Intangible Cultural Heritage in Need of Urgent Safeguarding').[89] The former includes, *inter alia*, the items already designated as Masterpieces of Oral and Intangible Heritage by UNESCO and is comparable to the World Heritage List. The latter is comparable to the List of World Heritage in danger.

The CSICH aims to remedy two structural imbalances within international law. First, it aims to counterbalance the regulation of cultural resources by international economic law. In this regard, the CSICH can counter both the perceived commodification of culture, that is, its reduction to a good or merchandise to be bartered or traded, and the hegemonic tendencies of dominant cultures. To do so, the 2003 Convention conceptualizes oral traditions and expressions—including music, dance, and theater—and knowledge and practices concerning nature and the universe—such as traditional medicine and artisanship—as forms of ICH, rather than mere cultural commodities.[90] This different conceptualization of cultural processes and phenomena determines a paradigm shift in the way these valuable assets are to be governed. Moreover,

84 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH), 17 October 2003, 2368 UNTS.

85 List of States Parties to the 2003 Convention, <http://www.unesco.org/eri/la/convention.asp?language=E&KO=17116> (accessed on 18 January 2022).

86 CSICH Article 2.1.

87 *See generally* Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention. A Commentary* (Oxford: OUP 2020).

88 CSICH Article 16.

89 CSICH Article 17.

90 See, for example, Valentina Vadi, 'Intangible Heritage, Traditional Medicine, and Knowledge Governance' (2007) 10 *Journal of Intellectual Property Law and Practice* 682; Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property—Genetic Resources, Traditional Knowledge and Folklore* (Wolters Kluwer 2008) 510.

since the CSICH identifies local communities as ICH creators and guardians, it consequently requires the involvement of such communities for safeguarding ICH. The CSICH is more participatory than any other international cultural heritage law instrument to date. The adoption of a participatory regime of implementation oriented toward cultural bearers can counter patterns of cultural hegemony and empower local communities.

Second, the CSICH aims to remedy a gap in global cultural governance, which has traditionally favored the protection of tangible heritage over the protection of intangible heritage. For example, while the 1972 WHC focuses on the conservation of static and tangible monuments and sites,[91] the CSICH safeguards dynamic and intangible heritage. As such, the CSICH does 'not envision cultural heritage as a … relic of the past,' but as living heritage that is constantly evolving.[92] Whereas the WHC requires outstanding universal value for items to be inscribed on its list, the CSICH has a representative list. The shift from 'outstanding' to 'representative' heritage fosters comprehensiveness and inclusion. It also enables historically marginalized countries to bring their heritage to the fore.[93] Furthermore, while the WHC allows only for limited participation of non-state actors, the ICH regime places communities at the center of its operation.[94] The ICH regime acknowledges that 'there is no folklore without the folk' and that communities shape their ICH as much as ICH shapes their identity.[95] Therefore, the CSICH highlights the importance of involving communities in all processes related to their ICH.[96]

Despite its achievements, the CSICH has been criticized because of its 'substantive overreach' and procedural underachievement.[97] On the substantive level, the definition of ICH is too broad and descriptive, risking an unwelcome politicization of culture.[98] States often list ICH in the pursuit of

91 Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

92 Alivizatou, 'Contextualising Intangible Cultural Heritage', 48.

93 Lenzerini, 'Intangible Cultural Heritage: The Living Culture of Peoples', 104.

94 Britta Rudolff and Susanne Raymond, 'A Community Convention? An Analysis of Free, Prior, and Informed Consent given under the 2003 Convention' (2013) 8 *International Journal of Intangible Heritage* 154.

95 Alivizatou, 'Contextualising Intangible Cultural Heritage', 47.

96 CSICH, Article 15.

97 Tomer Broude, 'A Diet too Far? Intangible Cultural Heritage, Cultural Diversity, and Culinary Practices' in Irene Calboli and Srividhya Radavan (eds), *Protecting and Promoting Diversity with Intellectual Property Law* (Cambridge: CUP 2015) 3.

98 *See generally* Tullio Scovazzi, Benedetta Ubertazzi, and Lauso Zagato (eds), *Il Patrimonio Culturale Intangibile nelle sue Diverse Dimensioni* (Milan: Giuffré 2012) 93–126; Tullio Scovazzi, 'La Notion de Patrimoine Culturel de l'Humanité dans les Instruments

cultural, political, and economic goals. However, an excessive politicization of the listing process – namely, using the listing process for predominantly, if not exclusively, purposes beyond cultural goals – risks affecting the functioning of international cultural instruments, and endangering, rather than safeguarding, heritage.

Meanwhile, on the procedural level, critics of the ICH regime have also questioned the effectiveness of the listing mechanism, as it is up to states, not local communities, to nominate items for inscription.[99] Moreover, inventories do not do justice to ICH as a living phenomenon; rather, they risk creating cultural islands that are separated from the progression of time and the vitality of culture. In this sense, critics fear that measures for the protection of ICH 'may possibly hinder their further development and make them less relevant to contemporary communities'.[100] Furthermore, the very effectiveness of such a listing is controversial, as mere inventories will hardly save ICH.[101]

Conflicts between the CSICH and other international norms—whether customary or conventional—have demonstrated additional procedural shortcomings of the Convention. The CSICH intersects with several instruments of international trade law, which have different aims and objectives. While the CSICH aims to safeguard ICH, international trade law instruments aim to promote free trade. Furthermore, while the CSICH does not provide a binding dispute resolution mechanism, the WTO is characterized by the compulsory, highly effective, and sophisticated DSM. As such, when a substantive clash between the promotion of free trade and the safeguarding of ICH has arisen, such disputes have been brought before the WTO DSM.[102]

3.4 *Cultural Diversity*

The concept of cultural diversity is 'multifaceted, multilevel, [and] almost as complex as the concept of culture itself.'[103] It 'refers to the existence of a

---

Internationaux' in James A.R. Nafziger and Tullio Scovazzi (eds), *Le Patrimoine Culturel de l'Humanité/ The Cultural Heritage of Mankind* (Leiden: Brill 2008) 3–144.

99 Michelle Stefano, 'Reconfiguring the Framework: Adopting an Ecomuseological Approach for Safeguarding Intangible Cultural Heritage', in Michelle Stefano, Peter Davis, and Gerard Corsane (eds), *On the Ground: Safeguarding the Intangible* (Cambridge: CUP 2013) 223–238.

100 Alivizatou, 'Contextualising Intangible Cultural Heritage', 47.

101 Kurin, 'Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention', 74.

102 See Chapter 5 below.

103 Céline Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion Operating in the Law on Cultural Policies' (2016) 22 *International Journal of Cultural Policy* (2016) 273–290, 273.

multiplicity of cultures … in the same vein as biodiversity refers to the variety of living forms through the ecosystems.'[104] Not only does cultural diversity constitute a fundamental aspect of the human condition, but it also constitutes a core element of international law that governs the interaction between different civilizations since time immemorial.

Globalization is having a profound effect on all civilizations and ways of life. As an economist pointed out, '[i]t has affected what we eat and the ways we prepare our foods, what we wear and the materials from which our clothing is made; it has affected the music we hear, the books we read, even the language we use to communicate with each others'.[105] Some argue that globalization can exert strong homogenizing tendencies thus weakening or even erasing existing cultures and leading to a sort of cultural imperialism. By facilitating the export of cultural products such as television programs, music, and other entertainment from given countries to others, economic globalization could pave the way to the emergence of an overarching world culture.[106] The resulting cultural globalization would gradually lead to cultural losses, the end of cultural diversity, and a diffusion of uniform beliefs across time and space.

For example, economic globalization has enabled Hollywood studios to market their movies on a global level at a scale unprecedented before. The rise of 'the jewel in America's trade crown'[107] has entailed the relative decline of other national cinemas in the global film market.[108] In order to counter this hegemonic process, states have adopted a range of cultural policies to assist domestic film production, not simply because of economic considerations but also for sustaining diverse forms of cultural expression.[109] Since the early 2000, several countries such as Canada have adopted policies such as quotas, tax incentives, and subsidies to reduce the showing of foreign films and to instead feature more domestic programming. Within the EU, common cultural policies have been adopted.[110] Such policies express the pursuit of

104 Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion', 273.

105 Keith Griffin, 'Globalization and Culture', in Stephen Cullenberg and Prasanta Pattanaik (eds), *Globalization, Culture, and the Limits of the Market: Essays on Economics and Philosophy* (New Delhi: OUP 2004) 241–263, 252.

106 John Hill and Nobuko Kawashima, 'Introduction: Film Policy in a Globalised Cultural Economy' (2016) 22 *International Journal of Cultural Policy* 667–672, 669.

107 Christopher Bruner, 'Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products' (2008) 40 *New York University Journal of International Law and Politics* 351–434, 356.

108 Xu Song, 'Hollywood Movies and China' (2018) 3 *Global Media and China* 177–194, 179.

109 Hill and Kawashima, 'Film Policy in a Globalised Cultural Economy', 668.

110 Id. 670.

economic objectives (such as full employment in the cultural industries and positive cascading effects on other industries) and cultural ones (such as the safeguarding of domestic culture and the promotion of cultural diversity) in film policies.[111] This has determined a tension between countries that are net exporters of audiovisual products (that consider such cultural policies as a disguised protectionism) and countries that are importers of such products (that desire to maintain some space for domestic cultural products and processes). The former consider such cultural products as mere goods. The latter conceptualize cultural goods not only as merchandise but also as vectors of cultural meaning, value, and identity.

Analogously, economic globalization has deeply changed domestic food cultures. As is known, food has cultural value and its preparation can be considered an expression of cultural diversity. While trade in food has undeniably facilitated access to food in many countries by increasing the availability of food as well as decreasing the prices of the same, globalization has also greatly changed local food cultures.[112] In parallel, FDI in the agribusiness sector has entailed a shift toward overspecialization, agriculture intensification, and long chain models where food is traded long distances.[113] Such overspecialization and intensification of agricultural production can disrupt traditional lifestyle, reduce biodiversity, and affect soil fertility, thus reducing communities' resilience in times of crisis.[114] Moreover, in long food chains, raw ingredients are usually transformed into processed products with considerable sugar, salt, and fat content.[115] For example, fast food companies have become popular across different continents, often making highly processed foods cheaper and more available than healthy alternatives. This has led to a shift in dietary habits worldwide as people increasingly consume food that is rich in sugar, salt, and fat. Therefore, the new global diet has increased the risk of obesity, type

111 Hill and Kawashima, 'Film Policy in a Globalised Cultural Economy', 668.

112 See, for instance, Sarah E. Clark, Corinna Hawkes, Sophia M.E. Murphy, Karen Hansen-Kuhn, and David Wallinga, 'Exporting Obesity: US Farm and Trade Policy and the Transformation of the Mexican Consumer Food Environment' (2012) 18 *International Journal of Occupational and Environmental Health* 53–64 (noting that, facilitated by the North American Free Trade Agreement (NAFTA), the United States's agriculture and trade policy has influenced Mexico's food system.)

113 Anna Lartey, Günter Hemrich, and Leslie Amoroso, 'Influencing Food Environments for Healthy Diets', in FAO, *Influencing Food Environments for Healthy Diets* (Rome: FAO 2016) 1–14, 5.

114 Olivier De Schutter, 'International Trade in Agriculture and the Right to Food' in Olivier De Schutter and Kaitlin Cordes (eds), *Accounting for Hunger* (Oxford: Hart 2011) 137–191, 141.

115 Corinna Hawkes, 'The Role of Foreign Direct Investment in the Nutrition Transition' (2005) 8 *Public Health Nutrition* 357–365.

2 diabetes, and other noncommunicable diseases (NCDs), thus constituting a global health threat in both industrialized and developing countries alike. It can also lead to the gradual abandonment of traditional food cultures with the resulting loss of cultural diversity.[116]

Food has always been a driving force for globalization, especially in the early modern period when the world's appetite for spices opened new trade routes, redrew the world's map, and shaped the structure of the then global economy. Nowadays, economic globalization has led to the convergence if not homogenization of food, eating habits, and cuisines.[117] Food cultures are on the move and some cultures have become dominant on the global plane. Whether one global fusion cuisine will emerge–that combines elements of different culinary traditions that originate from different countries, into a melting pot of culinary influences from all across the globe–or whether a plurality of culinary cultures can flourish remains a matter of debate. Nonetheless, different aspects of international economic law can enable or constrain governments' ability to adopt or maintain cultural policies.

The 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions (CCD) was adopted to counter concerns of cultural imperialism.[118] Through this agreement, the international community acknowledged the dual nature, both cultural and economic, of contemporary cultural expressions. The CCD recognizes the sovereign right of states to adopt policies to protect and promote cultural diversity.

Because the legal notion of cultural diversity is characterized by fundamental indeterminacy, it permits different interpretations and legitimatizes different cultural policies.[119] In a diverse society such as the international community, cultural diversity constitutes a safety valve (or an agreement to disagree) that enables states to fruitfully maintain their divergences of opinion while maintaining international peace. Such inherently vague and flexible concept

116 Sam-ang Seubsman, Matthew Kelly, Pataraporn Yuthapornpinit, and Adrian Sleigh, 'Cultural Resistance to Fast-Food Consumption?', (2009) 33 *International Journal of Consumer Studies* 669–675.

117 Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227 [1988] (holding that Germany cannot limit the use of the word *Bier* to beverages manufactured in accordance with German standards); Case 120/78, *Rewe Central AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 [1979] (holding that Germany cannot prohibit import of liqueur legally manufactured in France because it fails to meet minimum alcohol content under German law).

118 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. I, at 83.

119 Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion', 274 and 276.

works as an 'incompletely theorized agreement' precisely because 'it reflects divergences about culture, cultural policies, and their relationships with markets, societies, and States.'[120] Consequently, the measures adopted by the States Parties to comply with the Convention can be contradictory. Whether cultural diversity can be be better promoted by allowing the broadcasting of foreign movies or by requiring the compulsory broadcasting of domestic movies remains an open question. Whether the globalization of food industries contributes to eradicating hunger by bringing cultures together or contributes to malnutrition bringing an excessive food uniformity remains to be seen.

The indefinite fluidity of international cultural heritage law allows states to calibrate their cultural policies according to their specific needs. It can also assist the achievement of a suitable balance between the protection of cultural heritage and the promotion of economic interests in international law. Yet, concerns remain that cultural policies can disguise discrimination and protectionism. The particular fluidity of international cultural heritage law can make it difficult for adjudicators to ascertain the legitimacy of such measures. Because there is no World Heritage Court, cultural diversity-related disputes have been attracted and settled by international economic courts.[121]

3.5 *Indigenous Cultural Heritage*

Indigenous cultural heritage plays an essential role in the building of the identity of Indigenous peoples. Indigenous peoples are culturally distinct ethnic groups who are native to a place which has been colonized and settled by another ethnic group.[122] They are geographically rooted in given places but historically and legally situated between the national and the international arenas. Geographically, they are '*Indigenous*' (from the Latin term *indigena* indicating native people who are born in a place) because 'their ancestral roots are embedded in the lands on which they live.'[123] They have been living in a

120 Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion', 278.

121 See Chapter 3 below.

122 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 ILM 1382, Art. 1 (defining 'Indigenous peoples' 'on account of their descent from the populations which inhabited the country … at the time of conquest or colonization or the establishment of present state boundaries and who … retain some or all of their own social, economic, cultural, and political institutions'.)

123 James Anaya, *Indigenous Peoples in International Law*, II ed. (Oxford: OUP 2004) 3.

given territory long before the establishment of the nation state under whose sovereignty they live today.

Nonetheless, historically and legally, Indigenous nations have played a role in international relations, signed treaties, and used to be recognized as sovereign nations. Before the coming of Europeans to Indigenous lands, Indigenous peoples were 'sovereign political communities.'[124] Nonetheless, for centuries, states tended to view and govern Indigenous peoples as units of domestic law rather than as legal subjects under international law.[125] In parallel, international law largely forgot them.[126]

Nowadays, there has been 'a paradigm shift in international law,'[127] and Indigenous peoples have been increasingly considered to be 'legal subjects' under the same.[128] Indigenous peoples are directly influencing and contributing to international law making; new international instruments have specifically recognized the rights of Indigenous peoples in the past five decades; and a growing jurisprudence of various UN and regional bodies has firmly reaffirmed their rights.[129] If the 'claims and aspirations' of Indigenous peoples 'are diverse,' they present a common thread: the quest for safeguarding their cultural heritage.[130]

Indigenous cultural heritage comprises 'all objects, sites, and knowledge' that have been 'transmitted from generation to generation' and that pertain to Indigenous peoples.[131] It includes both 'tangible and intangible manifestations of their ways of life, worldviews, achievements, and creativity.'[132] Indigenous peoples see culture and nature as deeply interconnected and do not differentiate

124 *United States v. Wheeler*, 435 U.S. 313, 322–323 (1978).

125 *Cayuga Indians* (*Great Britain*) *v. United States*, 6 *Review of International Arbitral Awards* 173, 176 (1926) (stating that an Indian tribe 'is not a legal unit of international law.')

126 J. Kleinfeld, 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard LR* 1755–1778, at 1758.

127 Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford: OUP 2016) 149.

128 Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, II revised edition (Leiden: Brill 2016) XIII.

129 Kleinfeld, 'The Double Life of International Law', at 1758.

130 Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 EJIL 121–140, 121.

131 UN Special Rapporteur Daes, Protection of the Heritage of Indigenous Peoples, E/CN.4/Sub.2/1995/26, Annex.

132 Human Rights Council, 'Promotion and Protection of the Rights of Indigenous Peoples with Respect to their Cultural Heritage', Study by the Expert Mechanism on the Rights of Indigenous Peoples', A/HRC/30/53, 19 August 2015, para. 6.

between cultural heritage on the one hand and natural heritage on the other. Rather, their cultural traditions are inseparable from their lands.

For Indigenous peoples, land is the basis not only of economic livelihood, but also the source of spiritual and cultural identity.[133] Indigenous peoples maintain cultural and spiritual ties with the territory they have traditionally occupied,[134] not only due to the presence of sacred sites but also because of the intrinsic sacred value of the territory itself.[135] They 'see the land and the sea, all of the sites they contain, and the knowledge and the laws associated with those sites, as a single entity that must be protected as a whole.'[136] Although Indigenous cultures vary across continents, 'there is a common thread that runs through these diverse Indigenous groups—a deep cultural and spiritual connection to the land.'[137]

For Indigenous peoples, preserving their cultural heritage is particularly important because its safeguarding contributes to building both individual and collective identity, resilience, and a sense of common destiny.[138] For them, cultural heritage transforms the past into a tool to address present needs and future challenges. Therefore, the safeguarding of Indigenous cultural heritage is not only complementary but also necessary to respect, protect, and fulfill their human rights.[139] The protection of Indigenous cultural heritage 'ensure[s] the survival and continued development of the cultural, religious, and social identity of the [Indigenous peoples] concerned, thus enriching the fabric of society as a whole.'[140]

---

133 Jérémie Gilbert, 'Custodians of the Land—Indigenous Peoples, Human Rights, and Cultural Integrity' in Michele Langfield, William Logan, and Máiréad Craith (eds), *Cultural Diversity, Heritage, and Human Rights* (Oxon: Routledge 2010) 31–44 at 31.

134 Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment, 31 August 2001, IACtHR Series C, No. 79, 75, para. 149 (clarifying that 'For Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.')

135 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, IACtHR Series C, No. 172, at para. 82.

136 Ciaran O'Faircheallaigh, 'Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia' (2003) 39 *Development and Change* 25–51 at 27.

137 Erin M. Genia, 'The Landscape and Language of Indigenous Cultural Rights' (2012) 44 *Arizona State Law Journal* 653–679, 659.

138 Tumu te Heuheu, Merata Kawharu, and R. Ariihau Tuheiava, 'World Heritage and Indigeneity' (2012) 62 *World Heritage* 8–17 at 17.

139 Wiessner, 'The Cultural Rights of Indigenous Peoples', 121–22.

140 Id.

Unlike other categories of heritage, Indigenous cultural heritage is not governed by a dedicated UNESCO Convention. Like other branches of international law, international cultural heritage law remains state-centric, that is, made by states for states.[141] Although Indigenous peoples have traditionally played a role in international relations, the state-centric structure of international law has somehow delayed, if not altogether prevented, the adoption of a specific convention safeguarding Indigenous cultural heritage.

Nonetheless, the recognition of Indigenous peoples' rights and cultural heritage has gained some momentum at the international level since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[142] Drafted with the active participation of Indigenous representatives, the Declaration constitutes a significant achievement for Indigenous peoples worldwide.[143] Not only does it re-empower Indigenous peoples, but it also shifts the discourse on their rights from the local to the international level with an intensity that was missing before.

The Declaration has mainstreamed the protection of Indigenous cultural heritage into the fabric of international law. The protection of Indigenous culture is a central theme of the Declaration[144] that dedicates many provisions to different aspects of Indigenous culture:[145] the word 'culture' appears no less than 30 times in the Declaration.[146] The UNDRIP recognizes the importance of Indigenous culture and acknowledges its essential contribution to the 'diversity and richness of civilizations … which constitute the common heritage of mankind'.[147] The Declaration recognizes the right of Indigenous peoples to

141 George Scelle, 'Le Phénomène Juridique du Dédoublement Fonctionnel', in Walter Schätzel and Hans Jürgen Schlochauer (eds), *Rechtsfragen der Internationalen Organisation—Festschrift für Hans Wehberg* (Frankfurt am Main: Klostermann 1956) 324–342.

142 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) GA Res. 61/295, UN Doc. A/RES/61/295, in force 13 September 2007.

143 Elvira Pulitano, 'Indigenous Rights and International Law: An Introduction', in Elvira Pulitano (ed.), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 1–30 at 25.

144 Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 EJIL 9 at 15.

145 Elsa Stamatopoulou, 'Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples', in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing 2011) 392.

146 See Yvonne Donders, 'The UN Declaration on the Rights of Indigenous Peoples. A Victory for Cultural Autonomy?', in Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights* (Antwerp/Oxford/Portland: Intersentia 2008) 99.

147 UNDRIP preamble.

practice their cultural traditions[148] and maintain their distinctive spiritual and material relationship with the land that they have traditionally owned, occupied, or otherwise used.[149]

While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law.[150] Some of its contents already express customary international law and/or general principles of international law or repeat provisions appearing in binding treaty law. Therefore, the UNDRIP certainly constitutes a powerful and significant move toward the safeguarding of Indigenous cultural heritage that can spur further legally binding developments.

Such developments are needed because, despite the adoption of the UNDRIP, law and policy tend to prioritize macroeconomic notions of growth in spite of actual or potential infringements of Indigenous entitlements.[151] Many of the estimated 370 million Indigenous people around the world have lost or risk losing their ancestral lands because of the exploitation of natural resources.[152] The development of natural resources is increasingly taking place in, or very close to, traditional Indigenous areas. While development analysts point to extractive projects as anti-poverty measures, and advocate FDI as a major catalyst for development,[153] Indigenous peoples in the areas where the resources are located tend to bear a disproportionate burden of the negative impacts of development through reduced access to natural resources, exposure to environmental degradation, and loss of cultural heritage and traditional lifestyle.[154] In parallel, free trade may destabilize Indigenous communities by commodifying their cultural heritage, transforming their lifestyles, and affecting their traditional cultural practices.[155] Indigenous peoples con-

148 UNDRIP Article 11.

149 UNDRIP preamble, Articles 8, 11, 12.1, and 13.1.

150 On the legal status of the Declaration, see Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 ICLQ 957–983.

151 Lila Barrera-Hernández, 'Indigenous Peoples, Human Rights, and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water' (2005) 11 *Annual Survey of International & Comparative Law* 1–28, 1.

152 Navi Pillay, 'Let us Ensure that Development for Some is not to the Detriment of the Human Rights of Others', Statement by the United Nations High Commissioner for Human Rights, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11284&LangID=E (2011).

153 OECD, *Foreign Direct Investment for Development* (Paris: OECD 2002) 3.

154 Barrera-Hernandez, 'Indigenous Peoples, Human Rights, and Natural Resource Development', 6.

155 See e.g. Carmen G Gonzalez, 'An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms' (2010–2011) 32 *University of Pennsylvania Journal of International Law* 723–803.

sider that trade liberalization and FDI 'are creating the most adverse impacts on [their] lives' through environmental degradation, forced relocation, and deforestation among others.[156]

Therefore, the protection of Indigenous heritage has increasingly intersected with the promotion of free trade and foreign direct investments. The collision between the protection of economic interests and Indigenous entitlements in international law makes the case for strengthening the current regime in place for the protection of Indigenous heritage. A real limitation of the legal framework protecting Indigenous cultural heritage is the absence—aside from the classical human rights mechanisms—of a special international court or tribunal where Indigenous peoples can raise complaints regarding measures that affect them. In fact, the UNDRIP has no binding force nor does it have enforcement or compliance mechanisms. While the jurisprudence of domestic courts and regional human rights courts has contributed to the interpretation and application of Indigenous rights, and international bodies have monitored the implementation of such rights,[157] the lack of a dedicated world court allows Indigenous heritage-related cases to be adjudicated by international (economic) courts with limited if no mandate to adjudicate Indigenous claims.

4 A Multipolar Cultural Heritage Law

Cultural heritage law has developed in a multipolar and multilevel way.[158] Different branches of law have regulated different categories of heritage at the national, regional, and international level. In this complex system, national policymakers and regional and international organizations jointly govern cultural heritage.[159] While states maintain primary responsibilities in the cultural field, other actors have come to play an important role with regard to cultural heritage governance, ranging from regional and international organizations to private actors. After briefly examining the aims and objectives of cultural heritage law, this section illuminates the main features of the field.

The fundamental aim of cultural heritage law is the conservation of heritage for the enjoyment of present and future generations.[160] Like any other field of

156 See Indigenous Peoples' Seattle Declaration on the Third Ministerial Meeting of the World Trade Organization, 30 November–3 December 1999.

157 Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 EJIL 165–202.

158 Janet Blake, 'On Defining Cultural Heritage', (2000) 49 ICLQ 61–85, 85.

159 Lorenzo Casini, 'I Beni Culturali e la Globalizzazione' in Lorenzo Casini (ed.), *La Globalizzazione dei Beni Culturali* (Bologna: Il Mulino 2010).

160 Prott and O'Keefe, Cultural Heritage or Cultural Property?' 310–311.

law, at the heart of cultural heritage law are human beings. This field protects cultural products and processes because they express human creativity and symbolize human experience.[161] The tendency to prioritize the conservation of cultural objects as such (in French, *primauté de l'objet*) has gradually begun to fade. A growing awareness has emerged that 'an object as such can never be of an absolute value.'[162] Rather, by protecting cultural heritage, states protect the human rights of individuals and communities. The effective protection of cultural heritage is thus linked to the protection of fundamental human rights and the maintenance of peace and security.[163]

Cultural heritage law has three principal objectives: (1) protecting cultural heritage by empowering state cultural sovereignty and enhancing international cooperation in the cultural domain; (2) promoting just, peaceful, and prosperous relations among nations by promoting mutual understanding; and (3) settling cultural heritage-related conflicts and disputes. First, cultural heritage law enhances state capacity to safeguard different types of cultural heritage and facilitates international cooperation in such protection. At the international level, the principal instruments protecting cultural heritage include the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention),[164] the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention or WHC),[165] the Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH),[166] the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD),[167] and the Convention on the Protection of the Underwater Cultural Heritage (CPUCH).[168]

Second, cultural heritage law can promote just and peaceful relations among nations by fostering respect and appreciation of cultural diversity, prohibiting and preventing the illicit trade of cultural property, requiring the return of

161 Fechner, 'The Fundamental Aims of Cultural Property Law', 378.

162 Id. 379.

163 Prott and O'Keefe, 'Cultural Heritage or Cultural Property?', 310–311.

164 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), 14 May 1954, in force 7 August 1956, 249 UNTS 240.

165 Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

166 Convention for Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 UNTS 1.

167 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. I, at 83.

168 Convention on the Protection of the Underwater Cultural Heritage (CPUCH), 2 November 2001, in force 2 January 2009, 41 ILM (2002) 37.

stolen cultural artifacts,[169] and forbidding the destruction of cultural heritage. Because 'claims for restitution and return of cultural heritage are typically the legacy of armed combat, imperial conquest, and theft,'[170] the return of such items contributes to the pursuance of just and peaceful relations among nations by fulfilling the promise of decolonization.[171] Because cultural heritage is 'a record of human experience and aspirations', its protection can 'inspire a genuine dialogue between cultures',[172] facilitate mutual understanding, and contribute to growth and sustainable development.

Finally, cultural heritage law provides mechanisms and rules for settling cultural heritage-related disputes. This is perhaps the most flexible pillar of the emerging architecture of cultural heritage law. In fact, at the international law level, the proliferation of international instruments governing cultural heritage has not been matched by the creation of a World Heritage Court. Rather, international cultural heritage law instruments generally have bland dispute settlement provisions mostly providing for diplomatic means of dispute settlement, such as negotiations in good faith,[173] good offices,[174] mediation,[175] and conciliation.[176] Some contemplate arbitration and, albeit more rarely, litigation before national and international courts.[177]

The flexibility characterizing the dispute settlement mechanisms under international cultural heritage law is intentional. Because cultural matters are perceived to be at the heart of state sovereignty, States have never agreed on

169 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 14 November 1970, in force 24 April 1972, 823 UNTS 231; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, in force 1 July 1998, (1995) 34 ILM 1322.

170 Nafziger, 'The Present State of Research', 261

171 Cynthia Scott, *Cultural Diplomacy and the Heritage of Empire—Negotiating Post-Colonial Returns* (Abingdon: Routledge 2021).

172 General Comment No. 21, para. 50(a).

173 CPUCH, Article 25(1); CCD, Article 25(1).

174 Hague Convention, Article 22; 1970 UNESCO Convention, Article 17(5); CCD, Article 25(2).

175 CPUCH, Article 25(2); CCD, Article 25(2).

176 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, in force 9 March 2004, 38 ILM (1999), Articles 35–36; CCD, Article 25(3) and Annex.

177 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Article 8(1) (referring to domestic courts) and 8(2) (referring to arbitration and international courts); CPUCH Article 25(3) (referring to the rules set forth in Part XV of the United Nations Convention on the Law of the Sea (UNCLOS) and providing that any party to the dispute that is also a party to the UNCLOS may submit the matter to the International Tribunal for the Law of the Sea (ITLOS), the ICJ, or an *ad hoc* arbitral tribunal.) United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.

establishing permanent courts and tribunals in the cultural field. As Shi points out, 'the conventional view of state power … asserts that culture is pre-political: culture precedes and constitutes the state and the state exists to protect that culture.'[178] If the traditional elements of states are territory, people, and government, culture constitutes the invisible glue that links and keeps the three elements together.

The agility of the dispute settlement provisions of international cultural heritage law can be perceived as both a strength and a weakness of the regime. It can be seen as a strength of the system because it enables cultural heritage law to be flexible enough to adapt to emerging circumstances and accommodate change. Diplomatic dispute settlement mechanisms can encourage amicable and mutually satisfactory solutions. This pragmatic approach can balance the different interests involved timely, efficiently, and effectively.

Nonetheless, the flexibility of such dispute settlement mechanisms can also be perceived as a weakness of the system. It can lead to temporary solutions that do not take into account the inherent value of cultural items, the long-term interests of local communities, and international justice.[179] Heritage matters can be, and have been, linked to other matters in a sort of give-and-take. For instance, negotiators have linked the restitution of cultural artifacts to security and migration.[180] Such linkages can reflect power politics, thus affecting international justice. Moreover, with the exception of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, none of the above mentioned UNESCO conventions allows claims to be brought by non-state actors. Arbitration between an individual and a state remains possible where the parties consent to it. Nonetheless, the lack of an automatic, binding, and exclusive dispute settlement mechanism in the cultural field entails that private actors, minorities, and given communities are not granted direct access (*locus standi*) to international courts and tribunals in matters of cultural concern. Consequently, while international cultural heritage law has been effective, it has not been as effective as it should be for all of the relevant stakeholders.

Three dualisms have traditionally characterized cultural heritage law: (1) the division between domestic and international law; (2) the distinction

178 Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Oxford: Hart 2013) 4.7.1.1.

179 Fechner, 'The Fundamental Aims of Cultural Property Law', 377.

180 Alessandro Chechi, 'The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene', (2008) *Italian Yearbook of International Law* 159–181.

between public law and private law; and (3) the distinction between mandatory and voluntary approaches. However, these traditional boundaries have become blurry in contemporary cultural heritage law, as both national and international dimensions and private and public traits constantly interact in several different ways. Moreover, voluntary approaches often pave the way to mandatory ones.

4.1 *National v. International*

Cultural heritage law is emerging as 'a distinct field in its own right' in international law and domestic law 'with its own concepts and principles.'[181] At the international law level, international humanitarian law requires special protection for cultural heritage in times of war. International criminal law provides for individual criminal responsibility for serious offenses against cultural heritage. In addition, a number of international law instruments require the protection of cultural heritage in times of peace. UNESCO has played a leading role in the making of international cultural heritage law.[182] It has produced conventions, nonbinding (but influential and morally suasive) declarations, and guidelines that have gradually extended the scope of international cultural heritage law. Due to their almost global ratification, these instruments raise awareness of the importance of heritage protection, channel cultural concerns into the fabric of international law, and influence policymaking and adjudication.[183]

Nonetheless, 'the duty of ensuring the identification, protection, … and transmission to future generations of cultural heritage belongs primarily to the state on whose territory it is situated.'[184] At the domestic level, even before the inception of UNESCO, many states had developed regimes protecting cultural heritage.[185] Nowadays, several municipal constitutions require the state to

181 Ana Filipa Vrdoljak, 'History and Evolution of International Cultural Heritage Law', paper presented at the Expert Meeting and First Extraordinary Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin, Seoul, 28 November 2008, p. 4.

182 Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO Constitution), 16 November 1945, in force 4 November 1946, 4 UNTS 275.

183 *See generally* Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO, Normative Action in Education, Science, and Culture* (vol. I) (Leiden/Boston: Martinus Nijhoff Publishers 2007).

184 Human Rights Council, Cultural Rights and the Protection of Cultural Heritage, A/HRC/37/L.30, 19 March 2018, preamble; Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, para. 50.

185 Regina Bendix, Aditya Eggert, and Arnika Peselmann, 'Introduction: Heritage Regimes and the State', in Regina Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, II ed. (Göttingen: Göttingen University Press 2017) 11–20, 17.

protect cultural heritage,[186] and the domestic implementation of the international heritage regime 'brings forth a profusion of additional heritage regimes.'[187]

In parallel, the boundaries between the international and the domestic are gradually fading, due to the increased connection between the two fields. There is a sort of mimesis and dialectic between the local and global dimensions of cultural governance. The emergence of international cultural heritage law has fostered global awareness that the conservation of cultural heritage constitutes a common concern of humanity.[188] While cultural heritage is normally located within the boundaries of sovereign states, international cultural heritage law has contributed to the consolidation of the idea that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all [hu]mankind since each people makes its contribution to the culture of the world.'[189]

At the same time, if UNESCO Member States choose to ratify a given convention, they have to translate the internationally binding legal instrument into domestic cultural policy. While the implementation of some conventions could build on pre-existing domestic legal frameworks, the implementation of others has required the adoption of new regulatory frameworks. The result of this process is not only that international cultural heritage law shapes national heritage law, but also that national cultural policies are embedded in and part of the global heritage system.[190]

Which interest should prevail in the management of cultural heritage: the interest of the locals or the interests of the international community? Often the two interests coincide. Both communities have an interest in the conservation of cultural heritage. However, when interests collide, policymakers and adjudicators face the dilemma as to whether they should proritize international interests over local concerns or vice versa.[191] While internationalists perceive cultural heritage as expressing 'a common human culture', wherever its place

186 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 49.

187 Bendix, Eggert, and Peselmann, 'Introduction: Heritage Regimes and the State', 14.

188 CSICH, preamble; Human Rights Council, Cultural Rights and the Protection of Cultural Heritage, A/HRC/37/L.30, 19 March 2018, preamble.

189 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, preamble.

190 Markus Tauschek, 'The Bureaucratic Texture of National Patrimonial Policies', in Bendix, Eggert, and Peselmann (eds), *Heritage Regimes and the State*, 195–212, 197.

191 John Henry Merryman, 'Two Ways of Thinking about Cultural Property Law' (1986) 80 AJIL 831–853, 831.

and location,[192] nationalists perceive it as part of the national culture.[193] Even assuming that relevant UNESCO Conventions incorporate a mixture of both approaches,[194] questions remain in those cases in which the two interests—internationalist and nationalist—diverge.

Under international law, once a State assumes a treaty commitment, it is bound by that commitment (*pacta sunt servanda*), and a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[195] International law prevails over domestic law, and governments must comply with the various international law instruments they have signed to. Therefore, state responsibility arises if a state fails to comply with its international obligations. For instance, under the WHC, if the state party fails to safeguard a given site's outstanding universal value, such a site will be delisted, a process which has happened three times.

The first site to be delisted was the Arabian Oryx Sanctuary in Oman, inscribed in 1994 and delisted in 2007. The decision was a consequence of the Omani government's reduction of the size of the protected area by 90 percent after oil was discovered at the site, and the depletion of the rare antelope occurred. The World Heritage Committee considered these events as destroying the outstanding universal value of the site.[196]

The second site to be delisted was the Dresden Elbe Valley in Germany, designated in 2004 and delisted in 2009 in response to the building of a four-lane bridge through the heart of the cultural landscape. For the World Heritage Committee, the construction of the bridge had a major visual impact on the cultural landscape and irreversibly damaged the site's outstanding universal value.[197] While some scholars consider that local communities should have

192 Francesco Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) 25 *Michigan JIL* 1209–1228, at 1213–1214.

193 Merryman, 'Two Ways of Thinking about Cultural Property Law', 831–2.

194 Raechel Anglin, 'The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide' (2008) 20 *Yale Journal of Law and the Humanities* 241–275, at 241 ff.

195 Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 27.

196 UNESCO, World Heritage Committee, Arabian Oryx Sanctuary–Oman, Decision 31 COM 7B.11 (2 July 2007).

197 UNESCO, World Heritage Committee, Dresden Elbe Valley–Germany, Decision 33 COM 7A.26 (30 June 2009). Douglas Schoch, 'Whose World Heritage? Dresden's Waldschlößchen Bridge and UNESCO's Delisting of the Dresden Elbe Valley' (2014) 21 *International Journal of Cultural Property* 199–223.

rescaled their project in order to maintain the integrity of the landscape, others argue that the expectations of UNESCO were unrealistic.[198]

The third site to be delisted was the Liverpool Maritime Mercantile City, designated in 2004 because of the architectural beauty of its waterfront and delisted in 2021 due to concerns over new buildings.[199] The Committe held that urban development, including siting a stadium on the waterfront, had significantly changed the city's skyline and lessened its authenticity and integrity thus undermining the outstanding universal value of the City. Whether such development amounts to cultural vandalism or a sort of cultural investment remains debatable. On the one hand, sport constitutes a fundamental aspect of modern cultures and can be seen 'as a means to promote education, health, [and] development.'[200] On the other hand, sport can foster international cooperation and peace by 'reduc[ing] the potential for actual conflict by playing out hostilities in … [a] controlled setting' and enhancing cultural understanding.[201]

Nonetheless, these decisions highlight three important points. First, inscription on the List does not mean that a given site will necessarily maintain outstanding and universal value forever or that circumstances leading to its inscription will not change. The World Heritage Committee needs to ascertain whether a given world heritage site keeps its relevance to the contemporary international community ot whether the circumstances leading to its inscription have changed to such an extent to make its delisting inevitable.[202] In the case of the Oryx Sanctuary, a fundamental change of circumstances—the decline of the Arabian antelope due to poaching and habitat degradation—led to the deletion of the Sanctuary from the List.

Second, questions arise about how to balance economic development and the protection of cultural heritage. The 2030 Agenda for Sustainable Development endorses the compatibility between economic development, social

198 Compare Sabine Von Schorlemer, 'Compliance with the World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlössen Bridge', (2008) 51 *German YIL* 3 with Amy Strecker, *Landscape Protection in International Law* (Oxford: OUP 2018) 89.

199 Josh Halliday, 'UNESCO Strips Liverpool of its World Heritage Status', *Guardian*, 21 July 2021.

200 UNESCO, International Convention Against Doping in Sport, adopted on 19 October 2005, in force on 1 February 2007, preamble.

201 James H. Frey and D. Stanley Eitzen, 'Sport and Society', in James A.R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln (eds), *Cultural Law—International, Comparative, and Indigenous* (Cambridge: CUP 2010) 755–756.

202 Rodney Harrison, 'Forgetting to Remember, Remembering to Forget: Late Modern Heritage Practices, Sustainability, and the 'Crisis' of Accumulation of the Past' (2013) 19 *International Journal of Heritage Studies* 579–595.

needs, and cultural heritage protection.[203] Nonetheless, balancing economic development and conservation of cultural heritage remains complex in practice. Views diverge on the matter as the delisting of the Dresden Elbe Valley and Liverpool Maritime Mercantile City aptly demonstrates. On the one hand, local communities benefit from the conservation of cultural heritage because it is part of their identity, attracts tourism, and sustains a number of related economic activities. On the other hand, some urban infrastructure may be necessary to enable sustainable development and the long-term viability of heritage conservation.

Third, and more fundamentally, these examples also illustrate the tension between state cultural sovereignty and international obligations under the WHC.[204] In fact, the different approaches to the conservation of cultural heritage reflect the divided identity of international law that sits somewhere between between realism and idealism.[205] International law itself thus 'constantly shifts between the opposing positions' and 'works so as to make them seem compatible.'[206] From an international law perspective, the delisting of a site can entail some reputational damage and loss of international funding for its conservation. From a domestic perspective, however, one may wonder whether local administrators can ignore the will of local communities. In the case of Dresden, local communities had voted in a referendum for the construction of the bridge. In the case of Liverpool, even the locals were divided. On the one hand, the building of a stadium reflected contemporary ambition of the city to become 'a veritable Mecca for football fans.'[207] At the same time, locals also expressed concerns that a historic city could be filled with shiny but cold high-rise buildings and transformed into the 'soulless' shell of a city.[208]

---

203 UNGA, Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution adopted on 25 September 2015, A/RES/70/1, Goal 11, (Making cities and human settlements inclusive, safe, resilient, and sustainable) Target 11.3 (mentioning the need of enhancing 'inclusive and sustainable urbanization') and Target 11.4 (mentioning the goal of 'strengthen[ing] efforts to protect and safeguard the world's cultural and natural heritage.')

204 Ole Christian Fauchald, 'International Environmental Governance and Protected Areas' (2021) *Yearbook of International Environmental Law* 1–35, at 27.

205 Marina Lostal, 'The Role of Specific Discipline Principles in International Law' (2013) 82 *Nordic JIL* 401.

206 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: CUP 2005) 59–60.

207 Marthe De Ferrer, 'Liverpool Loses its UNESCO World Heritage Status', *Euronews*, 26 July 2021.

208 Id.

4.2 *Public v. Private*

The distinction between public and private is blurred in cultural heritage law. While states remain major actors in cultural heritage law, 'individuals and communities cannot be seen as mere beneficiaries or users of cultural heritage.'[209] Rather, individuals, communities, and nongovernmental organizations also play an important role in cultural governance.[210] Essentially, private actors have played a dual role in international cultural heritage law: on the one hand they can contribute, and have contributed, to the development of cultural heritage law, influencing its creation, implementation, and enforcement. At the same time, however, non-state actors can also affect the protection of cultural heritage, by damaging or destroying monuments and sites.[211] Therefore, their action elicits the aims and strengths of international cultural heritage law, but also highlights the limits of the field.

Private actors can be a force for good, increasingly contributing to the making, monitoring, and implementation of international cultural heritage law. For instance, nongovernmental associations have adopted a number of instruments on the protection of monuments.[212] Indigenous associations have voiced Indigenous peoples' claims with respect to the protection of their heritage before UN human rights bodies.[213] Even more significantly, litigation led by private actors has contributed to shaping the emerging field of cultural heritage law.[214]

If adjudication is considered to be a mode of governance, the expanding role of private actors in cultural heritage-related disputes has contributed to the development of the field. The jurisprudence arising from these claims before international bodies, regional human rights courts, and national tribunals underpins the development of law in this field.[215] Private actors

209 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 58.

210 Nafziger, 'The Present State of Research', 181.

211 Alessandro Chechi, 'Non-State Actors and Cultural Heritage: Friends or Foes?', in Elena Rodríguez Pineau and Soledad Torrecuadrada García–Lozano (eds), *Bienes Culturales y Derecho* (Madrid: Universidad Autónoma de Madrid 2015) 457–479.

212 Valentina Vadi, 'Exploring the Borderlands: The Role of Private Actors in International Cultural Law', in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations—Creation, Evolution, and Enforcement* (Leiden: Brill 2018) 109–125.

213 Ana Filipa Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights' (2018) 25 *International Journal of Cultural Property* 245–281, 250.

214 See e.g. James A.R. Nafziger, 'The Evolving Role of Admiralty Courts in Litigation of Historical Wreck' (2003) 44 *Harvard International Law Journal* 251–270.

215 Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights', 274.

often file claims against states for the recovery of cultural property looted in times of war, or for the violation of cultural entitlements before human rights courts and tribunals. Foreign investors may also file claims against the host state alleging that the state's cultural policies amount to disguised discrimination or an indirect expropriation of their investments. Such disputes present a mixture of private and public interests, which at times coincide converging towards the protection of a cultural item, and at times conflict when private economic or cultural interests clash with collective cultural or economic entitlements.[216]

The role of non-state actors in cultural heritage law also highlights the limits of the field. If the protection of cultural heritage can benefit individuals, local communities, and the international community as a whole, in certain cases, an excessive protection of cultural heritage can lead to scarce, if any, consideration of local communities' needs. Especially in the past, conservation has often privileged the physical protection of cultural heritage, thus separating cultural artifacts from their everyday context and their interaction with local communities.[217]

Countering *heritagization* processes within cultural heritage law requires overcoming the protection of heritage because of its mere intrinsic features ('heritage is heritage'), seeing cultural heritage against the background of human history, and illuminating the human dimension of cultural heritage law.[218] Therefore, the debate on the role of non-state actors in cultural heritage law contributes to the *humanization* of law, making it more porous to other interests and needs which go beyond the reason of state (*raison d'état*) and include the respect for human dignity and fundamental human rights.

Non-state actors can also affect the protection of cultural heritage, by damaging or destroying monuments and sites. Their expanding role in the damage and destruction of cultural heritage challenges the traditional way in which international law has responded to international crises, and calls for new and more effective approaches.

Finally, a sort of mimesis and dialectic exists between the private and public dimensions of cultural heritage law. There is an increasing awareness that

---

216 Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (Ann Arbour: University of Michigan Press 1999) 197–98.

217 Chiara de Cesari, 'World Heritage and Mosaic Universalism' (2010) 10 *Journal of Social Archaeology* 307.

218 Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: an Introduction' (2011) 22 EJIL 9–16.

cultural resources require public intervention because the conservation of cultural heritage includes elements of intra- and intergenerational equity. The protection of cultural heritage has come to be regarded as a form of public interest in addition to traditional instances of public interest such as public security, public order, and public health. Moreover, since the end of WWII, the protection of cultural heritage has been recognized to constitute a common interest of humankind.[219] However, private funding is also needed to recover and protect cultural heritage, and cooperation between the private and public sectors is particularly needed in times of economic crisis.

In conclusion, non-state actors lie at the heart of contemporary cultural governance. While their action elicits the aims and strengths of cultural heritage law, it can also highlight the limits of the field. Therefore, the expanding role of non-state actors in cultural heritage law requires some critical reflection. On the one hand, private actors can play a positive role in the development of cultural heritage law, contributing to rule-making and the conservation and safeguarding of heritage. On the other hand, political, religious, and economic iconoclasm by non-state actors risks damaging and/or destroying valuable cultural heritage. Their action highlights the urgent need to rethink the field and build bridges across different fields of law. In particular, the emerging role of non-state actors requires reconsideration of the available dispute settlement and enforcement mechanisms, as well as the linkage issue.

4.3 *Mandatory v. Voluntary Approaches*

The third dualism that characterizes international cultural heritage law is the distinction between mandatory and voluntary approaches. Binding cultural entitlements abound in international cultural heritage law, which is composed of a discrete number of treaties which are binding upon the parties who ratified them.[220] The great majority of such treaties have been adopted under the auspices of UNESCO. These instruments have raised awareness of the importance of heritage protection, in part codifying existing customary law and in part setting new standards in the cultural field, thus spurring the development

219 Jan Malíř, 'Public Interest before the ECtHR: Protection of Cultural Heritage and the Right to Property' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021).

220 These include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property; the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; the 2001 Convention on the Protection of the Underwater Cultural Property; the 2003 Convention to Safeguard Intangible Cultural Heritage; and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

of domestic cultural policies.[221] All of these instruments channel cultural concerns into the fabric of international law and influence policymaking and adjudication, due to their almost global ratification.

International cultural heritage law is also composed of a myriad of non-binding resolutions, declarations, recommendations, and other instruments of soft law such as standards, ethical codes, and rules of conduct.[222] Soft law does not constitute binding law, and some even question whether it can be considered to be law. It can prioritize political over legal reasoning, thus becoming an instrument of power in international relations. Such international instruments deal with a range of topics from the preservation of cultural heritage endangered by public or private works[223] to the safeguarding of cultural diversity[224] and the intentional destruction of cultural heritage.[225]

The adoption of soft law language in international cultural heritage law reflects the ongoing dialectics between the state and the international community in the cultural domain. On the one hand, the use of soft law language demonstrates the persisting importance of state sovereignty and the principle of nonintervention in international law.[226] On the other hand, the use of soft law also suggests a slow but progressive curbing of state sovereignty in the cultural field. In fact, soft law can constitute as sort of pre-legal, experimental, and formative framework that can endorse compromise, facilitate agreement on challenging issues, and shape opinion and practice, thus contributing to the emergence of customary law or general principles of law. In this sense, states may be more willing to adhere to soft law instruments and gradually undertake international obligations.

Consequently, the traditional boundaries between mandatory and voluntary approaches are blurring in contemporary cultural heritage law. On the one hand, certain binding instruments of international cultural heritage law

---

221 *See generally* Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO, Normative Action in Education, Science, and Culture* (vol. 1) (Leiden/Boston: Martinus Nijhoff 2007).

222 Examples of codes of ethics include the 1931 Athens Charter for the Restoration of Historical Monuments, adopted at the first International Congress of Architects and Technicians of Historic Museums and the 1964 Venice Charter for the Conservation and Restoration of Monuments and Sites, adopted by the European Council for Town Planners.

223 UNESCO, Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, 19 November 1968.

224 UNESCO, Universal Declaration on Cultural Diversity, Paris, 2 November 2001.

225 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Paris, 17 October 2003.

226 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States*) (Judgment) [1986] ICJ Rep 14, paras 202–209 (holding that 'each state is permitted, by the principle of state sovereignty, to decide freely for example the choice of political, economic, social, and cultural system, and formulation of foreign policy.')

contain only vague provisions encouraging states to adopt cultural policies. For instance, the 2003 ICH Convention is seen as a soft law instrument in formal hard law clothing. On the other hand, coalescing state practice, the global recognition of the importance of cultural heritage protection, and emerging jurisprudence contribute to the formation of general principles of international law and/or customary law requiring the protection of cultural heritage.

As is known, general principles are sources of international law only insofar as (a) they are recognized by the vast majority of states in international relations; or (b) they are derived from concepts recognized in the vast majority of domestic legal systems.[227] In examining international practice, 'some general principles have formed or are in the process of being formed, as part of general international law with regard to the obligation to respect and protect cultural heritage of significant importance.'[228] Such general principles 'have the potential to penetrate the sphere of domestic jurisdiction of individual States and also to provide standards of reference for States that are not parties to specific treaties.'[229] Moreover, the protection of cultural heritage is also recognized in the vast majority of municipal systems. In fact, respect for cultural heritage and cultural entitlements forms part of the constitutional traditions of many states not only in Europe,[230] but also in Oceania,[231] Africa,[232] Asia,[233] and the Americas.[234]

---

227 ICJ Statute, Article 38(1)(c). *See generally*, Hersch Lauterpacht, *Private Law Sources and Analogies in International Law* (London: Longmans, Green, & Co. 1927).

228 Francesco Francioni, 'The Evolving Framework for the Protection of Cultural Heritage in International Law', in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity* (Leiden: Martinus Nijhoff 2012) 25.

229 Francesco Francioni, 'Cultural Heritage', in *Max Planck Encyclopaedia of Public International Law* (2013) para. 2.

230 Céline Romainville, 'The Effects of EU Intervention in the Cultural Field on the Respect, the Protection, and the Promotion of the Right to Participate in Cultural Life' in Céline Romainville (ed.), *European Law and Cultural Policies* (Peter Lang 2015) 191.

231 Craig Forrest and Jennifer Corrin, 'Oceania', in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 860–877, 876 (reporting that 'many states in Oceania have made a constitutional pledge to uphold tradition and cultural values' and scrutinizing a number of such provisions.)

232 Folaryn Shyllon, 'Africa', in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 811–834 (detailing provisions of post-independence constitutions in Africa 'enshrining the protection of cultural heritage in the fundamental law (*grundnorm*) of the land').

233 Zhengxin Huo, 'Legal Protection of Cultural Heritage in China' (2016) 22 *International Journal of Cultural Policy*, 497–515, 498 (reporting that China has embedded the duty of the state to protect its cultural heritage in the Constitution since 1982); Manish Chalana and Ashima Krishna (eds), *Heritage Conservation in Postcolonial India* (Abingdon: Routledge 2020) (referring, *inter alia*, to Article 49 of the Indian Constitution).

234 James A.R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, *Cultural Law–International, Comparative, and Indigenous* (Cambridge: CUP 2010) 273–287.

Moreover, the emergence of state practice and the belief that such a practice is carried out as a legal obligation (*opinio juris*) can lead to the emergence of customary international law. Customs are sources of international law. For the time being, norms of customary law prohibit the destruction of cultural heritage of great importance for humanity in the event of armed conflict and in time of military occupation, as well as the looting and illicit transfer of cultural property from territories under military occupation.[235]

The question as to whether general principles of international law and customary law demand the protection of cultural heritage in peacetime has been a matter of much debate and controversy. The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage explicitly refers to 'the development of rules of customary international law … related to the protection of cultural heritage in peacetime as well as in the event of armed conflict'.[236] The Declaration articulates the need to protect cultural heritage both in times of peace and in the event of armed conflict.[237] It then affirms that if a State 'intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO …, [it] bears the responsibility for such destruction, to the extent provided for by international law'.[238] It is uncertain whether, and if so, to what extent, the Declaration reflects customary international law. It certainly codifies (albeit in soft law terms) the prohibition against the intentional destruction of cultural heritage during peacetime.

Nonetheless, the gradual emergence of customary law prohibiting the destruction of cultural heritage in peacetime can be inferred from three grounds. First, there is the developing State practice of condemning deliberate acts of destruction of significant cultural heritage. This evidence is strengthened by the growing number of signatories to UNESCO conventions for the protection of cultural heritage during peacetime.[239] Second, it would

235 Francesco Francioni, 'Custom and General Principles of International Cultural Heritage Law', in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 531–551, 540.

236 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Paris, 17 October 2003, Preamble.

237 Id. Articles IV and V.

238 Id. Article V.

239 As at 1 June 2022, the World Heritage Convention had 194 States parties; the Convention for the Safeguarding of the Intangible Cultural Heritage had 180 states parties; the Convention on the Protection and Promotion of the Diversity of Cultural Expressions had 150 states parties; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property had 141 States parties.

be illogical to provide greater protection of cultural heritage during period of armed conflict than peacetime.[240] In fact, the protection provided by international law during peacetime is necessarily greater than that applicable during armed conflict. Analogously, it can be argued that the customary law prohibition on the intentional destruction of cultural heritage in times of war logically presupposes analogous and even more forceful prohibition in peacetime. Third, the burgeoning jurisprudence of international courts and tribunals such as the ICJ, the ICTY, and even international economic courts may signal an evolution in this sense. Both scholars and practitioners argue that general principles of international law are gradually emerging, requiring the protection of cultural heritage in times of peace.[241]

5 Cultural Governance as a Battlefield

Cultural policies constitute a battlefield: they reflect fundamental political and legal choices about memory, heritage, and identity.[242] This section briefly illuminates some key dilemmas that have informed the making of cultural heritage law. First, the dichotomy between tangible and intangible heritage is examined, highlighting that this is a false dichotomy as most tangible cultural heritage also has a valuable intangible dimension, while intangible heritage often presupposes material practices. Second, the section investigates the shift from the past elitist conceptualization of cultural heritage to contemporary bottom-up approaches to the same. Third, the section discusses the clash between idealism and pragmatism that characterizes cultural heritage law. Fourth, the section scrutinizes the perceived effectiveness of cultural heritage law by illuminating its substantive overreach and procedural underachievement. Finally, the section discusses the potential clash between an excessive safeguarding of heritage and the protection of human rights.

240 See e.g. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, p. 226 (stating that international environmental law is applicable during armed conflict subject to certain provisos, including military necessity).

241 Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge/New York: CUP 2014).

242 Id. 27.

5.1 *Tangible v. Intangible Heritage*

For a long time, cultural heritage law favored the protection of monumental heritage over the intangible, protecting material artifacts only.[243] This monumental understanding of heritage reflected a Western vision of culture and permeated both domestic and international protection of cultural heritage.[244]

At the domestic level, by adopting a monumental vision of cultural heritage, cultural policies tended to favor hegemonic values.[245] In fact, dominant cultural communities used cultural policies to impose their own culture on minorities and Indigenous groups.[246] The inscription of given sites on the World Heritage list led to the forced displacement of minorities and Indigenous communities, thus not only restricting their access to culturally significant sites but also violating their human rights.[247] In these cases, conservation policies excluded people from their heritage, despite the fact that they had created, conserved, and cared for such heritage in the first place. The forced relocation of such groups from world heritage sites amounted to a violation of a range of distinct, albeit related, human rights.[248]

At the international level, the adoption of a monumental vision of cultural heritage prioritized the protection of built heritage, mosty characterizing Western cultures, over the natural heritage of different civilizations.[249] Because the WHC privileged a monumental conception of heritage, it ended up favoring the inscription of European sites on the World Heritage list, thus failing to appreciate the different intangible manifestations of heritage in Africa, the Americas, Asia, and Oceania.[250]

---

243 Laurajane Smith, 'Discussion' in Regina F. Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 389–395, 390.

244 Rosemary J. Coombe, 'Managing Cultural Heritage as Neoliberal Governmentality', in Regina F. Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 375–387, 375.

245 Kristin Kuutma, 'Concepts and Contingencies in the Shaping of Heritage Regimes', in Regina F. Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 21–36, 26.

246 Anne-Laura Kraak and Bahar Aykan, 'The Possibilities and Limitations of Rights-Based Approaches to Heritage Practice', (2018) 25 *International Journal of Cultural Property* 1–10, 6.

247 *See generally* Stener Ekern, William Logan, Brigitte Sauge, and Amund Sinding-Larsen (eds), *World Heritage Management and Human Rights* (London: Routledge 2014); Peter Bille Larsen (ed.), *World Heritage and Human Rights—Lessons from the Asia-Pacific and Global Arena* (London: Routledge 2018).

248 Anne-Laura Kraak, 'Human Rights-Based Approaches to World Heritage Conservation in Bagan, Myanmar: Conceptual, Political, and Practical Considerations', (2018) 25 *International Journal of Cultural Property* 111–133, 118.

249 Smith, 'Discussion', 391.

250 Coombe, 'Managing Cultural Heritage as Neoliberal Governmentality', 376.

In the past decades, however, there has been a paradigm shift: a monumental conceptualization of cultural heritage 'has given way to greater appreciation for cultural diversity, intangible cultural heritage, traditional cultural expressions', cultural landscapes, and Indigenous cultural heritage.[251] Cultural heritage is increasingly perceived not simply as a static good in need of conservation, but as a dynamic whole that includes both material and immaterial dimensions.[252] The addition of the category of cultural landscapes to the World Heritage List in 1992 and the adoption of the CCD and the CSICH have been crucial steps for determining this shift.[253]

5.2 *Toward a More Democratic and Bottom-up Heritage Governance*

Under international cultural heritage law, decision-making processes have long tended to be elitist, opaque, and top-down. Conflicts have arisen with regard to the question of who defines cultural heritage, who should manage it, and for whose benefit—and such conflicts have been particularly intense with regard to Indigenous and minorities' heritage.[254] Most UNESCO Conventions remain state-centric: States identify what cultural property falls within the relevant Convention's definition and is therefore protected.[255]

In the past decades, however, questions have arisen whether local communities, minorities, and Indigenous peoples were adequately consulted about, and involved in, the protection of cultural heritage. Such communities 'may have diverging interpretations of a specific cultural heritage', which states do not always take into consideration when adopting cultural policies.[256] In addition, international heritage policies can differ from or contrast with local values. Because the UNESCO heritage system adopts a global common language, its operation may create uniform and general protection policies, irrespective of diverse special needs. In fact, while the use of such common language can enhance the clarity and predictability of cultural policies, in some cases it can also disregard the various needs of local communities, minorities, and

251 Coombe, 'Managing Cultural Heritage as Neoliberal Governmentality', 382.

252 Id. 376

253 *See generally* Amy Strecker, *Landscape Protection in International Law* (Oxford: OUP 2018).

254 Helaine Silverman and D. Fairchild Ruggles, 'Cultural Heritage and Human Rights', in Helaine Silverman and D. Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Heildeberg: Springer 2007) 3–22, 3.

255 Athanasios Yupsanis, 'Cultural Property Aspects in International Law: The Case of the Still Inadequate Safeguarding of Indigenous Peoples' (Tangible) Cultural Heritage', (2011) 58 *Netherlands International LR* 335–361, 348.

256 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 11.

Indigenous peoples who should have the right to effectively participate in 'the development of, and decision-making on, [their] cultural heritage.'[257]

For instance, 'conservation programs … have had negative consequences on the rights of Indigenous peoples through forced evictions.'[258] After state authorities evicted the Endorois, an Indigenous group, from their ancestral lands to establish a game reserve in Kenya, the group filed a claim before the Africa Commission on Human and Peoples' Rights (ACHPR). The Commission held that Kenya had violated, *inter alia*, the group's cultural rights including access to cultural sites and the right to development, by failing to consult Indigenous peoples or to obtain their free, prior, and informed consent (FPIC).[259] Therefore, the Commission requested the return of the tribes to their ancestral lands. In the meanwhile, the state applied for the inscription of the Kenya Lake System, which includes the Endorois' ancestral lands, on the World Heritage List. Although the Endorois had not been consulted, the WHC inscribed the Kenya Lake System on the World Heritage List in 2011 because of its outstanding universal value.[260] The ACHPR held that the inscription violated its decision and called the state, the World Heritage Committee, and UNESCO to ensure full and effective participation of the Endorois in the decision-making concerning the site.[261] In 2014, the World Heritage Committee requested Kenya to address the ACHPR's decision and 'ensure full and effective participation of the Endorois in the management and decision-making of the property.'[262]

Therefore, international cultural heritage law has been called to adopt a more bottom-up approach to the treatment and protection of cultural heritage. The field has gradually started to respond to these concerns by enabling the limited participation of non-state actors to a growing number of UNESCO activities.[263]

---

257 Alexandra Xanthaki, 'The Cultural Heritage of Minorities and Indigenous Peoples in the EU: Weaknesses or Opportunities?' in Andrzej Jakubowski, Kristin Hausler, and Francesca Fiorentini (eds), *Cultural Heritage in the European Union* (Leiden: Brill 2019) 269–293, 269.

258 UN Permanent Forum on Indigenous Issues, Report of the Seventeenth Session, UN Doc. E/2018/43-E/C.19/2018/11 (2018).

259 Africa Commission on Human and Peoples' Rights (ACPHR), *Centre for Minority Rights Development* (*Kenya*) *and Minority Rights Group* (*on behalf of Endorois Welfare Council*) *v. Kenya*, Communication no. 276/03, 25 November 2009.

260 Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights', 262.

261 ACHPR, Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site', ACHPR Resolution 197, 5 November 2011.

262 Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights', 262.

263 Valentina Vadi, 'Exploring the Borderlands: The Role of Private Actors in International Cultural Law', in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations—Creation, Evolution, and Enforcement* (Leiden: Brill 2018) 109–125.

For instance, the 2003 CSICH has contributed to democratizing global cultural governance by fostering the cooperation between heritage institutions and social actors in the recognition and safeguarding of intangible heritage.[264] At the regional level, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) recognizes the 'need to put people and human values at the center of an enlarged and cross-disciplinary concept of cultural heritage.'[265] The 2012 Social Charter of the Americas[266] 'makes people, rather than states, the primary beneficiaries of cultural development' thus 'mov[ing] the focus of heritage protection away from the protection of state interests and toward the people who actually practice and live with or around heritage.'[267]

Since 2015, the Operational Guidelines for World Heritage sites have been amended to list Indigenous peoples as partners in the conservation of world heritage sites and require their consultation before the inscription of sites in the lists.[268] In 2017 the International Indigenous Peoples' Forum on World Heritage (IIPFWH) was established to engage with the World Heritage Committee during its meetings, in order to support and advise Indigenous peoples involved in the nomination, conservation, and management of world heritage sites. Finally, UNESCO adopted the 2018 Policy on Engaging with Indigenous Peoples, which calls for ensuring the full and effective participation of Indigenous peoples in the safeguarding and protection of their heritage.[269] As noted by Vrdoljak, 'by pressing for their effective participation in the protection and control of their heritage, … Indigenous peoples are … pushing [international law] to be more internally consistent in its interpretation and application.'[270]

---

264 CSICH, Article 15.

265 2005 Framework Convention on the Value of Cultural Heritage for Society (Faro Convention), opened for signature 27 October 2005, entered into force 1 June 2011, ETS No. 199, Article 4.

266 Organization of American States, Social Charter of the Americas, adopted on 4 June 2012, Doc OEA/Ser.P. AG/doc 5242/12 rev2 (20 September 2012).

267 Lucas Lixinski, 'Central and South America' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 878–907, 905.

268 UNESCO, World Heritage Committee, 2021 Operational Guidelines for the Implementation of the World Heritage Convention, WHC 21/01, 31 July 2021, available at https://whc.unesco.org/en/guidelines/, paras. 40 and 123.

269 UNESCO Policy on Engaging with Indigenous Peoples, approved by the Executive Board of UNESCO in October 2017 and available at https://unesdoc.unesco.org/ark:/48223/pf0000262748.

270 Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights', 249.

In conclusion, while in the past cultural heritage law tended to be state-centric and prioritized monumental heritage, thus privileging certain cultures over other civilizations, over the past decades there has been an attempt to 'democratize' cultural heritage law.[271] On the one hand, non-state actors such as local and Indigenous communities have been increasingly involved in the identification, conservation, and management of heritage.[272] Non-state entities, such as individuals and even groups (such as Indigenous peoples) which used to be on the periphery of the international legal order, are now increasingly playing an active and important role in international cultural relations. On the other hand, the concept of heritage has expanded to include intangible heritage and cultural landscapes.

5.3 *Pragmatism v. Idealism*

Cultural heritage law has often been considered to have a utopian character.[273] Having a multidisciplinary origin, it involves the work of archaeologists, anthropologists, architects, historians, and philosophers, as well as lawyers. Thus, it often relies on concepts and principles derived from archaeology and translated into law. It aims at conserving heritage in the context in which it was created. At the same time, the aims and objectives of cultural heritage law transcend a purely archaeological dimension. Founded in 1945 and based on the idea that peace can be built in the minds of people through education, science, and culture, UNESCO aims to foster international peace by promoting intercultural understanding and 'unit[ing] all nations in a universal community … through the promotion of … education, science, and culture.'[274] Whether this is a 'utopian dream' or a self-fulfilling prophecy remains open to debate.[275]

The mixture of archaeological and political objectives characterizes a number of legal instruments adopted by UNESCO. For instance, while the CPUCH reflects the increasing awareness within the international community of the

271 Miikka Pykkönen, 'UNESCO and Cultural Diversity: Democratisation, Commodification, or Governmentalisation of Culture?', in Geir Vestheim (ed.), *Cultural Policy and Democracy* (London: Routledge 2015) chapter 6.

272 Kristin Hausler, 'The Participation of Non-State Actors in the Implementation of Cultural Heritage Law', in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 760–786, 763.

273 Felice Casula and Liliosa Azara, *UNESCO 1945–2005. Un'Utopia Necessaria. Scienza, Educazione e Cultura* (Enna: Città Aperta 2005).

274 Lynn Meskell, *A Future in Ruins—UNESCO, World Heritage, and the Dream of Peace* (Oxford: OUP 2018).

275 Vincenzo Pavone, *From the Labyrinth of the World to the Paradise of the Heart: Science and Humanism in UNESCO's Approach to Globalization* (New York: Lexington 2008) 25–26.

importance of protecting underwater cultural heritage, it has been criticized for its utopian character.[276] The convention 'aims to ensure and strengthen the protection of underwater cultural heritage' 'for the benefit of humanity.'[277] The CPUCH describes *in situ* preservation of UCH as the preferred policy option and provides a rule against the commercialization of UCH for trade.[278] These provisions aim to enable the conservation of cultural artifacts in the context where they were found, protect cultural artifacts from looting, and foster tourism. They reflect the archaeological tenet that every archaeological object should be preserved in its original location; in this manner, archaeologists can map its history also relying on context.[279] The commercialization of UCH is lawful only if it is authorized by the competent authorities, in full conformity with the CPUCH.[280] In fact, once a resource has been sold, it is no longer capable of being seen by the public and providing any further economic benefit to the state in which it was found.

Because of its preservationist approach, several states remain reluctant to ratify the CPUCH because they lack the financial resources to implement it.[281] Locating UCH and deep-water excavation require extensive research, hard work, and significant monetary resources. Most countries lack the expertise, equipment, and funding for such works; they may have to prioritize other policy areas in times of economic crisis. Unless UCH can be located, the potential addition of that heritage to humankind's store of knowledge will never occur: the benefits of the quest for knowledge will only be realized if the quest is undertaken. In conclusion, by adopting a preservationist approach without conceding much space to private actors' concerns, the CPUCH has not established a global consensus on how to protect UCH.[282]

Instead, useful joint ventures can be envisaged in which investors would assume financial risks in exchange for a share of the revenues obtained by the

276 Valentina Vadi, 'Investing in Culture: Underwater Cultural Heritage and International Investment Law', (2009) 42 *Vanderbilt Journal of Transnational Law* 853–904, 864 (reporting this criticism).

277 CPUCH, Article 2(1) and (3).

278 CPUCH, Article 2(5) and (7).

279 Mariano Aznar, '*In Situ* Preservation of Underwater Cultural Heritage as an International Legal Principle', (2018) 13 *Journal of Maritime Archaeology* 67–81, 68.

280 CPUCH, Article 4.

281 Sarah Dromgoole, 'The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage and Its Principles relating to the Recovery and Disposition of Material from Shipwrecks', in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford: OUP 2020) 293–315.

282 Derek Luxford, 'Finders Keepers Losers Weepers—Myth or Reality? An Australian Perspective on Historic Shipwrecks,' in Barbara T. Hoffman (ed.), *Art and Cultural Heritage: Law, Policy, and Practice* (Cambridge: CUP 2006) 300–307, 307.

conservation and public display of UCH.[283] There is much to recommend joining private and public forces. First, private actors have been extremely successful in locating UCH. Second, because the risk of looting or unintentional destruction of UCH is relatively high, joint ventures between states and private companies represent a means of recovering UCH before it is damaged. Such recovery can provide great benefits to humanity.[284]

In conclusion, international cultural heritage law oscillates between idealism and realism. Some idealism seems necessary especially in times of crisis; the protection of cultural heritage can foster resilience and a sense of unity. The safeguarding of cultural heritage can also promote mutual understanding and international peace. In this sense, international cultural heritage law shares the ambition of international law to achieve just and peaceful relations among nations. Nonetheless, acknowledging that, like any other branch of international law, international cultural heritage law oscillates between realism and idealism enables a deeper appreciation of its functioning and its mission to promote just and peaceful relations among nations.[285]

5.4 *Substantive Overreach and Procedural Underachievement?*

International cultural heritage law is characterized by substantive overreach and procedural underachievement. Substantively, the field has been increasingly governed by a growing number of UNESCO Conventions and declarations as well as multilateral, regional, and bilateral legal instruments. Most of these instruments provide broad and inclusive definitions of cultural property, cultural diversity, and cultural heritage.[286]

At the same time, however, international cultural heritage law is characterized by intrinsic vagueness and a combination of hard and soft law. As mentioned, the vagueness of international cultural heritage law enables states to adopt different cultural policies on the basis of their specific needs. Many international cultural heritage law instruments have a 'soft' character and are not binding. Even those international cultural heritage law instruments

283 Vadi, 'Investing in Culture', 47–48.

284 Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge: CUP 2013) 240.

285 *See generally* Koskenniemi, *From Apology to Utopia*.

286 The substantive overreach of international cultural heritage law is also accompanied by some critical underinclusiveness—for instance, there is no specific convention governing Indigenous cultural heritage. While Indigenous cultural heritage plays a prominent role in the UNDRIP and a range of human rights instruments, the lack of an apposite legal instrument is a missed opportunity, as it would confer further momentum to the need for protecting such heritage.

that have a binding character often include obligations of means rather than results,[287] or explicitly lack supremacy *vis-à-vis* other international treaty provisions.[288] Therefore, states maintain a wide margin of appreciation as to how to implement their obligations under these instruments. This flexibility can be a positive aspect of global cultural governance as it enables states to strike the appropriate balance between different interests and to fine-tune their cultural policies to the evolution of international law.

However, the flexibility of international cultural heritage law can also constitute a weakness as its vagueness can lead to disputes relating to its proper implementation. Moreover, the soft law character of its provisions and the diplomatic nature of its dispute settlement mechanisms raise some enforcement issues. In fact, diplomatic dispute settlement mechanisms are not always effective in preventing breaches of international cultural heritage law.

At the procedural level, the lack of courts and tribunals dedicated to settling cultural heritage-related disputes can be particularly problematic. Problems of conflict and/or coordination between international cultural heritage law and other international law norms—whether customary or conventional—have highlighted this procedural shortcoming of the field. The development of international cultural heritage law as a distinct field of international law has not been accompanied by the establishment of a dedicated court. Such a field does not provide binding, centralized, and exclusive dispute settlement mechanisms. As cultural heritage-related disputes often lie at the heart of state sovereignty, states have not been able to agree on establishing a dedicated international court. The approach endorsed by international cultural heritage law clashes with international economic governance, which is conversely characterized by substantive underachievement and procedural overreach. The absence of international cultural heritage courts determines a sort of 'diaspora' of cultural heritage-related disputes before other courts and tribunals, such as international economic courts, which may lack the mandate to adjudicate on the violation of cultural heritage law.

The magnetism of other international courts and tribunals raises the question as to whether cultural heritage receives adequate consideration in adjudication before such courts. While some overlapping is inevitable among various areas of international law, the question of what steps should be taken to ensure

287 See e.g. Faro Convention, Article 6c (stating that no provision of the Convention shall be interpreted so as to create enforceable rights).

288 CSICH, Article 3(b) (stating that none of the provisions of the CSICH can be interpreted as affecting 'the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights.').

mutual supportiveness between different treaty regimes should also be examined. With the notable exception of the International Criminal Court, which has the mandate to adjudicate on the damages and/or destruction of cultural sites under Article 8(2)(e)(IV) of its Statute,[289] other courts and tribunals may not have the mandate to adjudicate on the eventual violation of cultural heritage law. This has led to the emergence of cases where important cultural issues were mentioned in passing and/or given various weights.

Finally, international cultural heritage law 'provides few indications as to the remedies, making enforcement contingent upon states' willingness to provide domestic remedies, and thus contributing to an even greater dilution of cultural heritage protection.'[290] Despite the existence of legal remedies, substantiating such remedies has been complex in the cultural field. Repairing cultural harms and damages poses a range of difficult theoretical and practical questions ranging from the identification of the victims entitled to reparation to the adequate forms of reparation.[291] While it is doubtful that the destruction of cultural monuments may ever be repaired, the misappropriation of Indigenous and local communities' intangible heritage has raised questions about the adequacy of existing remedies.

In conclusion, international cultural heritage law is characterized by substantive overreach and procedural underachievement. Substantively, the field has been increasingly governed by a growing number of UNESCO Conventions and declarations as well as multilateral, regional, and bilateral legal instruments. These developments have made international cultural heritage law quite a sophisticated area of international law governing cultural heritage both in times of war and in times of peace. Nonetheless, at the procedural level, international cultural heritage law remains underdeveloped, mostly including diplomatic, nonbinding dispute settlement mechanisms. Only rarely have cultural heritage-related disputes been brought before the ICJ. Rather, because of the partial overlapping of international cultural heritage law with other fields of international law, several cultural heritage-related disputes have been brought before specialized dispute settlement mechanisms established in specific subfields of international law. This diaspora of cultural heritage-related disputes raises the question as to whether cultural heritage concerns have received adequate consideration before these specialized fora that do not

289 Rome Statute of the International Criminal Court, adopted on 17 July 1998, in force on 1 July 2002, last amended 2010, 37 ILM 999 (1998).

290 Elisa Novic, 'Remedies', in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of Internationl Cultural Heritage Law* (Oxford: OUP 2020) 642–662, 642–643.

291 Id. 643.

necessarily have the mandate to check state compliance with international cultural heritage law.

5.5 *Heritagization – Heritage v. Humanity?*

The extraordinary expansion of international cultural heritage law since the aftermath of WWII has provided states with the much-needed leverage to adopt comprehensive cultural policies. It has led to the growing awareness that the protection of cultural heritage benefits states and the international community as a whole. Such protection is also significantly linked to the protection of cultural rights and a range of other freedoms and human rights.

However, an excessive emphasis on the protection of cultural heritage without sufficient input from the relevant stakeholders risks overprotecting heritage at the expense of other interests and values. Anthropologists have discussed the risks of 'heritagization' processes whereby items of heritage are identified without the consultation and participation of local communities, and/or overprotected irrespective of the impact of such conservation on local communities' needs. Cultural artifacts and sites have been commodified and detached from the life of local communities who contributed to create them in the first place.[292]

For instance, in Egypt, the vernacular architecture of the village of Gurna has been destroyed to preserve the 'authorized heritage discourse' in Luxor.[293] In Cambodia, local villagers have been excluded from Angkor, a World Heritage Site, in the name of conservation.[294] In Naples, a world heritage site of ineffable beauty, urban plans to requalify the Spanish Quarters (*Quartieri Spagnoli*) have raised concerns. Since its creation in the 16th century to house Spanish garrisons, the district has become a hotspot of Neapolitan popular culture.[295] Will the renovation render the poor communities invisible or can it constitute an opportunity for sustainable development?

While respect of human rights is built into UNESCO treaties, in practice there has been scarce community engagement in their implementation. In parallel, human rights courts have condemned the forced eviction of local

---

292 Aníbal Arregui, Gesa Mackenthun, and Stephanie Wodianka, 'Introduction', in Aníbal Arregui, Gesa Mackenthun, Stephanie Wodianka (eds), *Decolonial Heritage. Natures, Cultures, and the Asymmetries of Memory* (Münster/New York: Waxmann 2018) 7–28, 13.

293 Laurajane Smith, *Uses of Heritage* (London and New York: Routledge 2006).

294 Vadi, 'Exploring the Borderlands: The Role of Private Actors in International Cultural Law', 121.

295 Marta Pappalardo, 'Le Centre Historique de Naples: Patrimonialisation contre Pratiques Populaires?' (2014) 5 *Journal of Urban Research* 1–16.

communities from heritage sites. For instance, in the *Ogiek* case, the African Court on Human and Peoples' Rights condemned the forced eviction of the Ogieks, a Kenyan hunter-gatherer Indigenous community, from their ancestral lands. The government had evicted them from the Mau Forest, in Kenya's Rift Valley, for conservation reasons.[296] The Court held that the government had violated several of the Ogieks' rights under the African Charter on Human and Peoples' Rights, including their rights to freedom of religion and culture, to free disposal of wealth and natural resources, and to economic, social, and cultural development.[297]

These and similar cases require addressing the question of why international law protects heritage. Should international law conserve heritage because it is heritage or should it conserve heritage because of its importance to humanity? International law scholars have called for a 'humanization' of international cultural heritage law, that is, a recalibration of the field around its human dimension. Such evolution reflects the importance that the protection of cultural heritage has for individuals, local communities, and the international community as a whole. The humanization of international cultural heritage law would make it more porous to interests and needs which go beyond the reason of state (*ragion di stato*) and include the respect for human dignity and human rights.[298] The humanization of cultural heritage law can contribute to counteracting heritagization processes within international cultural heritage law which emphasize the protection of heritage because of its mere intrinsic features. Rather, cultural heritage should be seen against the background of human history. It matters to a variety of actors who attach different narratives to the same objects.

Moreover, cultural heritage often reflects the cultural identity, cultural practices, and sometimes the spiritual beliefs of local communities. While it can be 'part of national identity,' it can also reflect 'the spiritual, religious, and cultural specificity of minorities and groups.'[299] Cultural heritage 'is inextricably

296 ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* ('Ogiek case'), Application. No. 006/2012, Judgement, 26 May 2017.

297 African Charter on Human and Peoples Rights, adopted on 27 June 1981, in force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I, Articles 8, 17, 21, and 22.

298 Valentina Vadi and Hildegard Schneider, 'Art, Cultural Heritage and the Market: Legal and Ethical Issues', in Valentina Vadi and Hildegard Schneider (eds), *Art, Cultural Heritage and the Market: Ethical and Legal Issues* (Heidelberg: Springer 2014) 1–26, 16.

299 Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 EJIL 9–16, 9–10.

intertwined with its … social, cultural, and economic context.'[300] Therefore, not only the tangible aspects of heritage, but also its intangible dimension should be considered in the conservation of cultural heritage. Acknowledging the interaction between people and their heritage enables synergies between global and local cultural governance and between universal and particular values in the conservation of cultural heritage. Therefore, cultural policies should enable local communities to maintain a close connection to their tangible and intangible heritage. In this manner, the protection of cultural heritage can facilitate cultural understanding and international cooperation, and even promote just, peaceful, and friendly relations among nations.

6 Cultural Heritage as a Human Rights Issue

The protection of cultural heritage is 'a human rights issue.'[301] Several international human rights instruments refer to cultural heritage, highlighting the importance of its protection for individuals and communities, including Indigenous peoples.[302] As the protection of cultural heritage is essential to enable individuals to enjoy their cultural rights, its conservation is crucial to make these rights effective.[303] Engaging with the cultural heritage of one's choice is considered to be an aspect of the right freely to participate in cultural life and a range of other human rights.[304]

Moreover, the Committee on Economic, Social, and Cultural Rights has specified the state obligations to respect, protect, and fulfill cultural rights by explicitly referring to cultural heritage. For the Committee, the obligation to respect requires states to guarantee the right to access one own's cultural heritage and that of others, and the right to participate in decision-making processes that may have an impact on cultural rights.[305] The obligation to protect cultural rights requires states to safeguard cultural heritage in all its forms and

300 Jonathan Bell, 'The Politics of Preservation: Privileging One Heritage over Another' (2013) 20 *International Journal of Cultural Property* 431–450, 434.

301 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 77.

302 Id. para. 7

303 Ringelheim, 'Cultural Rights', 284.

304 Council of Europe, Framework Convention on the Value of Cultural Heritage for Society (Faro Convention), adopted and opened for signature on 27 October 2005, in force 1 June 2011, CETS 199, preamble.

305 CESCR, General Comment No. 21, para. 49.

at all times, whether in times of war or peace.[306] The Committee has emphasized the need to protect cultural heritage and in particular that of the most disadvantaged and marginalized individuals and groups from 'the adverse consequences of globalization' and economic development.[307] While drafting international economic agreements, 'states should take into account the right to access and enjoy cultural heritage and ensure it is respected.'[308] States Parties to the International Covenant on Economic, Social, and Cultural Rights have an obligation to ensure that policies and decisions of UNESCO and the WTO in the field of culture 'are in conformity with their obligations under the Covenant.'[309] Finally, for the Committee, the obligation to fulfill entails a duty for states to take appropriate measures necessary for the full realization of cultural rights.

Therefore, a human rights-based approach to cultural heritage must complement cultural conservation policies. Such an approach obliges states to safeguard cultural heritage, taking into account the rights of individuals and communities in relation to such heritage. A human rights-based approach to heritage protection has a 'transformational impact' on international cultural heritage law by moving it away from its state-centric focus.[310] In fact, 'cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities.'[311] The protection of such heritage is thus mandated 'not for its own sake but as an indispensable element of human flourishing.'[312]

The protection of cultural heritage is clearly linked to the enjoyment of cultural rights.[313] Cultural rights generally refer to the right to freely choose one's cultural identity and the right to take part in cultural life, the right to maintain

306 CESCR, General Comment No. 21, para. 50(a).

307 Id. para. 50(b).

308 Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, para. 77.

309 CESCR, General Comment No. 21, para. 75.

310 Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights', 273.

311 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 77.

312 Roger O'Keefe, 'Tangible Cultural Heritage and International Human Rights Law', in Lyndell Prott, Ruth Redmint-Cooper, and Stephen Urice (eds), *Realising Cultural Heritage Law, Festshrift for Patrick O' Keefe* (London: Institute for Art and Law 2013) 87, 95.

313 UN Committee on Economic, Social, and Cultural Rights, General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Article 15, para. 1a of the Covenant on Economic, Social, and Cultural Rights), 21 December 2009, E/C.12/GC/21, para. 50.

a way of life and the right to contribute to, and benefit from, cultural heritage.[314] Although a right to access and enjoy cultural heritage does not yet exist in the human rights' pantheon,[315] access to cultural heritage can be instrumental to the enjoyment of cultural rights. For instance, the Faro Convention recognizes that 'every person has a right to engage [in] the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right to participate freely in cultural life.'[316] Conversely, 'the destruction of, or damage to, cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights.'[317]

Notwithstanding early jurisprudence and the formal entry of cultural rights into the human rights pantheon after WWII, cultural rights have long been neglected, and have therefore been significantly less developed than civil, political, economic, and social rights.[318] They used to be considered as 'second-generation' and 'merely aspirational' rights to be left to governments to implement progressively.[319] States have feared that cultural entitlements could have emancipatory potential, determine claims of self-determination among minorities and Indigenous peoples, and ultimately jeopardize national unity.[320] Furthermore, the distinction between civil and political rights on the one hand, and economic, social, and cultural rights on the other was traditionally based on the perceived characterization of civil and political rights as entailing negative obligations on the part of the state, and economic, social, and cultural rights as requiring positive duties.

---

314 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 27.1; International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted 16 December 1966, in force 3 January 1976 (1967) 6 ILM 360 et seq, Article 15; International Covenant on Civil and Political Rights (ICCPR), Article 27.

315 But see UNGA Resolution 56/6, adopted on 9 November 2001, *Global Agenda for Dialogue among Civilizations* (recognizing 'the right of all members of all civilizations to preserve and develop their cultural heritage within their own societies.').

316 Faro Convention, preamble.

317 UN Human Rights Council, *Cultural Rights and the Protection of Cultural Heritage*, Resolution A/HRC/RES/33/20, 6 October 2016, preamble. See also the 2003 UNESCO Declaration on the Intentional Destruction of Cultural Heritage, preamble (highlighting that the intentional destruction of cultural heritage 'may have adverse consequences on human dignity and human rights.')

318 See Janusz Symonides, 'Cultural Rights: A Neglected Category of Human Rights' (1998) 158 *International Social Science Journal* 559–572.

319 ICESCR, Article 2(1) (articulating the obligation to achieve progressively the full realization of rights 'by all appropriate means, including particularly the adoption of legislative measures' and applying the 'maximum of available resources'.).

320 Symonides, 'Cultural Rights', 559.

In recent decades, however, cultural rights have undergone a renaissance.[321] UN treaty bodies have highlighted the indivisibility and interrelatedness of all human rights, recognizing that 'without affording full guarantees for … cultural rights … the protection offered … by other rights can become practically meaningless'.[322] Seminal studies have clarified the content of cultural rights and highlighted their transformatory and empowering potential by 'enabling the pursuit of knowledge and understanding', thereby 'promoting the full human personality and realizing all other human rights'.[323] Without their recognition and respect, may neither human dignity be guaranteed nor other human rights be fully implemented. Moreover, protecting cultural rights may form a crucial part of the response to many current global challenges by fostering 'dialogue, peace, and reconciliation.'[324]

The ICJ has adopted a 'culturally sensitive understanding of legal issues brought to the Hague'.[325] In parallel, human rights bodies have defined and elaborated upon cultural rights that have been increasingly claimed and adjudicated under domestic, regional, and international law.[326] The entry into force of the Optional Protocol to the ICESCR in 2013 has strengthened the view that cultural rights matter as much as the other human rights.[327] Such a mechanism enables individuals or groups of individuals to bring claims,

321 Lucky Belder and Helle Porsdam (eds), *Negotiating Cultural Rights* (Cheltenham: EE 2017); Andrzej Jakubowski (ed.), *Cultural Rights as Collective Rights: an International Law Perspective* (Leiden: Brill 2016); Manisuli Ssenyonjo, *Economic, Social, and Cultural Rights in International Law* II ed. (Oxford: Hart 2016); Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Leiden/Boston: Martinus Nijhoff 2008); Elsa Stamatopoulou, *Cultural Rights in International Law* (Leiden: Brill 2007); Yvonne Donders, *Towards a Right to Cultural Identity?* (Antwerp: Intersentia 2002).

322 UN Economic and Social Council, 'Commission on Human Rights: Final Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (D Türk), the Realization of Economic, Social, and Cultural Rights', 3 July 1992, UN Doc E/CN.4/Sub.2/1992/16.

323 Helle Porsdam, *The Transforming Power of Cultural Rights: A Promising Law and Humanities Approach* (Cambridge: CUP 2019).

324 Human Rights Council, Resolution 33/20, Cultural Rights and the Protection of Cultural Heritage, A/HRC/RES/33/20, 30 September 2016, preamble.

325 Eleni Polymenopoulou, 'Cultural Rights in the Case Law of the International Court of Justice' (2014) 27 *Leiden Journal of International Law* 447–464, 447.

326 State compliance with its obligations is now assessed in individual cases under the Optional Protocol to the ICESCR (OP-ICESCR) as well as in the growing number of cultural rights-related cases being adjudicated before domestic and regional courts.

327 Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (OP-ICESCR) adopted 10 December 2008, in force 5 May 2013, G.A. Res. 63/117, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/117 (2009).

thus strengthening the legal protection of cultural rights and enhancing their justiciability. Nowadays, it is generally acknowledged that all human rights entail both positive and negative obligations.[328] In addition, the Committee on Economic, Social, and Cultural Rights has clarified that the progressive realization of cultural rights must be compatible with the minimum core of such rights, that is, the minimum essential levels of cultural rights that must be immediately implemented by all states as a matter of top priority.[329] Such core obligations of states include the duty to prohibit discrimination based on cultural identity and guarantee equality in the enjoyment of the right to take part in cultural life.[330] Because the content of such a minimum core is closely related to human dignity, such a minimum core is absolute and immediately enforceable.

Some elements of cultural rights can achieve and have achieved a peremptory character (*jus cogens* status) and prevail over treaty obligations in the hierarchy of international public policy. Peremptory norms of general international law are 'norm[s] accepted and recognized by the international community of States as a whole as norm[s] from which no derogation is permitted and which can be modified only by subsequent norm[s] of general international law having the same character.'[331] For instance, the right of peoples to freely pursue their cultural development, that is a component of the right of self-determination, is commonly regarded as a *jus cogens* rule.[332]

The protection of cultural heritage is also linked to other human rights norms, including the right to self-determination, the right to education, the right of freedom of expression, and the right of freedom of thought and religion. It is also linked to the prohibition of discrimination and the promotion of substantive equality.[333] For instance, the Committee on the Elimination of

328 Bruce Porter, Jackie Dugard, Daniela Ikawa, and Lilian Chenwi, 'Introduction', in Bruce Porter, Jackie Dugard, Daniela Ikawa, and Lilian Chenwi (eds), *Research Handbook on Economic, Social, and Cultural Rights as Human Rights* (Cheltenham: EE 2020) xviii–xxvii, xxi.

329 Committee on Economic, Social, and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (1990) para. 10 (stating that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.')

330 Committee on Economic, Social, and Cultural Rights, General Comment No. 21, para. 55.

331 VCLT, Article 53.

332 ICCPR, Article 1.1 and ICESCR, Article 1.1 (emphasis added). Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: OUP 2006) at 51.

333 International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 7 March 1966, in force 4 January 1969, 660 UNTS 195, Article 5 (requiring states to prohibit discrimination and guarantee, *inter alia*, cultural rights) and Article 2.2 (enabling states 'when the circumstances so warrant' to take positive measures

Racial Discrimination called for the recognition, respect, and preservation of 'Indigenous distinct culture, history, language, and way of life as an enrichment of the State's cultural identity.'[334] It also called upon states parties to 'provide Indigenous peoples with conditions allowing for a sustainable … development compatible with their cultural characteristics' and 'recognize and protect the rights of Indigenous peoples to own, develop, control, and use their communal lands, territories, and resources.'[335]

A number of international legal instruments call for universal respect for human rights including the protection of cultural heritage.[336] These instruments acknowledge that the destruction of cultural heritage can affect the enjoyment of human rights, including cultural rights, and reaffirm that all human rights must be treated 'with the same emphasis' because of their universality and indivisibility.[337] Raising awareness on the mutually reinforcing relation between the protection of cultural heritage and human rights, these instruments call for 'the identification of innovative ways and best practices, at the national, regional, and international levels … for the prevention and mitigation of damage caused to cultural heritage.'[338] They also encourage states 'to take the measures necessary to prevent the destruction of historical monuments, works of art or places of worship that constitute the cultural or spiritual heritage of peoples, both in conflict and non-conflict situations, and promote respect for cultural diversity.'[339]

While the protection of cultural heritage is mainly the responsibility of states, all members of civil society—individuals, companies, local communities, minorities, and Indigenous peoples—also have responsibilities. For instance, certain types of business such as the extractive industries can cause

---

in the cultural field, that is, 'special and concrete measures to ensure the adequate development and protection of certain [ethnic] groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different [ethnic] groups after the objectives for which they were taken have been achieved.')

334 Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of Indigenous Peoples (Fifty-first session, 1997), UN Doc. A/52/18 (1997) para. 4(a).

335 Id. para. 4(c) and para. 5.

336 Human Rights Council, Resolution 33/20, *Cultural Rights and the Protection of Cultural Heritage*, A/HRC/RES/33/20, 30 September 2016.

337 Id. preamble.

338 Id. para. 7.

339 Human Rights Council, *Cultural Rights and the Protection of Cultural Heritage*, A/HRC/37/L.30, 19 March 2018, para. 12.

irreversible damage to the cultural heritage of Indigenous communities.[340] Therefore, 'businesses have a responsibility to protect the right to cultural heritage; if operations have a negative impact on the realization of that right, businesses have a responsibility to remedy that impact.'[341] In parallel, states should regulate the activities of the corporate sector that may have an impact on the protection of cultural heritage.[342] In particular, they 'should ensure that investors and corporations respect the cultural heritage of Indigenous peoples.'[343] Moreover, human rights bodies advise that states should 'declar[e] cultural heritage sites, sacred sites, and other areas of spiritual significance to Indigenous peoples as no-go zones for extractive industries, tourism development, and other development projects which have not received the free, prior, and informed consent of the Indigenous peoples concerned.'[344] In this regard, the Inter-American Court of Human Rights has held that when dealing with major investment projects that may affect the traditional land of Indigenous Peoples, states must not only carry out prior consultations, but also obtain Indigenous Peoples' free, prior, and informed consent.[345]

The interplay between heritage and human rights has been acknowledged not only in international human rights law and general international law, but also in international cultural heritage law. In fact, several instruments protecting various types of cultural heritage refer to human rights. The 2003 CSICH refers to existing international human rights instruments.[346] The UNESCO Declaration on Cultural Diversity recalls the commitment of the parties to 'the full implementation' of human rights and fundamental freedoms.[347] It also specifically calls for respect for human dignity and commitment to the human rights of minorities and Indigenous peoples.[348] More fundamentally,

340 Human Rights Council, 'Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage', Study by the Expert Mechanism on the Rights of Indigenous Peoples', A/HRC/30/53 19 August 2015, para. 56.

341 Id. para. 22.

342 General Comment No. 21, para. 73.

343 Human Rights Council, 'Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage', Study by the Expert Mechanism, para. 22.

344 Id. para. 13.

345 IACtHR, *Case of the Saramaka People v. Suriname*, IACtHR Series C No. 172, 28 November 2007, para. 137.

346 CSICH, preamble.

347 UNESCO Universal Declaration on Cultural Diversity, Adopted by the 31st Session of the General Conference of UNESCO in Paris, 2 November 2001, preamble.

348 Id. Article 4.

international cultural heritage law only protects heritage that is compatible with existing human rights instruments.[349]

In conclusion, a human rights-based approach to cultural heritage protection, as required by a number of international law instruments, centers on the human dimension of heritage discourse, expressing the need to put humanity at the center of international cultural heritage law. Such an approach obliges states to consider the rights of individuals and communities in relation to cultural heritage. In fact, '[a]ccessing and enjoying cultural heritage is an important feature of being a member of the human society.'[350]

7 Conclusions

Cultural heritage is a multifaceted concept which includes both tangible and intangible cultural resources. While culture represents inherited values, ideas, and traditions, which characterize social groups and their behavior, heritage indicates something to be cherished and handed down from one generation to another. There is no single definition of cultural heritage at the international law level; rather, different legal instruments provide *ad hoc* definitions often focusing on distinct categories of cultural heritage, rather than approaching it holistically.

The protection of cultural heritage is a fundamental public interest. It can be an engine of economic growth and welfare, being central in people's lives, enriching their existence in both a material and immaterial sense. It can foster sustainable development, that is, development which meets the needs of the present and future generations. Moreover, cultural exchanges create the conditions for renewed dialogue among civilizations. Respect for the diversity of cultures is deemed to be among the best guarantees of international peace and security.[351]

---

349 Faro Convention, Article 4c; Convention on Cultural Diversity, Article 2.1 (providing that '[c]ultural diversity can be protected and promoted only if human rights and fundamental freedoms … are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as … guaranteed by international law, or to limit the scope thereof.'); CSICH, Article 2 (delimiting its scope of application 'solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups, and individuals, and of sustainable development.')

350 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 2.

351 Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO Constitution), adopted 16 November 1945, in force 1946, 4 UNTS 275 (1945), preamble.

Cultural governance has come of age. Once the domain of elitist scholars and practitioners, cultural governance has emerged as a new frontier of study and has come to the forefront of legal debate. Cultural governance is multilevel because different layers of regulations enacted at different levels—international, regional, and national—can conflict and/or overlap. It is also multipolar, as a number of different bodies—ranging from international administrative bodies to private actors—govern cultural heritage at national, regional, and international levels.

International cultural heritage law is a thriving part of international law. Constantly evolving, the field is characterized by some fragmentation as different legal instruments protect various types of cultural heritage.[352] Most such instruments have a soft character and are not binding. Even those instruments that are binding often explicitly lack supremacy *vis-à-vis* other international treaties and include obligations of means rather than results. Therefore, states have a wide margin of appreciation as to how to implement their obligations under international cultural heritage law. This flexibility can be a positive aspect of global cultural governance as it enables states to strike the appropriate balance between different interests.

As rule-making in the cultural field 'has not been matched by a corresponding development of enforcement procedures and mechanisms',[353] many cultural heritage-related disputes have been adjudicated by borrowed fora, that is, courts or tribunals established within other branches of law.[354] As cultural heritage-related disputes often lie at the heart of state sovereignty, states have not established a dedicated international court in the field of cultural heritage. Such absence determines a sort of 'diaspora' of cultural heritage-related disputes before other courts and tribunals which may lack the mandate to adjudicate on the violation of cultural heritage law. The magnetism of other courts raises the question as to whether cultural heritage receives adequate consideration before such courts.[355]

Top-down approaches in policy making and an excessive emphasis on the protection of cultural heritage without sufficient input of the relevant

352 See Jean-Baptiste Harelimana, *La Defragmentation du Droit International de la Culture: Vers une Cohérence des Norms Internationales* (Paris: L'Harmattan 2016).

353 Francesco Francioni and James Gordley, 'Introduction', in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford: OUP 2013) 1–5, 1–2.

354 See Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014) 129–134; Federico Lenzerini, 'The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage', in Francioni and Gordley (eds), *Enforcing International Cultural Heritage Law*, 40–64.

355 Valentina Vadi, 'Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage' (2015) 18 JIEL 51–77.

stakeholders risks overprotecting heritage *vis-à-vis* other fundamental human values.[356] Anthropologists have discussed the risks of heritagization processes whereby items of heritage are overprotected irrespective of local communities' needs. While the respect of human rights is built into UNESCO treaties, there has been scarce community engagement in practice.

Of particular importance is the interplay between international cultural heritage law and human rights law. In the past decades, the United Nations has attempted to mainstream human rights law in the operation of its various organizations, including UNESCO.[357] While international cultural heritage law and human rights law have developed in quite separate ways, with different aims and objectives, nowadays scholars have increasingly focused on the linkage between the protection of cultural heritage and the fulfillment of human rights and fundamental freedoms.[358] While 'there is room for much more engagement between these two fields,' they have learned much from each other.[359] For instance, the content of the UNDRIP is influencing the development of international cultural heritage law, thus showing that international law can and should be interpreted holistically.

As a subfield of international law, international cultural heritage law is contributing to the development of international law in different ways. First, it is contributing to expanding the reach of international law to areas that used to be the *domaine reservé* of states. Second, the growing competition between international cultural heritage law and other subfields of international law can give rise to a cross-pollination of concepts and principles and the eventual emergence of general principles of law or customary international law requiring the protection of cultural heritage in times of war and in times of peace. The cross-pollination of concepts from a subfield of international law to another can help interpreters and practitioners to overcome the alleged fragmentation of international law through treaty interpretation.[360] It can also help treaty-makers and international organizations to overcome the alleged fragmentation of international law by adopting new policies and principles, and authoritative interpretations of existing instruments.

---

356 *See generally* Matthew Humphrey, *Preservation Versus the People? Nature, Humanity, and Political Philosophy* (Oxford: OUP 2002).

357 Hilary Charlesworth, 'Human Rights and the UNESCO Memory of the World Programme', in Michele Langfield, William Logan, and Mairead Nic Craith (eds), *Cultural Diversity, Heritage, and Human Rights—Intersections in Theory and Practice* (London: Routledge 2010) 21–30, 21.

358 Id.

359 Id.

360 Lostal, 'The Role of Specific Discipline Principles in International Law', 415.