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INTERNATIONAL CULTURAL HERITAGE LAW

Janet Blake

CULTURAL HERITAGE LAW AND POLICY

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Series Editors

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International Cultural Heritage Law

CULTURAL HERITAGE LAW AND POLICY

The aim of this series is to publish significant and original research on and scholarly analysis of all aspects of cultural heritage law through the lens of international law, private international law, and comparative law. The series is wide in scope, traversing disciplines, regions, and viewpoints. Topics given particular prominence are those which, while of interest to academic lawyers, have significant bearing on policymaking and current public discourse on the interaction between art, heritage, and the law.

International Cultural Heritage Law

JANET BLAKE

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2015

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: yet to receive

ISBN 978–0–19–872351–6

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

To
Nasser and Daniel,
for their endless patience
And to
Professor Iain Scobbie,
for his invaluable support and guidance

Series Editors' Preface

The books in this series thus far have provided a detailed viewpoint of specialist areas of international law covering the protection of cultural heritage. The very fact that such book length treatments are possible reflects the accelerated development of this field of law.

This volume by Janet Blake is a different but equally important contribution to this series The author endeavours to provide a detailed overview of the field of cultural heritage law as a whole. A number of academics have sought to undertake this task in the last century and their efforts reflect the gradual evolution and growing density of this field of law – from its disparate beginnings to a panoply of specialist instruments at the international and regional levels covering immovable and movable, tangible and intangible heritage during war and peacetime, today. These treaties have been adopted over time and accordingly are often defined by differing (even competing) objectives. Therefore, bringing these various threads together in a comprehensive and logical whole is a significant challenge but one which the author embraces fully.

Importantly, Janet Blake also places these specialist developments in cultural heritage law within other related areas of international law including human rights law, environmental law, and intellectual property. This approach emphasises its synergies, as well as possible normative conflicts, between these specialist areas of international law. It also enables readers to better understand and appreciate the concepts, ideas and concerns which connect this volume with those that have preceeded it in the series and those that shall follow.

Francesco Francioni
Ana Filipa Vrdoljak

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United Nations

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List of Abbreviations

ABS	access and benefit-sharing
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ASEAN	South-east Asia
BPR	Register of Best Practices
CBD	UN Convention on Biological Diversity
CCD	Convention to Combat Desertification
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CHM	common heritage of mankind
CITES	Convention on the International Trade in Endangered Species
CMS	Bonn Convention on the Conservation of Migratory Species of Wild Animals
COP	Conference of the Parties
DOALOS	UN Division of Ocean Affairs and the Law of the Sea
ECOSOC	UN Committee for Economic, Social and Cultural Rights
EEZ	Exclusive Economic Zone
EF	expressions of folklore
EPBC Act	Australian Environment Protection and Biodiversity Conservation Act 1999
FAC	Fund for Assistance of Culture
FAO	Food and Agriculture Organization
FCCC	UN Framework Convention on Climate Change
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	intangible cultural heritage
ICOMOS	International Council on Monuments and Sites
IFAR	International Fund for Art Research
IFREMER	French Institute for the Research and Exploration of the Sea
IKO	Institut für Informations und Kommunikationsøkologie
ILA	International Law Association
ILC	International Law Commission
IOM	International Organization for Migration
IP	intellectual property
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
LOSC	Law of the Sea Convention
MFA	Museum of Fine Arts
NAM	Non-Aligned Movement
NAS	Nautical Archaeology Society
NSPA	National Stolen Property Act
OAS	Organization of American States

OIC	Organization of the Islamic Conference
PIC	Prior Informed Consent
RDG	Restricted Drafting Group
RL	Representative List of Intangible Heritage of Humanity
RMST	RMS Titanic Inc
SIDS	Small Island Developing States
TCEs	traditional cultural expressions
TEK	Traditional Ecological Knowledge
TK	Traditional Knowledge
TKC	Traditional Knowledge Commons
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRNC	Turkish Republic of North Cyprus
TSC	Territorial Sea Convention
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDOC	UN Office for Drugs and Crime
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organization
UPOV	Union for the Protection of New Varieties of Plants
USL	List of Intangible Cultural Heritage in Need of Urgent Safeguarding
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Cultural Heritage Law

Contextual Issues

This opening chapter is aimed at providing a brief overview of the field of international cultural heritage law, its early development, some important issues, and its current form and purposes. This is therefore intended to introduce the reader to the field in general terms and to lay the basis for the chapters that follow. Although the subject here is international law of cultural heritage, I will not address international law in detail save for a few basic principles that are crucial to understanding how international law operates to provide a protective framework for cultural heritage. Readers who wish to learn more about this aspect of the question can consult the introduction provided in Forrest's book on cultural heritage law or an introductory textbook on international law, such as that by Dixon.[1] I mostly use the term 'cultural heritage' in this book as the predominant term of art today in the field, although there are contexts in which 'cultural property' may be more appropriate (eg in relation to cases where the point at issue is primarily the ownership of a cultural object), or other formulations such as 'cultural expressions' or 'cultural goods and services'. The specific usages of these terms will be made clear in the following chapters that address such issues as illicit trade in cultural objects, intellectual property approaches to protecting traditional cultural expressions, and protecting the rights of cultural creators and producers in global markets, for example. This raises the fundamental point that cultural heritage is a portmanteau term with a myriad of possible meanings and interpretations and both this fact and terminological choices will be considered later in this chapter.

Valuing and Protecting Cultural Heritage

From ancient times to the late nineteenth century

Placing a value on monuments and artefacts which reflect the cultural and religious expressions of a society is by no means a modern impulse. Examples can be

[1] Craig Forrest, *International Law and the Protection of Cultural Heritage* (London and New York: Routledge, 2010) at pp 31–55. See also: Martin Dixon, *Textbook on International Law* (Blackstone Press, 1990).

found from ancient times of concern for the protection of cultural artefacts such as an early museum of antiquities established in ancient Babylon by the daughter of King Nabonidus in the sixth century BC.[2] In the following century in Greece, Thucydides attempted to use archaeological finds as the basis for historical explanation when he considered that Delos had been settled by Carians since the type of armour and weapons he found in many of the graves there resembled those of the Carians of his day.[3] The Chinese historian Sima Qian visited ancient ruins and studied antiquities when writing his history[4] in the second century BC. In the late Roman Republic, Cicero attacked Verres, the Roman Proconsul of Sicily between 71 and 73 BC, in his court orations[5] for removing looted artworks to Rome.

It seems, however, that early antiquities legislation developed first in Europe in the fifteenth century AD with the papal Bull[6] promulgated by Pope Pius II in 1462 aimed at the preservation of the ancient monuments located in the papal States. In 1630, King Gustavus Adolphus of Sweden appointed a state antiquarian, thus demonstrating a desire to protect and preserve important state cultural heritage. In 1684, he issued a Royal Decree aimed at protecting archaeological remains located in the ground which were rendered Crown property, in return for a finder's reward.[7] The Ottoman Turkish authorities began to develop a legislative and administrative system for the preservation of antiquities in the late nineteenth century in what was one of the earliest 'modern' antiquities protection regimes. In 1846, they established in Istanbul the Assemblage of Ancient Weapons and Antiquities which, in the late 1860s, became the Imperial Museum; under the directorship of Osman Hamdi Bey, it undertook the first archaeological excavations by an Ottoman team.[8] The first Ottoman Historic Monuments Act was adopted in 1874[9] and is one of the earliest examples of a modern antiquities legislation. It stated, inter alia, that excavation finds should be shared between the excavation team, the owner of the land, and the State[10] and it placed all foreign excavation teams under the control and supervision of the Ministry of Education (a forerunner to the later Turkish system of granting permits for excavation work). The third version of this law adopted in 1884 included the significant provision of granting state ownership of all antiquities[11] and established the Department of Antiquities to administer the legislation.

[2] Ennigaldi lived in sixth century BC and is said to have acted as a museum curator. Vicki León, *Uppity Women of Ancient Times* (Conari Press, 1995) pp 36–7.

[3] Thucydides, *The History of the Peloponnesian War*, Book I.

[4] The *Shi Ji* was a history of China's dynastic empires, written between the end of the second century and the beginning of the first century BC by legendary scholars Sima Tan and his son Sima Qian of the Han Dynasty.

[5] *In Verrem*, Acta I and II.

[6] Papal Bull entitled *Cum Alma in Nostram Urbem,* cited in Lyndel V Prott and Patrick J O'Keefe, *Law and the Cultural Heritage*, vol 1 (Abingdon: Professional Books, 1984) at p 34.

[7] Prott and O'Keefe, *Law and the Cultural Heritage* (n 6) at p 35.

[8] Information on the Ottoman law from Emre Madran, *The Restoration and Preservation of Historical Monuments in Turkey (From the Ottoman Empire to the Republic of Turkey)* (Ankara, 1989). See also: A Çilingiroglu and B Umar, *Eski Eserler Hukuku (Ancient Monuments Law)* (Ankara Universitesi Basimevi, Ankara, 1990) [in Turkish].

[9] *Asari Antika Nizamnemesi*.

[10] The best third being given to the State.

[11] The importance of such a provision is explored more fully in Chapter 2 on the illicit trade in cultural objects.

The case of the Ottoman Empire and, later, the Turkish Republic is an informative one in this context since it illustrates both a growing sense of the importance of cultural heritage to state identity and also the beginning of a reaction towards the large-scale removal of antiquities from Turkey, Greece, Egypt,[12] and Italy by European travellers, diplomats,[13] and colonizers. In the case of the Ottoman Empire, it found itself the home to antiquities which many Europeans regarded as their own heritage from ancient Greece and Rome—and to which they, as Turks from eastern Asia, had no direct link other than geographical and territorial. The activities of nineteenth-century European archaeologists were, in many cases, really a form of officially sanctioned treasure-hunting through which they filled the museums of London, Paris, and Berlin with antiquities from the Near, Middle, and Far East. The photograph of Schliemann's wife wearing gold jewellery from ancient Troy[14] is a powerful image of such attitudes.

They were, of course, the basis for a powerful tension and for competing claims over this heritage which the Ottomans began to respond to in the mid- to late-nineteenth century. Interestingly, they had felt no such connection with the sculptural frieze on the Parthenon which, as the power controlling Athens in the late-eighteenth century, they were happy to allow Lord Elgin to remove to the British Museum in 1799 under a *firman* issued by the Sublime Porte of the Ottoman Empire.[15] Lowenthal makes clear the connection between a global view of heritage and the Eurocentric colonial tradition, '[i]n the course of dispensing global benefits, Western powers also acquired global heritage and then came to construe their spoils of conquest as global stewardship. European mandates to plunder stemmed from the common view that their Christian and scientific legacy was immeasurably superior to the barbarous customs of others'.[16] The approach taken by Europeans towards the ruins of Great Zimbabwe is a striking example of such mechanisms at play as is the keeping of anatomic specimens and skeletal remains of African and Australian indigenous people in the natural history museums of Europe and North America. Thus consideration of the competing claims

[12] By Napoleon's conquering army, amongst others.

[13] Such as Sir William Hamilton who served as the British Ambassador to the Kingdom of Naples in 1764 to 1800 and who was a famous 'connoisseur' of antiquities who followed in the footsteps of his Roman predecessor Verres by collecting antiquities from southern Italy and Sicily, many of which he removed to Britain. David Constantine, *Fields of Fire: a Life of Sir William Hamilton* (London: Wiedenfeld and Nicholson, 2001).

[14] This image is easily accessible online. Accessed 30 November 2014 at <http://www.gettyimages.com/detail/news-photo/sophia-schliemann-wife-of-german-archaeologist-heinrich-news-photo/50695956>.

[15] Lord Elgin was able to take advantage of this general lack of interest in antiquities when he was granted a *firman* (a decree issued by the Ottoman Sultan or one of his high officials) allowing the removal of the Parthenon frieze in 1799 and its subsequent transport to the British Museum. The text of this *firman* is reproduced in *The International and National Protection of Movable Cultural Heritage* edited by Sharon Williams (New York: Oceania, 1978) at p 10. See also: Jeanette Greenfield, *The Return of Cultural Treasures* (Cambridge University Press, 1989) at pp 61–72.

[16] David Lowenthal, *The Heritage Crusade and the Spoils of History* (Viking, UK, 1997) at pp 240–1.

of indigenes and later settlers forces us to reassess the terms of reference we apply to the cultural heritage in general.

This question of major museums such as the British Museum in London and the Louvre in Paris holding large collections of cultural objects (and even sculptural elements[17]) is a chapter unto itself, but it does point to some important tensions that underlie this area of law, in particular the question of ascribing a universal value to cultural heritage (as a 'universal heritage of humanity') as opposed to recognizing local and/or national claims to the heritage. In addition, the fact that much of the cultural heritage held in European and North American museums that is being claimed by other countries and/or peoples was removed from its original communities and location as part of the colonial experience (including the colonization of indigenous lands by European settlers).[18] This tension will be discussed in more detail below.

International cultural heritage law from 1945

Although some attempts were made to regulate cultural heritage, in particular in the event of armed conflict[19] and on the regional (American) level,[20] it is fair to say that modern international law relating to the protection of cultural heritage started in the period following the Second World War, the establishment of the United Nations (UN) and the UN Educational, Scientific and Cultural Organization (UNESCO) in 1945, and the adoption of the Universal Declaration on Human Rights (1948). It is no surprise, then, that the first international treaty in this area concerned the protection of cultural heritage in wartime,[21] in view of the purpose of the UN stated in its Charter to foster the peaceful coexistence of States and of UNESCO (set out in its Constitution) to build peace in the minds of men (sic).[22] The 1954 'Hague Convention' sets out its purpose and underlying philosophy in the Preamble, recognizing that 'cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in

[17] Such as the Altar of Zeus constructed by Eumenes II from Pergamon (south-western Turkey) now held in the Pergamon Museum in Berlin.

[18] The colonial despoliation of Africa is described in Folarin Shyllon, 'The Right to a Cultural Past: African Viewpoints', in *Cultural Rights and Wrongs* edited by Halina Niec (UNESCO Publishing and Institute of Art and Law, 1998) at pp 103–19.

[19] Conventions No IV and IX adopted by the International Peace Conference of 1907 addressed issues relating to cultural property, in particular the Regulations appended to Convention No IV (Arts 23(g), 25, 28, and 47). See Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Dartmouth/UNESCO, 1996) at p 10.

[20] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments ('Roerich Pact') adopted by the Pan-American Union in 1935 [167 LNTS 289, entered into force 26 August 1935].

[21] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954 [249 UNTS 240; First Hague Protocol 249 UNTS 358]. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, The Hague, 14 May 1954 [249 UNTS 358].

[22] Preamble at para 1 reads: 'since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed'.

the technique of warfare, it is in increasing danger of destruction' and that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'.

Two years later, UNESCO addressed archaeological excavation in a Recommendation[23] through a set of non-binding international principles to govern this activity. Again, this provides as the raison d'être for the protection of this aspect of cultural heritage the importance that the archaeological heritage holds for mankind and as a means of encouraging international cooperation in its protection, thus preventing international conflicts. Interestingly, this early statement of international policy acknowledges the universal-specific duality of cultural heritage in that it notes that while 'individual states are more directly concerned with the archaeological discoveries made on their territory, the international community is nevertheless the richer for such discoveries'. Further Recommendations addressed the safeguarding of the beauty of landscapes (1962) and the preservation of cultural property endangered by public works (1968).[24] The next cultural heritage treaty-making was seen with the adoption of the 1970 Convention for the prevention of the illicit trafficking and movement of cultural property (1970) and the Convention for the protection of the world cultural and natural heritage (1972).[25] The immaterial aspects of cultural heritage were first addressed in the UNESCO Recommendation on Traditional Culture and Folklore (1989) and more recent UNESCO treaties in this field are the 2001 Underwater Heritage Convention,[26] the 2003 Intangible Heritage Convention[27] and, the most recent, the 2005 Convention on the Diversity of Cultural Expressions.[28]

Cultural heritage treaty-making on the international (global) level is therefore of relatively recent date and the field is still a young and evolving one with all the uncertainties that this entails. These treaties also tended to reflect current concerns at the time of their adoption and, thus, involve differing approaches and

[23] Recommendation on International Principles Applicable to Archaeological Excavations (UNESCO, New Delhi, 5 December 1956) accessed on 18 December 2014 at <http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[24] Recommendation on Safeguarding the Beauty of Landscapes 1962, adopted by UNESCO on 11 December 1962, accessed on 13 February 2015 at <http://portal.unesco.org/en/ev.php-URL_ID=13067&URL_DO=DO_TOPIC&URL_SECTION=201.html>; and the Recommendation on the Preservation of Cultural Property Endangered by Public Works (1968) accessed on 13 February 2015 at <http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[25] Convention on the Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970) [823 UNTS 231] and UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)].

[26] Convention on the Protection of the Underwater Cultural Heritage (UNESCO, Paris, 2 November 2001) [41 ILM 40], discussed further in Chapter 3.

[27] Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO, 17 November 2003) [2368 UNTS 3], discussed further in Chapter 5.

[28] Convention for the Protection of the Diversity of Cultural Contents and Artistic Expressions adopted by UNESCO on 20 October 2005 at the 33rd session of the General Conference, discussed further in Chapter 6.

even underlying philosophies. The 1954 Hague Convention, as we have seen, very much reflected a desire both to prevent the outbreak of future armed conflict and to minimize damage to cultural property in the event of such conflict. The 1970 Convention embodied what might be typified as a 'nationalist' view of cultural heritage, reflecting the concerns particularly of newly created post-colonial (developing) countries that had suffered great loss of cultural heritage during the colonial period and their wish to build national identities for which heritage would serve as a major constitutive element. The 1972 Convention, in contrast, showed a desire to characterize some outstanding examples of cultural heritage as a 'common heritage of mankind' and worthy of international protection as such and a growing concern with environmental protection[29]—both of which may be seen as concerns of developed as opposed to developing States.

Some Terminological Questions

As noted above, this is a relatively youthful area of international law and, as such, the terminologies it employs are still being developed and their meanings are, at times, shifting and evolving. In this section, I briefly address a few of the most important terms of art of this field of law. Writing in 1989, Prott expressed this problem as follows: 'While cultural experts of various disciplines have a fairly clear conception of the subject matter of their study, the legal definition of the cultural heritage is one of the most difficult confronting legal scholars today.'[30] Today, this assessment would be less starkly expressed, but it is by no means fully resolved and still requires consideration by lawyers and others working in the field.[31]

Heritage or property?

As will be noted, the aforementioned treaties and other instruments employ the terms cultural heritage and cultural property in an apparently interchangeable manner and it is therefore important to examine if this is really the case or not. In some sense, this is a false question since legal texts can and, to some extent, do dictate the meaning of any given term for the purposes of the instrument itself.[32] There are, however, certain specific characteristics of these terms that are generally understood and so should be explored here. Moreover, the aforementioned treaties do not explicitly define either cultural property or cultural heritage as such and this leaves their meaning open to interpretation. It is possible, for

[29] Declaration of the UN Conference on the Human Environment (Stockholm, 1972) was adopted at the 21st plenary meeting on 16 June 1972 in the same year this Convention was adopted by UNESCO [UN Doc A/Conf.48/14/Rev 1 (1973); 11 ILM 1416 (1972)].

[30] Lyndel V Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', *Recueils des Cours*, vol V (1989): pp 224–317 at p 224.

[31] Eg, Janet Blake, 'On Defining the Cultural Heritage', *International and Comparative Law Quarterly*, vol 49 (2000): pp 61–85.

[32] As noted by Prott and O'Keefe, *Law and the Cultural Heritage* (n 6).

example, to ascertain that cultural heritage is generally conceived of as a broader, all-encompassing term of which cultural property forms a (material) subsection but which is broader than simply movable items that may be subject to trade or trafficking. For example, the aforementioned 1968 Recommendation described cultural property as 'the product and witness of the different traditions and of the spiritual achievements of the past . . . an essential element in the personality of the peoples of the world'.[33]

Of course, before reaching a full understanding of either of these two terms it is helpful to address the meaning of 'culture' itself. Anthropological definitions of culture give an indication of the difficulties in providing a working definition of culture that can inform our understanding of how it applies in the phrases cultural property and cultural heritage. It has been described as a totalizing concept in which material culture, ritual culture, symbolic culture, social institutions, patterned behaviour, language-as-culture, values, beliefs, ideas, ideologies, meanings, etc are contained and whereby everything in society is supposed to have the same culture (as in the concept of shared values).[34] For the purposes of legal regulation of the trade in antiquities or even of monumental heritage, this would appear to be an extremely wide-ranging definition; interestingly, however, it is much closer to the way in which culture is understood with regard to intangible aspects of cultural heritage. Another anthropologist, Stavenhagen,[35] has proposed three main potential categories of 'culture' that can be helpful here. These are, first, the idea of 'culture as capital', or the accumulation of material heritage of humankind in its entirety. Second, he proposes 'culture as creativity' where culture is represented by scientific and artistic creations, and third, an all-encompassing 'anthropological' view of culture as 'the sum total of all material and spiritual activities and products of a given social group that distinguishes it from other social groups'. In these categories, we can find elements that match to the different meanings of culture as employed in cultural heritage instruments which, in one way, suggests the complexity of the idea of culture as used in cultural heritage law. The idea of 'heritage' is an easier one to grasp and contains elements that are essential for understanding this field of law: it refers to an inheritance received from the past, to be held 'in trust' by the current generation (that may enjoy its value in the present) to be handed down in at least as good a state as it was received to the next generation.

Cultural property as a category was first established in the 1907 Convention No IV and then reiterated in the Roerich Pact (1935) and the Hague Convention (1954). It is a term that obviously contains the potential for damaging outcomes when applied to cultural expressions, manifestations, and even objects that are of special importance to a specific cultural community but who are not defined as their 'owners' under law. Rodota has sought to overcome this difficulty by suggesting that 'property' when applied to cultural items and expressions can

[33] Preamble. [34] Raymond Williams, *Culture* (Glasgow: Fontana, 1981).
[35] Rodolfo Stavenhagen, 'Cultural Rights: A Social Science Perspective', in *Cultural Rights and Wrongs* edited by Halina Niec (UNESCO Publishing and Institute of Art and Law, 1998) pp 1–20.

constitute a 'new form of ownership' to avoid the notion of exclusive control usually implied by that legal terminology.[36]

In the 1978 Recommendation on movable cultural property,[37] the following definition of that term is given: 'movable cultural property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and are of archaeological, artistic, scientific or technical value or interest'. For an instrument whose primary objective is to control the movement of such cultural objects, the use of this term is relatively uncontroversial and the definition given here does clearly state the non-economic values attached to such items. However, it remains rather strange to employ a legal concept that usually relates to ownership rights and then to state that it is being used without implying such rights, when alternative terms exist that are free of this historical baggage. However, in view of the sense of discomfort felt by many commentators today, this term is much less widely used and the alternative cultural heritage is generally favoured.[38] In addition, now that our idea of what cultural heritage encompasses has greatly expanded not only to include aspects of natural heritage (or mixed cultural and natural ones) and non-material elements, 'cultural property' is far too limited a term: how well, for example, can it cover rock art, places associated with the development of certain technologies, natural features endowed with cultural significance, sacred and ritual sites, and even the rituals themselves?

There is, of course, a further sense included in the term cultural heritage that is also highly significant and is, possibly, the best argument for its use. As noted above, it encompasses the idea of an inheritance received in a certain condition from the previous generation(s) to be safeguarded by the current one and handed on to following generations in a condition at least as good as that in which it was received. This idea of cultural heritage as an inheritance is not new and was articulated in the UNESCO Constitution (1945) in the requirement of the Organization to 'assure the conservation and protection of the world's inheritance of works of art and monuments of history and science'.[39] However, the idea of an inheritance has gathered further meaning over the years, in particular with the adoption of the concept of sustainable development. It is important since it includes the central concept of inter-generational equity and the duty of the current generation to safeguard the cultural and natural wealth of this planet for the

[36] Stefano Rodota, 'The Civil Law Aspects of the International Protection of Cultural Property' in *International Legal Protection of Cultural Property: Proceedings of the Thirteenth Colloquy on European Law*, Delphi, 20–22 September 1983.

[37] Recommendation for the Protection of Movable Cultural Property (UNESCO, 1978) adopted by UNESCO at the twentieth session of General Conference held in Paris from 24 October to 28 November 1978, accessed on 12 December 2014 at <http://portal.unesco.org/en/ev.php-URL_ID=13137&URL_DO=DO_TOPIC&URL_SECTION=201.html> at Art 1.

[38] With regard to controlling international trade, the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Rome, 1995) [34 ILM 1322] which is discussed further in Chapter 2 uses the phrase 'cultural objects' in the place of 'cultural property'.

[39] Article 1.

future.[40] It also includes a related idea that, since we do not know today what our future needs will be nor can we anticipate the ways in which existing knowledge (heritage) might be employed in the future, we should keep it against future needs.[41] Given that, like natural resources, cultural heritage is a non-renewable resource, its use and enjoyment must be conducted in such a way as not to exhaust it.[42] This notion of heritage is also one of the fundamental bases for a general duty to be placed on States to protect and safeguard cultural heritage.[43]

Perhaps one of the most striking, and possibly problematic, aspects of cultural heritage today is its all-pervasive character. Leaving aside the notion of 'heritage' as a lifestyle accessory—heritage bathroom fittings, heritage restaurants—[44] there remain a large, and expanding, number of heritage sites, heritage 'experiences', and heritage museums worldwide.[45] For some reason, we have a greater social and emotional need in the contemporary world for the past (and its present purposes) in the face of rapid technological change, inter-connectivity, and globalized relations. This, of course, relates also to the role played by cultural heritage in the construction of local, national, regional, and even 'human' identities which are under pressure today in ways they were not previously. It is no accident that the cultural heritage law-making by UNESCO has gradually moved from issues of a predominantly national importance (protection of cultural property during armed conflict and against illicit movement and trade) to ones regarded as of a more universal interest (eg the world cultural and natural heritage) to those much more closely tied up with local and regional interests (intangible cultural heritage and diversity of cultural expressions).

[40] Article 4 of the 1972 World Heritage Convention places the duty on Parties of 'ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage'.

[41] This mirrors closely the classic statement of sustainable development as articulated by the 'Brundtland' Report of the World Commission on Sustainable Development in 1987 as: 'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'

[42] This is summed up well in the submission made by the Czech Republic to the Helsinki Conference of Ministers of Culture of the Council of Europe in 1995, which refers to the 'enlargement of the concept of cultural heritage to cultural aspects or cultural resources of the environment and of society—listed and unlisted, known and unknown, material or immaterial. They are similarly non-renewable and for human life, health and safety as necessary as natural resources of the environment'.

[43] Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in *Standard-setting in UNESCO, volume I: Normative Action in Education, Science and Culture, Essays in Commemoration of the Sixtieth Anniversary of UNESCO* edited by Ahmed Yusuf Abdulqawi (UNESCO, 2007) at p 237 also suggests that the human rights dimension of cultural heritage is one of the factors behind the shift from cultural property to cultural heritage.

[44] Rodney Harrison, *Heritage: Critical Approaches* (Routledge, 2013) addresses the tendency towards a theme-park notion of 'heritage' at pp 1–12.

[45] According to David Lowenthal, *The Heritage Crusade and the Spoils of History* (n 16), 95 per cent of contemporary museums have appeared since the Second World War.

Tangible or intangible heritage?

The archaeological heritage is a good illustration of this dual nature of cultural heritage. As a subset of the overall category of cultural heritage, archaeological heritage is primarily viewed in terms of its material culture—sites, remains of buildings, human remains, and artefacts. However, the main significance of this material culture for the scientific discipline is the evidence it can provide of past societies, forms of human organization, and practices. As such, its intangible aspect which is the information that we can glean from the material culture is an essential part of the whole: it is this intangible element—the intellectual, human context in which the material culture was made or evolved—that gives the physical finds their *archaeological* significance. Hodder and Hutson express the special value of context for an archaeologist succinctly in the following passage:

> Handed an object from an unknown culture, archaeologists will often have difficulties in providing an interpretation. But to look at objects by themselves is really not archaeology at all. Archaeology is concerned with finding objects in layers and other contexts (rooms, sites, pits, burials) so their date and meaning can be interpreted. As soon as the context of an object is known, it is no longer mute . . . Clearly we cannot claim that, even in context, objects tell us their cultural meaning, but on the other hand they are not totally mute. The interpretation of meaning is constrained by the interpretation of context.[46]

This explanation of the role of context in archaeological interpretation of material culture can serve as a useful analogy for understanding the relationship that exists between 'tangible' and 'intangible' cultural heritage. It has to be accepted that the distinction that has developed in cultural heritage law-making, especially within UNESCO, between tangible and intangible cultural heritage is an artificial one that does not accord with the reality. In most cases, the two are inextricably linked and have such a close mutual relationship that to separate them is counter-intuitive.[47] Hence, the value and significance of a large proportion of cultural properties on the World Heritage List, for example, is related to their associated intangible cultural elements[48] while, at the same time, intangible forms of heritage are often actually perceived through the tangible elements (costumes, musical instruments, agricultural tools, etc) associated with them. It is more a function of legislative history and the relative importance ascribed to various aspects of heritage at different times and by different groupings of States that cultural heritage law has developed as it has. As a result, predominantly 'tangible' aspects were accorded protection directly from the 1954 Hague Convention up until the 2001 Underwater Heritage Convention, although the intangible aspects of this material heritage were often very prominent and alluded to in the treaty

[46] Ian Hodder and Scott Hutson, *Reading the Past—Current Approaches to Interpretation in Archaeology*, 3rd edn (Cambridge University Press, 2003) at p 4.

[47] See: Mounir Bouchenaki, 'A Major Advance towards a Holistic Approach to Heritage Conservation: The 2003 Intangible Heritage Convention', *International Journal of Intangible Heritage*, vol 2 (2007): p 106.

[48] Dawson Munjeri, 'Tangible and Intangible Heritage: From Difference to Convergence', *Museum International*, vol 221-2 (2004): pp 12–20.

texts and the implementation thereof.[49] Hence, for example, the 2001 Convention gives importance to the special link that some countries may have with a historic shipwreck; this link may often be expressed in terms of intangibles such as the importance of a battle in the country's history at which the ship sank. Similarly, the Operational Guidelines for the 1972 World Heritage Convention developed over the years to include a criterion for inscription of cultural properties that made direct reference to their 'associated intangible elements'. More recently, the definition of ICH given in the 2003 Convention refers to 'the instruments, objects, artefacts and cultural spaces associated' with the intangible heritage. The 2003 Convention was adopted in part in recognition of the fact that these intangible aspects of heritage had not been given sufficient prominence in the earlier treaties and, in particular, as a reflection of the different priorities of developing countries and countries of the South for whom intangible heritage is of special importance. 'Intangible cultural heritage' has now become the international legal term of art for this aspect of cultural heritage,[50] even if it is not an ideal one. It is difficult, for example, to find an exact equivalent in Spanish[51] and the French term 'immatériel' carries a different set of connotations from the English 'intangible'. The arrangement finally settled upon for defining the term in the 2003 Convention involves defining 'intangible cultural heritage' for the purposes of the treaty[52] and then setting out a non-exhaustive list of the five main domains in which it is found. This signals that it is a complex concept that cannot be rendered in a single, neat phraseology.

'Safeguarding' versus 'protection'

The rationale for choosing the term 'safeguarding' over the more common one of 'protection'[53] used in the cultural heritage field is worth examination. It makes sense first since this is the term employed in the 1989 Recommendation on traditional culture and folklore which was the precursor to this treaty and the only pre-existing instrument dealing with this particular aspect of cultural heritage. Since one of the underlying approaches of both the 1989 Recommendation and the 2003 Convention was to employ a broader, cultural, approach to protection than that offered by intellectual property law (in which 'protection' is the term of art), it makes sense on this ground too.[54] It is also a term that suggests a far broader

[49] As early as 1956, the Recommendation on International Principles Applicable to Archaeological Excavations (n 23) noted in the Preamble 'the feelings aroused by the contemplation and study of works of the past'; the 1998 and 2000 revisions of the *Operational Guidelines* to the 1972 World Heritage Convention allow for the intangible associations of cultural properties to be taken into account in applying the inscription criteria.

[50] Particularly with the adoption of the 2003 Intangible Heritage Convention.

[51] A point noted by the Spanish delegate at intergovernmental negotiations on the 2003 Convention.

[52] Article 2(1).

[53] Used in UNESCO's 1954, 1970, and 1972 Conventions cited at n 5.

[54] It is worth noting that out of Sections A to F of the Recommendation for the Safeguarding of Traditional Culture and Folklore (Paris, 1989), accessed on 10 November 2014 at

approach than that of protection, implying not only that the ICH is protected from direct threats to it but also that positive actions that contribute to its continued survival must be taken. Significantly, safeguarding is specifically defined in the 2003 Convention[55] and this definition bears a close relationship to the five main divisions of that 1989 Recommendation, namely identification, conservation (including documentation), preservation, dissemination, and protection.[56]

As a consequence, safeguarding is seen as a comprehensive notion that not only includes classic 'protection' actions such as identification and inventorying of the ICH but also involves providing the conditions within which it can continue to be created, maintained, and transmitted. This, in turn, implies the continued capability of the cultural communities themselves to do this. Hence, the community is placed at the centre of this Convention as the vital context for the existence of ICH rather than the heritage itself. In this way, the safeguarding of ICH is a more context-dependent approach that takes account of the wider human, social, and cultural contexts in which the enactment of ICH occurs. Measures that should be taken by governments in order to achieve this include ensuring that the economic, social, and cultural rights of the communities (groups and individuals) that allow them to create, maintain, and transmit their ICH. From such a viewpoint, protection carries with it a more negative sense of 'protection against' while safeguarding implies taking positive actions to foster the heritage, its holders, and the context in which it is developed.

Universal, National, or Local Heritage?

A continuing challenge to international cultural heritage law is and has been whether to characterize the heritage that merits protection as a cultural heritage of humankind, a 'national treasure', or the source of value and identity to local and indigenous communities. As shall be demonstrated through this book, depending on various factors such as the prevailing politics, the type of heritage in question, and whether its preservation is regarded as a global value, a variety of approaches have been taken to this question. Thus there is a potential contradiction which lies at the heart of the construction of a global culture and, hence, of the notion of 'global heritage' or the 'universal heritage of mankind'. When examining this in relation to international cultural heritage law, the question encapsulates many of the competing interests at stake since it is in the nature of legal questions to be expressed in such a way. Writing about the cultural heritage in the legal and wider contexts, Lowenthal suggested that, '[t]oo much is now being asked of heritage. In the same breath we commend national patrimony, regional and ethnic legacies,

<http://unesdoc.unesco.org/images/0013/001323/132327m.pdf>, only Section F is entitled 'Protection' and this section deals with intellectual property aspects of protection.

[55] Article 2(3).

[56] The measures for safeguarding listed in Art 2(3) are: 'identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.'

and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible'. The idea of basing protection on the notion of a universal, global value, as a heritage of humankind,[57] has been predominant throughout international law-making since the second half of the twentieth century and has formed the justification for international cooperation in this field.[58]

Both the 1970 UNESCO Convention on movable cultural property and the 1995 UNIDROIT Convention on the return of stolen and/or illegally exported cultural objects both characterize the importance of the objects in question as a universal one.[59] This is interesting and suggests that this is, in part, designed to render more acceptable to art market States treaties that are still fundamentally nationalist in their thrust since they reaffirm the idea that States of origin have preferential rights over cultural artefacts. A further tension with regard to the notion of a universal cultural heritage is in its contrast to the representative character of heritage, namely the way in which heritage is representative of specific cultural communities and their identity. Hence, implementation of the 1972 World Heritage Convention has, over the 40 years of its operation, slowly moved away from the notion of an 'iconic', 'wonders of the world' approach[60] towards the idea of exemplars of cultural heritage that are 'representative of the best' in a particular cultural area, region, theme, or historical period.[61] In order to resolve the apparent tension between the universality and specificity of heritage under the Convention, the World Heritage Committee has started to emphasize the 'representative' character of heritage sites to allow the World Heritage List to represent the diversity of

[57] Not to be confused with the doctrine of the 'common heritage of mankind' developed by Ambassador Pardo with regard to deep seabed mineral deposits and that applies in international law to common space areas, such as the deep seabed and the moon. Claims have also been made for treating Antarctica as a common heritage of mankind and even certain iconic species, such as mountain gorillas. See: Christopher C Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind', *International and Comparative Law Quarterly*, vol 35 (1986): pp 190–9; and Ellen S Tenenbaum, 'A World Park in Antarctica: The Common Heritage of Mankind', Note in *Virginia Environmental Law Journal*, vol 10 (1991): p 109.

[58] It was used as far back as 1931 when the Secretary-General of the International Office of Museums wrote of 'la nouvelle conception qui se fait jour depuis quelque temps et qui tend à considérer certains monuments d'art comme appartenant au patrimoine commun de l'humanité', stating that, 'il semble qu'il y a là enformation un nouveau principe de droit international dans le domaine artistique', Euripide Foundoukidis, *Mouseion. Revue internationale de muséographie*, no 15 (1931): p 97. Cited in Noé Wagener, 'Les usages de la figure de "patrimoine commun"', Working Paper presented to a Research Workshop on *Dissemination et mimétisme en droit international: un regard anthropologique sur la formation des normes*, l'Institut de Hautes Etudes Internationales et du Développement, Geneva, 20 November 2014.

[59] In the Preamble, the 1970 Convention cites the 'importance of the protection of cultural heritage and cultural exchanges for promoting understanding between peoples, and the dissemination of culture *for the well-being of humanity* and the progress of civilisation' (emphasis added).

[60] For a discussion of this 'iconic' approach, see: Christina Cameron, 'Evolution of the Application of "Outstanding Universal Value" for Cultural and Natural Heritage' at the Special Expert Meeting of the World Heritage Convention on *The Concept of Outstanding Universal Value*, held in Kazan, Republic of Tacarstan, Russian Federation 6–9 April 2005. UNESCO Doc WHC-05/29.COM/INF.9R, of 15 June 2005.

[61] Yusuf A Abdulqawi, 'Article 1—Definition of Cultural Heritage', in *The 1972 World Heritage Convention—A Commentary* edited by Francesco Francioni (with the assistance of Federico Lenzerini) (Oxford University Press, 2006) pp 23–50.

all cultures around the world in their intellectual, aesthetic, religious, and sociological expressions.[62] It is no accident that one of the ways in which the drafters of the 2003 Intangible Cultural Heritage Convention sought to distinguish it from the 1972 Convention (on which it was loosely modelled) was to name its main international list, the Representative List of Intangible Heritage of Humanity. By using the term 'Representative' in its title, this was intended to signal the idea that the list was not celebrating 'unique' or 'outstanding' elements of heritage, but rather that the inscribed elements were representative of the mass of intangible cultural heritage in the world and, importantly, its global diversity.[63]

Cultural heritage as universal heritage

All the post-War cultural heritage treaties express this notion, either explicitly or implicitly, as the basis for international cooperation over its protection. The 1954 'Hague' Convention on the protection of cultural property in armed conflict,[64] the first of these treaties, notes that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind',[65] thus suggesting a general duty on all States to ensure its protection in wartime. More notable given its highly 'nationalist' position towards the right of States to retain (and have returned) their cultural heritage, the 1970 UNESCO Convention on the illicit import, export, and transfer of cultural property[66] implicitly refers to the idea that its subject matter has a value that goes beyond that of national heritage alone, stating that, 'cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting'.[67] The UNESCO treaty that most clearly reflects this view of cultural heritage is the 1972 UNESCO World Heritage Convention[68] which asserts that, '[p]arts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole'. This is not surprising since it deals with the cultural and natural heritage together and the notion of a global heritage is now well-established in that field of law: '[t]hat the natural heritage is global is now beyond dispute. Fresh water and

[62] According to Francesco Francioni, 'Preamble', in *The 1972 World Heritage Convention—A Commentary* edited by Francesco Francioni (with the assistance of Federico Lenzerini) (Oxford University Press, 2006) pp 11–21 at p 20, the *Global Strategy* of the 1990s led to a dynamic interpretation of 'universality' and contains an evident anthropological dimension of cultural heritage, as opposed to a purely aesthetic and monumental art history approach.

[63] Janet Blake, *Commentary on the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage* (UK: Institute of Art and Law, 2006) at p 20.

[64] The 1954 'Hague' Convention on the protection of cultural property in the event of armed conflict (n 20).

[65] Preamble, para 2.

[66] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (n 24), discussed in more detail in Chapter 2.

[67] Preamble, para 3.

[68] 1972 World Heritage Convention (UNESCO, 1972), discussed in more detail in Chapter 4.

fossil fuels, rain forests and gene pools are legacies common to us all and need all our care. Cultural resources likewise form part of the universal human heritage.'[69]

The 1972 Convention clearly takes as its starting point the idea that some aspects of the cultural heritage are of such outstanding importance that they should be preserved for the benefit and enjoyment of all mankind,[70] an out-and-out assertion of the global heritage position.[71] The listing of cultural properties under the 1972 Convention has helped to save the temples at Angkor Wat in war-torn Cambodia from destruction through an international conservation effort, saved the historic city of Dubrovnik from further destruction during bombardment in the early stages of the war in ex-Yugoslavia, and led to an international outcry when dam-building threatened ice-age rock art in the Coa valley in Portugal. Thus the application of the concept of a global heritage through the mechanism of the 1972 Convention, for example, can have important positive outcomes for safeguarding sites whether faced with extreme threats such as war damage or submersion as a result of dam-building projects or simply from deterioration due to government neglect.[72] By placing a duty of protection on the State on whose territory the listed monument or site is located, acting as a trustee of the heritage on behalf of mankind, this treaty attempts to reconcile the tension that exists between State ownership of the sites and the interests of humankind (the global interest). In the 1972 Convention we find the idea that such outstanding heritage is a non-renewable resource with significance for all peoples and cultures and must therefore be safeguarded for future generations as their inheritance. On the surface, this is an attractive approach and appears uncontroversial and we can accept certain archetypal national icons may also be global legacies, such as: Stonehenge, the Egyptian Sphinx, the Parthenon, and Angkor Wat.

Despite these positives, there remains an unavoidable tension between the global and culture-specific approaches towards cultural heritage that is linked to the (potentially) conflicting interests of many different groups with claims to 'their' cultural heritage. Whilst with regard to natural heritage, 'a universal standard of excellence is conceivable, because the geological, biological, or physical value of a natural site can be appreciated in light of objective, scientific standards', in the field of cultural heritage what is very special and thus 'outstanding' normally relates to the distinctive qualities of a particular culture and social environment, the very antithesis of what is 'universal'. This can be illustrated by an example such as the Great Wall of China

[69] Lowenthal, *The Heritage Crusade* (n 16) at p 228.

[70] It states that cultural and natural heritage properties 'constitute an essential feature of mankind's heritage and a source of enrichment and harmonious development for present and future generations'.

[71] This idea is analysed as follows by Francioni, 'Preamble' (n 61) at p 19: 'And yet they are universal in the sense of their universal appeal, in the resonance of their exceptional qualities everywhere and with everyone in the world, as is demonstrated by the constant flow of visitors from all over the world to the two sites. So, at a textual level, the term "universal" as applied to cultural heritage can be understood as defining the quality of a site of being able to exercise a universal attraction for all humanity and exhibit importance for the present and future generations'.

[72] However, it is important to note also that this can have negative consequences, such as damage resulting from too high visitor numbers or the exclusion of local people from the site.

which is 'universal' in the sense of having a universal appeal for everyone around the world but does not exist everywhere and involve everyone.[73] Of course, it can be argued that each of these Conventions was designed to confront a particular threat to a specific class of elements of the cultural heritage and that the differences of philosophy underlying each instrument simply reflect that fact. However, because of this fact, it is important to consider more closely what the potential negative outcomes of such a contradiction in these legal approaches may be. As an example of this, the 1982 UN Law of the Sea Convention[74] includes an article dealing with the treatment of archaeological and historical artefacts located in the deep seabed area in which the directly contradictory global and Statist approaches are employed in a manner which has potentially absurd consequences.[75] First, it calls for archaeological and historical objects to be disposed of 'for the benefit of mankind' (a globalist position) while recognizing, at the same time, the 'preferential rights of the state or country of origin, or the state of cultural origin, or the state of historical and archaeological origin' (clearly a Statist position). One cannot, of course, expect the drafters of an instrument designed for the codification and progressive development of the laws of the sea to have a very sophisticated understanding of the philosophies behind cultural heritage protection. However, it is telling that the drafters of this article imported these two potentially contradictory views of the cultural heritage which are expressed in UNESCO texts[76] and, by placing them side-by-side in the same article, showed clearly their incompatibility.

Cultural heritage as national heritage

As is discussed in detail in Chapter 8 (on human rights and cultural heritage), heritage plays a pivotal and often constitutive role in the creation of national heritage. It is for this reason that many countries have taken strong measures to prevent the export of cultural objects they view as 'theirs' and some artefact-rich States have enacted legislation to assert a blanket claim of ownership over all cultural heritage found in their territory. The 1970 Convention, while giving lip-service to the idea that all the peoples of the world should enjoy the world's cultural property, is strongly 'Statist' in its espousal of the rights of the State of origin to retain and control its cultural property and to have stolen or illegally exported items restored to it. M'Bow, then the Director-General of UNESCO, expressed this in a manner which clearly recognized the contradiction between nationalist views of heritage and the universalist position espoused officially by UNESCO:

> The men and women of these [despoiled] countries have the right to recover these cultural assets which are part of their being. They know, of course, that art is for the world and

[73] Francioni, 'Preamble' (n 61) at pp 18–19.

[74] UN Convention on the Law of the Sea (Montego Bay, 1982) [1833 UNTS 3/[1994] ATS 31/21 ILM 1261 (1982)].

[75] Article 149.

[76] Especially the 1970 and 1972 Conventions that were adopted during the UNCLOS III conference at which the final version of the 1982 LOSC was negotiated.

they are aware of the fact that this art, which tells the story of their past and shows what they really are, does not speak to them alone. . . . These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which represent their culture . . .

In this way he attempts to assert the special relationship that exists between a people and the artworks created by themselves and their ancestors while trying also to allow for their character as the cultural heritage of humankind.

Claims made by States for the return or restitution of cultural treasures which they regard as having been stolen and/or illegally exported illustrates the confusions and potential contradictions between the two positions as well as the competing interest involved. The dispute between Turkey, Germany, and the Russian Federation over the ownership of the treasure found by Schliemann at ancient Troy (in western Turkey) known as 'Priam's Gold' is a good illustrative case.[77] This hoard was excavated by Schliemann at Troy in 1873 while working under a permit from the Ottoman authorities allowing him to keep half of his finds. He secreted this find and smuggled it all out of Turkey to Athens where the Ottomans initiated a legal suit for the restitution of their half of the treasure. In April 1875, an agreement was reached whereby Schliemann kept the whole of the find in return for compensation. He then gifted the collection to the German people in 1877 and it was placed on museum display in Berlin. After the Red Army occupied Berlin in 1945, three crates of the Trojan Treasure disappeared. In the late 1980s, documents revealed that a crate containing the gold items and four silver vessels from Troy had been placed in the Pushkin Museum in July 1945.[78] In 1990, a German-Russian treaty was signed that included the mutual exchange of cultural property removed during the war and, in 1993, an Intergovernmental Commission was set up to oversee this. The Turkish Government then claimed the treasure on the basis that, whatever agreement had been reached with Schliemann in 1875, his export of the items was illegal under the Ottoman legislation existing at the time. Thus it is a hugely complex situation in which three States have put forward competing claims, with the status of the treasure as a part of the 'common heritage of humankind' as a unique collection also a significant factor.[79]

This nationalist position tends towards a 'retentionist' attitude[80] by artefact-rich States such as Turkey and Mexico which apply very tight export regimes (often

[77] DA Traill, 'Schliemann's Mendacity: A Question of Methodology', *Anatolian Studies*, vol XXXVI (1986): pp 91–8.

[78] When the Red Army removed artworks in 1945, they were acting under the terms of the Allied Policy of 'Restitution in Kind' in exchange for those items looted and/or destroyed by the German army.

[79] Turkey has made the somewhat disingenuous suggestion that a 'Monument to Mankind' should be established at the Troad (the site of Troy in northwest Turkey) under international control, with an international museum in the National Park at the Troad for all Trojan artefacts. This neatly conflates both the universalist and nationalist positions.

[80] As typified by John Henry Merryman in 'The Nation and the Object', *International Journal of Cultural Property*, vol 3, no 1 (1994): pp 61–76.

total prohibitions) allied with attempts to secure the repatriation of items illegally removed from their countries. The issue of the return of items removed in historical times (often in the late eighteenth and nineteenth centuries) which are of great significance to a particular country and or people, is a very complex and difficult one. It generally concerns removal under very different political realities (often within a colonial context) and so concerns political and cultural sensitivities—often a sense of national identity—due to the symbolic nature of the often monumental items. The removal of the ritually significant royal bronzes removed from Benin by the British colonial powers in that country in the nineteenth century[81] is a good example of such cases: they have a unique character and can be conceived of as 'universal heritage of humankind' while enjoying, at the same time, a special significance as a symbol of modern national identity.

Attempts to secure the restitution of antiquities exported in more recent times in contravention of export regulations—often the result of illicit excavation causing destruction of the archaeological record of a country—would appear to be relatively simple and uncontroversial. They are not, however, free of controversy given the conflict of interests between those States which espouse a liberal, free-market view that encourages a licit trade in antiquities (generally, of course, the market States such as the US, UK, Japan, and Germany) and States which take a nationalist, 'retentionist' position towards preserving their cultural artefacts (majority of source States).[82] The free-market view proposes that no single State or group of people should have a special right to the ownership or control over items of the cultural heritage but that their movement should be governed by market forces. It contends that by opening up the market to a sufficient number of licit antiquities to satisfy bona fide collectors, the demand for illicit ones will be lessened.[83] This is, effectively, a universalist approach in so far as it challenges a nationalist view of the cultural heritage, arguing that the cultural heritage should be available to all who can afford to pay for it. It also reflects the global capitalist view that the market should be left to regulate itself, even in areas such as environmental pollution, and that state intervention should be kept to a minimum. On a purely practical level, this argument is highly problematic in that it would require access to a sufficient number of 'surplus' antiquities which source States are prepared to allow onto the market (unlikely in itself) to satisfy the market.[84] A more philosophical difficulty would be that it implies the commodification of cultural artefacts by viewing some as more 'valuable' than others.

[81] Shyllon, 'The Right to a Cultural Past: African Viewpoints' (n 18).

[82] John Henry Merryman, 'A Licit International Trade in Cultural Objects', *International Journal of Cultural Property*, vol 4, no 1 (1995): pp 13–60.

[83] As expressed by Merryman, 'A Licit International Trade' at p 14: 'An expanded, licit international trade in art is more likely to advance general interest in the cultural heritage of mankind.'

[84] It is equally unlikely that collectors who tend to want unique and special items would be interested in items such as Roman glassware of which there are several hundred identical exemplars rather than a unique item of outstanding beauty.

Globalization and heritage

Much has been written on the effects of globalization[85] and these are as relevant to cultural heritage as to many other aspects of life. Since globalization impacts on almost all areas of cultural development, it can threaten the continued practice of traditional arts and handicrafts by turning youth away from these traditional forms of cultural expression towards a unified 'global' culture while. At the same time, while the global marketplace can be exploited to disseminate traditional cultures to a wider (even global) audience, it also creates a situation in which local products are squeezed out by cheaper imported goods. Globalization forces us to redefine the role of States in the cultural arena as well as the relationship of private individuals and independent organizations to government, while highlighting the 'universalist' role of international standard-setting instruments as a means of countering the effects of economic and cultural globalization. Some commentators have identified an apparent contradiction between the universalist nature of the standard-setting instruments of UNESCO and the importance of respecting cultural diversity. It has also been criticized as expressing a 'Western' (and even colonialist) view of the 'global' cultural heritage which does not value other cultural traditions sufficiently.[86] More recently, however, UNESCO programmes have increasingly acknowledged non-Western views of heritage with the recognition of the importance of intangible heritage which may be the predominant form of cultural heritage in some societies. As globalization may reduce the role of States by by-passing borders in many areas of economic and cultural activity, it also increases the importance of local expressions of cultural identity in response to global pressures.[87] This last point may prove significant, for example, when 'selling' a policy of valuing and safeguarding intangible cultural heritage to States because of its very 'local' nature and since by safeguarding this heritage that is rooted in the local cultural community may provide a new means for States to legitimate their role in cultural terms.[88] Hence, in the face of the challenge of globalization, they can be seen as safeguarding a sense of local cultural identity within the framework of the State while protecting the traditional cultural expressions from exploitation. Of course, some indigenous peoples and other cultural minorities seek to challenge the State by asserting claims for self-determination or greater local autonomy, it is generally true that accepting and increasing the profile of local cultural traditions within the official framework is more positive

[85] See, eg: M Featherstone (ed), *Global Culture: Nationalism, Globalization and Modernity* (Sage, London, 1990); and J Friedman, *Cultural Identity and Global Process* (London: Sage, 1995).

[86] William S Logan, 'Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-based Cultural Practice', *International Journal of Heritage Studies—Special Issue on World Heritage and Human Rights: Preserving our Common Dignity through Rights Based Approaches*, vol 18, no 3 (2012): pp 231–44.

[87] Lynn Meskell, 'Introduction: Archaeology Matters', in *Archaeology Under Fire* edited by Lynn Meskell (London: Routledge, 1998) pp 1–12 at p 8 notes 'the contradictory tendencies of globalisation and localisation existing side by side'.

[88] Much of the monumental cultural and archaeological heritage has traditionally been employed by States to foster a sense of national cultural identity that legitimizes the State itself.

for a State than not. Since international instruments are elaborated by States (or their representatives at intergovernmental level), this reassessment of their role is not without importance in the context of this study.

The situation of indigenous heritage

Claims of priority made by indigenous and tribal peoples to their cultural heritage is one which also runs wholly counter to the concept of a global cultural heritage. It also raises very important questions about ownership of the cultural heritage which is, in itself, a hugely complex one.[89] There are innumerable examples of competing claims to the cultural heritage between indigenous peoples and later settlers in North America, Australasia, northern Europe, Latin America, and south-east Asia and this has become an important issue for archaeologists working in regions where remains relating to indigenous groups are to be found. In Australia, for example, there has been much controversy over the issue of aboriginal land rights which is also intimately connected to claims to the cultural heritage,[90] while cases relating to indigenous cultural rights have been heard by the European Court of Human Rights and the Inter-American Human Rights Commission.[91] In the US, federal legislation has been passed to address Native American claims for reburial rights over skeletal remains of their ancestors.[92]

Consideration of the rights of indigenous peoples to their cultural heritage can be seen as subversive of the two leading (and internally contradictory) approaches put forward for the protection of cultural heritage: first, that of State ownership (a 'statist' or 'nationalist' approach) and, second, that of international trusteeship (a 'universalist' approach). The claims made by indigenous and tribal people to their cultural heritage not only challenges the State's right to own and control sacred sites, skeletal and other remains, but it also questions the basis of the idea of a global, universal cultural heritage: it suggests that this notion primarily expresses a Eurocentric worldview that does not take into account the understanding indigenous peoples have of the nature (or importance) of their cultural heritage.[93] For example, the development of a 'world' approach to archaeology as a discipline reveals the degree to which it has developed out of and been

[89] As a consequence, many commentators in the cultural heritage law field prefer to avoid applying the notion of ownership in its classical sense to heritage.

[90] Elizabeth Evatt, 'Enforcing Indigenous Cultural Rights: Australia as a Case Study', in *Cultural Rights and Wrongs* edited by Halina Niec (UNESCO Publishing and Institute of Art and Law, 1998) at pp 57–80.

[91] The 'Case of the Miskitos' of Nicaragua was the case in which the Inter-American Human Rights Commission came out in the most comprehensive defence of the collective rights of indigenous peoples. Case cited at: IACHR 'Report on the situation of human rights of a sector of the Nicaraguan population of Miskito origin', OAS/Ser.L/V/II.62.doc 10 rev.3 and doc 26, Washington, DC, 1984, p 12.

[92] The Native American Graves and Repatriation Act (1991) in the United States is one of the most far-reaching of this type of legislation, incorporating as it does indigenous values. After its adoption, control over a large number of ritual and cultural objects and grave sites has been handed over from US museums to Indian tribes.

[93] This is discussed in more detail in Chapter 8.

heavily influenced by a western intellectual tradition. An example of this is the gap between the attitude of western archaeologists and Australian Aborigines towards Aboriginal rock art where the 'contextless' nature of Western concepts of art and archaeology was in direct conflict with the views of the local indigenous community; this led to young Aboriginals touching up the fading rock art, much to the horror of the archaeologists.[94] In the context of New Zealand, there has been a resurgence of the importance placed on Maori cultural identity accompanied by growing demands that Maoris should define and interpret their own culture which has directly affected archaeologists, curators, ethnographers, and others working professionally with Maori culture and cultural remains.[95] There is a growing acceptance that Maoris are the primary owners of this heritage and Maoris are becoming increasingly uncomfortable with the idea of their cultural heritage forming part of a 'universal' cultural heritage held in common with all New Zealanders which could lead to white control of that heritage. This rejection of outside control extends to the publication in academic journals of views of their heritage which they find unacceptable: white scholars are viewed as 'cultural looters' and of encroaching on the Maoris' sense of continuity with the past. This is interesting since it takes the debate beyond the question of giving (or denying) consent for interference with sites of cultural importance to indigenous peoples to that of the control over understanding and interpreting this heritage.[96] What lies at the heart of this and other disputes is the question of who has the right to claim ownership and control of the past (and the material evidence thereof) and the underlying issue of whether such a thing as a single past exists.

In conclusion, it can be stated that the actors with an interest in the protection and safeguarding of cultural heritage are many and hold diverse interests and objectives in this process that, at times, collide. It is therefore not an easy question to assign rights and concomitant duties with regard to cultural heritage under international law and, as we shall see, depending on the aspect of heritage and the context within which safeguarding takes place, the nature of the rights and duties and even of the right- and duty-holders themselves and their mutual interactions will change. In sum, it is not possible to state one single approach to the protection of cultural heritage under international law: as we have seen and shall see

[94] Described in *The Politics of the Past* edited by Peter Gathercole and David Lowenthal (Routledge, 1994) at pp 7–10.

[95] Ilana Gershon, 'Being Explicit about Culture: Maori, Neoliberalism, and the New Zealand Parliament', *American Anthropologist*, vol 110, no 4 (2008): pp 422–31 examines the hazards of making Maori indigenous identity an explicit basis for legislation by looking at debates in the New Zealand Parliament on this issue.

[96] As described in Laurajane Smith, Anna Morgan, and Anita van der Meer, 'Community-driven Research in Cultural Heritage Management: The Waanyi Women's History Project', *International Journal of Heritage Studies*, vol 9, no 1 (2003): pp 65–80. With regard to this project, Smith notes elsewhere that in this project, 'basic assumptions about the physicality of heritage and its management were challenged, as the passing on of stories and cultural knowledge about sites and places to the appropriate people was identified as heritage "management"—a process of conserving the meaning and value of heritage places'. See: Laurajane Smith, 'Gender, Heritage and Identity', in *The Ashgate Research Companion to Heritage and Identity* edited by Brian Graham and Peter Howard (Ashgate Publishing, 2007) pp 159–80 at p 160.

further illustrated in the following chapters, cultural heritage means many things to many people (and groups of people) and the challenge facing international law in this field is to try to satisfy as many of the legitimate interests in heritage as possible while, at the same time, operating within a system primarily established by and for sovereign and equal States.

2

Cultural Heritage

Illicit Excavation, Theft, and Trafficking

Introduction

The illicit excavation, theft, and illegal exportation and trade in cultural objects is a serious threat that damages the cultural heritage and, in the most extreme cases even the cultural fabric, of most countries in the world. It is impossible for any State effectively to police all its known cultural heritage (archaeological sites, museums, private collections, etc) effectively. Although this affects all countries to differing degrees, those countries richest in terms of cultural sites and artefacts are often also relatively poor and are unable to devote sufficient resources to preventing this lucrative illegal trade. Writing in 1982, Bator[1] made the stark assessment that '[a]n entire army would be needed to guard all the churches of Italy or all the known sites in Turkey'; a statement rendered particularly graphic since it was applied to land-based cultural heritage. If we add marine sites to this calculation, the problem is magnified many times over since it is virtually impossible to police marine sites effectively. The importance of an effective legal framework to reduce the threat to scientific evidence posed by illegal trade to cultural property is a further crucial point to appreciate here.[2] This chapter is concerned with examining the approaches and measures—legal and non-legal—open to States, individuals, and institutions to prevent the loss of cultural objects and to retrieve those that have been looted and illegally traded. This will include an examination of the prevailing international legal framework as well resort to the courts in the country where such a cultural object resurfaces or is known to have been traded.

The 1970 UNESCO Convention on Illicit Import, Export and Transfer of Ownership of Cultural Property[3] was the first concerted effort by the international community to address this problem through developing an international framework of cooperation. In its Preamble, this Convention makes some very salient points about the nature of this trade and its regulation, noting that 'the

[1] Paul M Bator, 'An Essay on the International Trade in Art', *Stanford Law Review*, vol 34, no 2 (1982): pp 275–384.

[2] Richard J Elia, 'Looting, Collecting and the Destruction of Archaeological Resources', *Nonrenewable Resources*, vol 6, no 2 (1997): pp 85–98.

[3] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Paris, 14 November 1970 [823 UNTS 231].

protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close cooperation'. This makes clear that, although international cooperation is a valuable and essential tool of regulation, this also requires the readiness of individual States to take effective action on the national level to control the problem. As this chapter will show, although litigation in national courts for the return and restitution of stolen cultural property has proved an effective strategy for some States, it is necessary also to have an international framework to facilitate such litigation as well as international cooperation over the return and restitution of cultural property without recourse to the courts. The dual—national and international—character of cultural property is also recognized in the Preamble which notes that 'cultural property constitutes one of the basic elements of civilization and national culture'. This statement neatly encompasses one of the most challenging issues in this area of law—how to reconcile a 'nationalist/retentionist position' with others which regard cultural heritage either as a commodity to be traded internationally or as a common heritage of humankind. The damage to the non-commercial values of cultural heritage[4] that illicit excavation and subsequent illegal export and/or trade in cultural property can wreak is also mentioned here: 'its true value can be appreciated only in relation to the fullest possible information regarding is origin, history and traditional setting'.

The Scale of the Problem of Illicit Movement and Site Destruction

The problem of the illicit trade in art and antiquities is a worldwide phenomenon and has affected many of what are known as 'art-rich' or 'artefact-rich' States. It is also an inescapable fact that the source countries tend, on the whole, to be poorer (often developing) States while the importing countries are the rich 'western' States such as the US, UK, Germany, Japan, and Switzerland. Moreover, there is a moral dilemma posed by the existence of extreme poverty among the local residents of such areas and the desire to prevent them from looting cultural objects whose sale might well feed their families for some time.[5] The modern situation suggests a parallel with the removal of antiquities and works of art during the colonial period by European colonial powers, in this case the power relationship being an economic rather than a traditional imperialist relationship.

The value of this illicit trade is enormous and UNESCO estimated trafficking in cultural property (ie the illicit movement of protected cultural objects across international borders) at $2–6 billion dollars per year in 2013.[6] Although the

[4] These include its informational value for archaeological and historical research.

[5] Helaine Silverman and D Fairchild Ruggles, 'Cultural Heritage and Human Rights', in *Cultural Heritage and Human Rights* edited by Helaine Silverman and D Fairchild Ruggles (Springer Science and Business Media, LLC, 2007) pp 3–23 at p 15.

[6] Figure cited in Greg Borgestede, 'Cultural Property, the Palermo Convention, and Transnational Organized Crime', *International Journal of Cultural Property*, vol 21, no 3 (2014): pp 281–90.

basis of such figures has been questioned,[7] we can judge from the $1.4 million paid by the Metropolitan Museum of Art in New York for a hoard of Lydian artefacts illegally exported from Turkey in 1966 (case discussed below) as a good indicator of the kind of sums involved. To put it in some perspective, this money could have funded several officially sanctioned US archaeological programmes in Turkey at that time. To understand the impact of this illegal trade (and the other illegal actions taken to feed it), we can look at the steady leeching of antiquities from Turkey since the 1990s.[8] Turkey's neighbour Iran also faces a severe problem of antiquities smuggling as illustrated by the seizure in 1994 in Javanrood (Kermanshah Province) of 70 antiquities (including stone and bronze statues, silver seals, coins, and dishes) from smugglers and the arrest of six smugglers in connection with this.[9] African countries, having previously experienced wide-scale removal of their heritage during European colonial occupation,[10] continued to be vulnerable to trafficking in their cultural property.[11] Latin America appears to have suffered some of the most spectacular devastation of its archaeological heritage through clandestine excavation to feed the illegal trade in pre-Columbian antiquities and other artefacts: up to 95 per cent of archaeological sites in Belize may have been destroyed by looting.[12]

In 1996, the International Fund for Art Research (IFAR) in New York, a leading organization involved in tracing stolen art and antiquities, estimated the annual turnover of illicit trade in antiquities at $2 billion.

[7] Mark Durney, 'Reevaluating Art Crime's Famous Figures', *International Journal of Cultural Property*, vol 20 (2013): pp 221–32.

[8] In an eight-month period from February to September 1991, the police seized the following items: 3,589 coins from Roman and later periods valued at over $100 each; 390 late-Hellenistic Bronze coins; six gold Byzantine coins; several Roman 'teardrop' bottles; 945 early Islamic silver coins and 421 silver coins from other periods; a large sculptural frieze from the Roman period weighing 3.5 tons (disguised on the export manifest as textiles); five Roman tombstones; six marble sculptures and eight sculptured heads; eight Venetian coins; 48 silver Roman coins; some bronze arrowheads and some small terracotta sculptures. Information from an article in *Cumhuriyet* newspaper, August 1993. More recently, the INTERPOL list of recovered stolen items shows ones of Turkish provenance, such as a Late Hellenistic altar recovered in Marmaris in 2003, a Roman sculpture of a Bearded Man (thought to be Dionysus) was recovered in Munich in 2004 and a carved inscription from 1681 AD was seized in Erzurum in 2004. INTERPOL, accessed on 27 December 2012, <http://www.interpol.org>.

[9] Information supplied by Iranian Cultural Heritage Organization.

[10] See: Folarin Shyllon, 'The Recovery of Cultural Objects by African states through the UNESCO and UNIDROIT Conventions and the Role of Arbitration', *Uniform Law Review*, vol 5 (2000–2): pp 219–41; Folarin Shyllon, 'The Nigerian and African Experience on Looting and Trafficking in Cultural Objects', in *Art and Cultural Heritage: Law, Policy and Practice*, edited by Barbara T Hoffman (New York, Cambridge University Press, 2006).

[11] Amadou-Mahtar M'Bow, 'Pour le retour, à ceux qui l'ont créé, d'un patrimoine culturel irremplaçable', *Museum*, vol XXXI, no 1 (1979): pp 58–9. More generally, see: David Gill and Christopher Chippindale, 'The Trade in Looted Antiquities and the Return of Cultural Property: A British Parliamentary Inquiry', *International Journal of Cultural Property*, vol 11, no 1 (2002): pp 50–64.

[12] Mark A Gutchen, 'The Destruction of Archaeological Resources in Belize, Central America', *Journal of Field Archaeology*, vol 10 (1983): pp 217–27. In this article, Gutchen attempted to ascertain the extent of site destruction in Belize due to illegal excavation by statistical examination. His findings suggest that, for Mayan sites, instances of reported site destruction were as high as 74.3 per cent (for major sites). A classic article on the problems of trafficking pre-Columbian antiquities is: Clemency Chase Coggins, 'Illicit Traffic of Pre-Columbian Antiquities', *Art Journal*, vol 29 (1969).

This shocking statistic illustrates the economic and geopolitical realities of a trade where some of the poorest people in the world are neighbours of the world's largest antiquities market in the US. Moreover, the great profits to be made from this illicit trade in looted antiquities continue to make it a highly attractive business for unscrupulous individuals. Neil Brodie and colleagues have shown that over 98 per cent of the final price of smuggled antiquities ended up in the pockets of the middlemen, with looters in the Petén region of Central America receiving about $200–$500 each for vessels which might ultimately be sold for $100,000.[13] Similarly, a table-leg depicting Marsyas being flayed by Apollo discovered by a farmer near Antalya in southwest Turkey was bought by a dealer for $7,500, representing a large sum for the farmer himself, and was subsequently placed at auction in New York with an asking price of $540,000.[14] The link between the destruction of archaeological sites and the market for antiquities is obvious and, as the example of Belize given above illustrates, this can lead in extreme cases to the wholesale obliteration of a country's archaeological record. The problem of theft from museum collections and archaeological sites to feed the market's need for antiquities is also a significant factor. Acar and Rose[15] cite INTERPOL statistics which show that between December 1993 and December 1994, the following items are known to have been smuggled out of Turkey after being stolen from Turkish archaeological sites or museums: seven classical Greek marble statues or heads; four Roman marble frieze blocks; three Roman marble grave *stelai*; several carved column capitals and bases; one Hellenistic marble relief of a woman; and one Byzantine fresco.

Nature of the Illicit Trade in Antiquities

In many cases, the networks smuggling are interchangeable and the same organization may operate in several illicit areas, including counterfeiting, money laundering, arms dealing, drug trafficking, people smuggling and trafficking, as well as stealing and trafficking antiquities. Essentially, these gangs are opportunistic and will use the routes they have established for moving whatever illicit 'product' is available to them at the time. As we have seen above, the profits to be made in smuggling cultural objects is sufficient to make it attractive to them. Most modern criminal groups are characterized by fluid network structures which are particularly well suited for trafficking: there is no central leadership and each participant is a replaceable cog in a series of criminal

[13] Neil Brodie, Jenny Doole, and Peter Watson, *Stealing History—The Illicit Trade in Cultural Material* (UK: ICOM and Museums Association, 2000). This issue is examined also in Lisa J Borodkin, 'The Economics of Antiquities Looting and a Proposed Legal Alternative', *Columbia Law Review*, vol 95, no 2 (1995): pp 377–417.

[14] Özgen Acar and Mehmet Kaylan, 'The Turkish Connexion—an Investigative Report on the Smuggling of Classical Antiquities', *Connoisseur*, October 1990, pp 130–7.

[15] Özgen Acar and M Rose, 'Turkey's War on the Illicit Antiquities Trade', *Archaeology*, March/April 1995, pp 45–56.

relationships.[16] This flexibility of criminal networks creates a myriad of challenges for law enforcement. To transport illicitly acquired and/or exported artefacts from source to market requires organization and involves a vast population of participants, from farmers to university-trained antiquities experts, whose only connection with each other is a shared opportunity. The four stages observed within antiquities trafficking[17] illustrate how both specialization and profit increase through the stages: the looter, the early stage middleman or intermediary, the late stage intermediary, and the collector.

In analysing the problems of the illegal trade in antiquities, comparisons are sometimes made with the drugs trade as another example of internationally trafficked illegal goods. There are many superficial similarities between the two trades: drugs and antiquities are often moved from economically poor and underdeveloped regions of the world to the rich countries; the same countries are often suppliers for both trades such as Colombia and Peru (for cocaine and pre-Columbian artefacts to the US) and Turkey, Afghanistan, Iran, and Pakistan (for heroin and classical as well as Islamic period art). However, there is a fundamental structural difference between the two which has consequences for the way in which they can be controlled: the drugs trade is one where there are a limited number of suppliers for a virtually unlimited market; conversely, the art and antiquities market is a small and limited one with a large potential number of suppliers. Thus, in the case of the drugs trade it is easier to control the suppliers and sellers while, in the case of the antiquities market, it is more effective to police the buyers (and dealers). It is for this reason that litigation against private collectors or, more commonly, against museums and similar institutions for the return of stolen antiquities are of such importance. If it can be made sufficiently unattractive for most buyers to acquire items of dubious provenance then the market for stolen and illegally exported artefacts will be much reduced. There will always be those collectors who are not concerned by the legality of the items they collect and who may not display their collection openly, however such judicial action will serve to narrow the scope of the problem greatly. Some significant cases of this type are discussed below. A much more appropriate comparison, on many levels, is with the trade in endangered species. As with antiquities, the species concerned are a non-renewable source (if rendered extinct) and their extinction would represent the destruction of a part of the 'biological record'; this is comparable to the destruction of the archaeological record caused by illegal excavation.[18]

[16] Peter B Campbell, 'The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage', *International Journal of Cultural Property*, vol 20 (2013): pp 113–53. These fluid network structures are analogous to a 'plate of spaghetti [where] every piece seems to touch each other, but you are never sure where it all leads'.

[17] Campbell, 'The Illicit Antiquities Trade as a Transnational Criminal Network' (n 16).

[18] The Convention on the International Trade in Endangered Species (CITES) Washington, 3 March 1973, entry into force 1 July 1975 [993 UNTS 243] is designed to control this international trade through a strict permit system supported by two appendices of protected species: Appendix I includes the most seriously threatened species such as the tiger and the Asian elephant and prohibits all trade in these species; and Appendix II covers species which may become threatened unless the trade is regulated (through a system of export licences) which includes most parrots, cacti, and orchids.

Afghanistan: A case study[19]

Afghanistan is a major victim of the illicit antiquities trade. Subsistence diggers, local citizens that turn to looting due to economic hardship, are the primary looters. This type of looting often occurs during the political turmoil following military action, when law enforcement is unable to protect sites. Subsistence diggers sell artefacts to intermediaries who visit villages or archaeological sites. The primary exit for Afghan antiquities appears to be Pakistan. Narcotics smugglers are known to cross easily into Pakistan at the unmanned border crossing at Baramcha. Several established smuggling organizations operate along the Afghan-Pakistani border, engaging in any profitable enterprise including trafficking of narcotics, arms, humans, antiquities, and other commodities, as well as crimes including kidnapping and theft. Such 'jack-of-all-trades' smuggling groups are likely the primary transportation for antiquities headed to Pakistan.[20] Once in Pakistan, the antiquities are sold in border towns and transported to major cities and then on to the United Arab Emirates, which is an arterial route for antiquities leaving the region for market countries. Illicit antiquities emanate from the entire region, including Afghanistan, Iraq, Iran, Yemen, Azerbaijan, and Pakistan, as well as countries outside the immediate area like Turkey. Upon arrival in Sharjah,[21] antiquities are purchased by individuals with connections abroad, who collaborate with corrupt customs officials in order to export them. Antiquities are smuggled hidden in commonplace items like furniture, under falsified cargo manifests, or in false compartments. Many of these objects then head to the traditional European transit country of Switzerland, popular because of its tendency to favour the good faith purchaser in litigation and for its banking secrecy rules. Once in Europe, antiquities travel from Switzerland and Germany to market countries like the UK and Belgium, or even onwards to the US.

Internet sales

The internet has become a major conduit for criminal activities, and illicit antiquities are available online. The benefits of online sales for criminals include reaching a wider population, impersonal interactions, and what is termed 'simple concealment', based on the privacy afforded by a personal computer. Sales accounts show that both high- and low-end antiquities are being sold with considerable

[19] C Schetter, 'The "Bazaar Economy" of Afghanistan: A Comprehensive Approach', in *Afghanistan: A Country without State?* edited by C Noelle-Karimi, C Schetter, and R Schlagintweit (Frankfurt am Main: Institut für Informations und Kommunikationsøkologie (IKO), 2002) pp 15–19. See also: Bettine Proulx, 'Organized Criminal Involvement in the Illicit Antiquities Trade', *Trends in Organized Crime*, vol 14, no 1 (2010): pp 1–29.

[20] Ironically, the Afghan Transit Trade Agreement waiving import taxes between Afghanistan and the Pakistani port of Karachi also ensures a large flow of Afghan goods through the port, including a large quantity of smuggled goods.

[21] The example of transport of a Turkish shipment worth an estimated at US$6 million via Sharjah demonstrates the importance of the United Arab Emirates as a transit country.

ease through websites, often for record sums. Traditional dealers are frequently moving toward internet sales, including established galleries with known links to the illicit antiquities trade. Auction site dealers are able to sell large quantities of cheaply priced, but culturally significant, looted artefacts. This activity is unlikely to cease in the future, so understanding how internet sales function is important for researchers.

Existing Forms of Control

There are several existing forms of control of the movement of antiquities employed by States, mostly by the artefact-rich States in an attempt to prevent the illegal removal of items and, by implication, to control illicit excavation within their territories. Listed below are some of the commonest forms of control.

Export controls

This is an obvious form of control and a popular one with artefact-rich States wishing to stem the tide of illicitly removed cultural objects. O'Keefe and Prott[22] examine the elements which go towards creating the offence of illegal export which they describe as being usually the offence (either civil or criminal) of exportation of items contrary to some form of export prohibition. This point is an important one in the case of legal suits for the return of illegally exported items since it is vital that the essential elements of the offence of illegal export are understood. The most common type of export control is through a licensing system: this may be inclusive and require a licence for all antiquities, or it may apply only to a specific range of items. Some artefact-rich States combine export controls with a form of 'umbrella statute' declaring the state ownership of all antiquities (or of a certain class of item) and related export prohibitions.[23] Other than the obvious wish to protect their archaeological and cultural heritage from widespread depredation, artefact-rich States may also have economic and political motives for imposing export restrictions.[24] Turkey is an example of a State with umbrella ownership statutes, having asserted state ownership of all antiquities under its Antiquities Law since 1906 and having introduced several additional controls on

[22] Patrick O'Keefe and Lyndel V Prott, *Law and the Cultural Heritage*, vol 3 (London: Butterworths, 1989).

[23] Bator, 'An Essay on the International Trade in Art', p 277 (n 1), notes that: 'Embargo, whether explicitly or administratively imposed, is the dominating philosophy of almost all the states rich in antiquities and archaeological materials, including the Mediterranean region, the Middle East, and the nations of Central and South America.'

[24] The artistic and archaeological heritage may be a significant factor in the tourist industry which is often a major earner of hard currency for developing or less well-off countries. Regulating the export of antiquities may also prevent the flight of capital during political upheavals. Following the Islamic Revolution in Iran in 1979, antique gold coins and carpets were used as a means to remove capital from Iran in the face of currency restrictions.

the export of such items.[25] The advantages of such legislation is that it makes illicit export much more difficult since it is easier to control and it also renders the possession within the country of origin of items of cultural property an offence. As the previous statistics bear out, however, it is limited in its success and a high volume of illegally excavated antiquities is still exported illegally from these countries. Although such blanket assertions of State ownership can be helpful in litigation in foreign courts for return of illegally exported cultural items, courts do not generally apply the export prohibitions of foreign States.[26]

As with any law, export controls are only as good as their enforceability which, unfortunately, may be quite low depending on the circumstances. Control at the customs point is the commonest form of enforcement, but this requires a high level of honesty and expertise amongst customs officials to recognize the items which are controlled. In countries where the pay of a customs official is relatively low and the bribes offered to cast a blind eye to the export of certain items high, it is clear that there may be serious problems with the administration of such laws. Export controls are, however, a necessary element in the protection regime and only increased resources and better intelligence will improve enforcement. Clearly, the existence of stiff penalties for acts of illegal exportation of antiquities will greatly improve the effectiveness of these controls. Such penalties, however, must be in terms of prison sentences as well as fines for serious cases since, otherwise, the money to be made from this trade would make most fines simply a business expense for serious smugglers.

There are conflicting views as to the efficacy or even desirability of applying strict export regulations, although most artefact-rich States favour this approach. As Prott points out: 'The response of States to the excessive exploitation of their cultural heritage has been a mass of legislation.'[27] However, the problem must be seen as being as much with the art market States and their failure to control the importation of antiquities which have probably been illegally exported and/or excavated from a third State and which operates export controls on these items. Artefact-rich States should avoid excessively rigid controls which stifle any

[25] For more detail on Turkey's legislation to control illicit export of antiquities, see: Janet Blake, 'Turkey', in *Cultural Property and Export Controls* edited by James A Nafziger and Robert K Paterson (UK: Edward Elgar, 2013) pp 437–59.

[26] This is based on the principle of extra-territoriality. According to this, a court will not enforce a claim which is the manifestation of another State's sovereignty over its territory. This issue is discussed in detail in: Jonathan S Moore, 'Enforcing Foreign Ownership Claims in the Antiquities Market', *Yale Law Journal*, vol 97 (1988): pp 466–87. A case in which this was a central issue was that of *Attorney-General of New Zealand v Ortiz and others* [1982] QB 349 and [1984] AC 1 concerning Maori carvings offered for sale at auction in London in 1978. The New Zealand Government sued Ortiz (the purchaser), Entwistle (the dealer), and Sothebys (the auction house) for their return, claiming that they had been exported in contravention of New Zealand legislation and should be forfeited to the Crown. In the House of Lords Appeal case, Lord Denning ruled that the decision by Staughton J (in the lower court) to take a purposive approach to interpreting the New Zealand statutes faced the 'fatal objection' that it would give the 1962 Act extra-territorial effect which would be contrary to international law since 'no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory.' *Ortiz* Appeal case (1984) at 19.

[27] Lyndel V Prott, 'Problems in Private International Law for the Protection of the Cultural Heritage', *Receuils de Cours*, vol v (1989): pp 224–317.

legitimate trade in antiquities while the importing States must respect the needs of the former. There have, for example, been calls made for liberating the trade in art[28] as a means of reducing the amount of illicitly trafficked items by making more legitimate art and antiquities available to dealers and buyers. This position, however, is strongly resisted by those who favour more protectionist approaches. The achievement of this balance of interests is particularly important since it is clear that export controls alone can never be sufficient and that they can only work effectively in tandem with import controls in art market States. What may provide a way to resolve these conflicting philosophies, still very present in the debate over illicit trade in antiquities, can be found in the view expressed by Lord Brightman in dismissing the New Zealand Government's appeal in the *Ortiz* case: he expressed 'every sympathy with the appellant's claim . . . [since] . . . New Zealand has been deprived of an article of value to its artistic heritage in consequence of an unlawful act committed by a second respondent'.[29] In this he appears to accept that cultural property has a character that goes beyond most other forms of property.

Import controls

Since determined smugglers can always by-pass export controls, their effectiveness is greatly dependent on the attitude of the receiving States and the degree to which they respect and are prepared to conform with the exporting State's controls. Hence, the imposition of some form of import controls by receiving States is an essential corollary to the exercise of export controls by artefact-rich States.[30] However, one major difficulty with this approach is the attitude of many of the market States operating a free-market philosophy in relation to the movement of antiquities and works of art and for whom import controls would be contrary to this approach. An example of this philosophy in operation is the 1983 US implementing legislation for UNESCO's 1970 Convention which seriously watered-down the obligations binding on that country.[31] It should also be noted

[28] See: Clemency Chase Coggins, 'A Licit International Trade in Ancient Art: Let There be Light!', *International Journal of Cultural Property*, vol 4 (1995): pp 61–80; John Henry Merryman, 'A Licit International Trade in Cultural Objects', *International Journal of Cultural Property*, vol 4 (1995): pp 13–60; and H K Wiehe, 'Licit International Traffic in Cultural Objects for Art's Sake', *International Journal of Cultural Property*, vol 4 (1995): pp 81–90.

[29] *Ortiz* Appeal case (1984) at 49.

[30] As CITES does in the case of scientific and other exceptions to the total prohibition on export of Appendix I species: in such cases, both an export licence *and an import licence* are required, creating a very tight regime.

[31] Convention on Cultural Property Implementation Act 1983 (19 USC s 2602); See Bator, 'An Essay on the International Trade in Art' (n 1); Jeanette Greenfield, *The Return of Cultural Treasures* (Cambridge University Press, 1989). At the time of ratification, the United States placed the following reservation: 'The United States reserves the right to determine whether or not to impose export controls over cultural property. The United States understands the provisions of the Convention to be neither self-executing nor retroactive. The United States understands Article 3 not to modify property interests in cultural property under the laws of the States parties . . . The United States understands the words "as appropriate for each country" in Article 10 (a) as permitting each state party to determine the extent of regulation, if any, of antique dealers and declares that in the United

that the art market in the UK, for example, is a large invisible earner for the country and so there is also a financial incentive for the government to favour the freedom of movement of art and antiquities. The establishment of the single market in the European Union since 1992 also made this a much more complex issue since it sets up an opposition between the duty to protect the cultural heritage of Europe, on the one hand, and the freedom of movement of goods on the other. Many art market States apply only very selective export controls on antiquities and works of art which is in itself an illustration of their attitude towards export controls for such items and, by implication, towards the export controls of other States.[32] This attitude is, of course, based on the calculation that the balance will always lie with a much larger number of artefacts entering than leaving an art-market State (such as the US) and thus it has little to lose and much to gain by such a policy. The issue of import controls has been hotly debated since the early 1970s and many important aspects of the debate have been raised.[33]

The 1972 Pre-Columbian Art Act[34] which places a ban on the importation into the United States of pre-Columbian artefacts from Mexico is a bi-lateral agreement with Mexico and so has no implications for art or artefacts from other countries or even from other cultures in Mexico. The same is true of similar Executive Agreements with Ecuador and Guatemala. These do not signal any great shift in philosophy or policy and may have more to do with the battle against the drugs (cocaine, in particular) which often enter the US from these countries. Whatever the motives of the US Government, these agreements have had the effect of significantly reducing the quantity of pre-Columbian artefacts entering the US which, in view of the depredation suffered by that region, is a positive result. In response to the discovery of the wreck of the *Titanic* in 1985 by a Franco-US team and French divers raising items from the site of the wreck, Congress passed a bill in 1987 to prohibit the importation of these artefacts into US territory. The above examples underline the preference of the US Government to impose import restrictions on cultural property in reaction to specific cases rather than as a general policy, although there is recognition of their usefulness in certain cases. The US customs service has taken a very proactive approach to enforcing those bilateral agreements and has also been willing to act in the case of items suspected of having been illegally exported from a third State.[35] The cumulative effect of these actions is to force buyers of antiquities, especially institutional collectors, to be much more careful about checking the provenance of items which they buy.

States that determination would be made by the appropriate authorities of state and municipal governments…'

[32] E Des Portes, 'Traffic in Cultural Property—a Priority Target for Museum Professionals', *International Cultural Property Review* (summer 1994): p 79.

[33] Coggins, 'A Licit International Trade in Ancient Art', Merryman, 'A Licit International Trade in Cultural Objects', and Wiehe 'Licit International Traffic in Cultural Objects for Art's Sake' (n 28).

[34] US 1972 Pre-Columbian Art Act.

[35] An example of this is that of the 'San Antonio Empress' illegally exported from Turkey which US customs seized from the San Antonio museum once they were aware of questions surrounding its provenance. Case reported in: Acar and Kaylan, 'The Turkish Connexion' (n 14).

Inventory systems

Inventories of cultural property represent essential tools of any policy which seeks to prevent the illegal traffic in antiquities from any State since the identification of items to be protected is a fundamental step in their protection. The requirement to establish systems of inventory found in recent international cultural heritage treaties (not only those dealing specifically with the movement of cultural property) shows how fundamental this is to protection by controlling interference with and the illicit movement of inventoried items.[36] Comprehensive inventories are vital for the identification of stolen artefacts and provide the necessary proof of illicit export once an item is found. Reporting of stolen and illegally traded cultural property under the 1970 Convention can only operate if such inventories exist.[37] The use of new technologies, particularly multimedia technology which allows for images to be stored digitally, makes this a much more effective tool where the resources are available to carry this out. Of course, inventory systems can only be of direct relevance to preventing illicit trade in already identified items and not to those clandestinely excavated. However, institutional and private collectors will become more wary of buying any items of dubious provenance if the possibility that they have already been entered on the inventory of the State of origin is reasonably high.

Regulation of the internal market

In certain artefact-rich States, a system of licensing art and antiquities dealers is used to control the internal market. The need for this is well illustrated by the sale of artefacts for absurdly low prices on local markets: in the *Bumper Development* case, an Indian agricultural worker discovered a bronze idol of Siva Nataraja in 1976 and sold it for 200 rupees (*c.*£12) to a local dealer; it later fetched £250,000 when sold at auction in London in 1982.[38] An additional advantage of this form of control is that dealers can be used to police each other. In some countries, collectors and their collections are controlled through the registration of collectors, their collections or individual items within their collections.[39] The last is a common requirement and the disposal of objects which are registered is often subject to controls. There may also be a requirement to inform the authorities of a change

[36] Work in the Council of Europe to establish common standards of inventory-making following the adoption of the 1992 European Convention on the Protection of the Archaeological Heritage [CETS 143] is a good illustration of this.

[37] Other than UNESCO's own database of stolen art, some other important international databases are: INTERPOL's Stolen Works of Art database (to be updated with the help of Italy's specialist Carabinieri Unit for the Protection of Cultural Heritage under project PSYCHE), the Art Loss Register, and the IFAR database.

[38] *Bumper Development Corp Ltd v Commr of Police* [1991] 4 All ER 638 [United Kingdom]. This case is discussed in: Robert K Paterson, 'The Curse of the "London Nataraja" ', *International Journal of Cultural Property*, vol 5, no 2 (1996): pp 330–8.

[39] This is regulated in Turkey by the relevant provisions of the 2009 Antiquities Law (Arts 25, 27, 28, and 29) and by Regulation No 18 278 Relating to the Trade in Movable Cultural Property and Commercial Premises (author's translation) published in the *Resmi Gazete* on 11 January 1984).

of location of a collection (or single item) within the country. Obviously, the majority of States which control collectors and their collections are those, such as Italy and Turkey, which are rich in antiquities and artworks. Although this has some value in controlling the illegal movement of such items, it only has relevance to those already within collections.[40] Another form of regulation of dealers is through self-regulation based on codes of practice as is foreseen in Article 5 of the 1970 UNESCO Convention. This has led to the development of UNESCO's International Code of Ethics for Dealers in Cultural Property (November 1999) which requires that traders in cultural property: will not import, export, or transfer the ownership of this property which they believe has been stolen, illegally alienated, clandestinely excavated, or illegally exported; will not assist in any further transaction with such objects, except with the agreement of the country where the site or monument exists; will take steps to assist in the return of such objects if the country of origin seeks them; will not provide professional services for promoting or failing to prevent its illicit transfer or export; will not dismember or sell separately parts of one complete item of cultural property; and will undertake to try to keep together ensembles of cultural heritage.[41]

Museum self-regulation

Since museums are some of the largest collectors of artefacts and other archaeological materials, the control of museum acquisition policies is extremely important in controlling the illicit excavation and subsequent movement in such items. Many museums are state controlled institutions and are regarded as reflecting official government policy. When major museums are prepared to buy questionable items or collections of dubious provenance, it is difficult to persuade private collectors to refrain from doing so. The ICOM Code of Ethics (2006)[42] is a comprehensive document that, if put into practice by museums worldwide, will help greatly to prevent the acquisition of and/or other activities by museums with regard to cultural objects of dubious provenance or that have been illegally excavated. It requires museums, inter alia, to: show due diligence before acquiring objects to ensure that they have not been illegally obtained in or exported from their country of origin or another country; avoid displaying or otherwise using material of questionable origin or lacking provenance; take prompt and responsible steps to cooperate with the country of origin in the return of an illegally exported object that is part of that country's cultural heritage; abstain from

[40] Patrick J O'Keefe, *Feasibility Study of an International Code of Ethics for Dealers in Cultural Property for the Purpose of More Effective Control of Illicit Traffic in Cultural Property* (Paris: UNESCO, May 1994) Doc CLT-94/WS/11.

[41] Article 5(e) of the 1970 Convention calls for States to establish national bodies whose functions include: 'establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules'. The relevant articles of the international Code of Ethics are Arts 1, 3, 5, 6, and 7.

[42] An updated version of the 1986 Code of Ethics.

purchasing or acquiring cultural objects from an occupied territory; not to support the illicit traffic or market in natural or cultural property, directly or indirectly; not to accept any gift, hospitality, or any form of reward from a dealer, auctioneer, or other person as an inducement to purchase or dispose of museum items, or to take or refrain from taking official action.[43] With regard to the treatment of artefacts from illegal excavation, the Code requires that:

> Museums should not acquire objects where there is reasonable cause to believe their recovery involved the unauthorized, unscientific, or intentional destruction or damage of monuments, archaeological or geological sites, or species and natural habitats. In the same way, acquisition should not occur if there has been a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.[44]

As a general principle, museums are expected to conform fully to international, regional, national, and local legislation and treaty obligations for the return and restitution of cultural property, for example, under the terms of the 1954 UNESCO Convention, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention in cases where the country of origin seeks its return.[45] These and other such Codes of Practice reflect a change in attitude amongst museum professionals from viewing themselves as custodians of the objects in their collections to an appreciation of the items and collections as part of a continuum of knowledge of which the site and context within which the items have been discovered is of equal importance.[46]

International and local policing

Some countries have set up specialist police departments to deal with the theft of art and antiquities which are staffed by officers trained to recognize such items. The Italian *Carabinieri Tutela del Patrimonio Artistico* is probably one of the most developed, with officers trained in different aspects of art history and archaeology, including marine archaeology. This, of course, reflects the enormous problem which Italy faces in controlling the illegal export of items of the Italian cultural heritage. In contrast, the specialist branch of the UK police forces dealing with art theft will be much more narrowly concerned with issues such as the theft of artworks from stately homes since UK Government policy leans towards operating few export controls and a free market approach to the trade in art and antiquities. A major aspect of these specialist units is their role in coordinating internationally through the INTERPOL system. Since the trade in art and antiquities is an international one with items often 'laundered' through one or more third countries, the institution of INTERPOL as an international policing body to control this trade amongst other criminal activities which cross international borders is

[43] Sections 2.3, 2.4, 4.5, 6.3, 6.4, respectively.
[44] Jane Leggett, *Restitution and Repatriation, Guidelines for Good Practice* (London: Museums and Galleries Commission, 2000).
[45] Principle 7. [46] At s 3.12.

an important one. One of the major tools of INTERPOL is an international database of stolen items which can then be compared with the inventories of the possible States of origin in order to identify items.[47]

The Role of Transit States in Antiquities Trafficking

One of the perennial problems facing international treaties regulating any illicit trade is that of non-Party States which create a regulatory 'black hole' through which the protected objects (species, in the case of CITES) can be 'laundered',[48] allowing the illegal movement of antiquities in and out of these States more easily than if they were active Parties to the Convention. In the case of the 1970 Convention of UNESCO, for example, a non-Party State to the Convention is not required to take notice of appeals for return of stolen objects by States Parties and is free from other obligations placed on it by the Convention. Until recently, most major market States were not ready to ratify the Convention in the belief that it favoured the interests of States of origin over market States, however, there have been positive moves towards wider ratification since the late 1990s.[49] It is worth noting in this regard that the 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage (discussed in Chapter 5) includes a provision designed to prevent the laundering of marine cultural property through third States after being raised from the seabed.

Transit States are used for the illegal movement of antiquities since this allows for much easier concealment of the illicit provenance of the item(s). Often these States also offer specialist services of use both to the licit and illicit trader in antiquities. States often used as transit States include Australia (for objects from Papua New Guinea and the Pacific Islands), Cameroon (for Nigerian artefacts), and Thailand (for Cambodian artefacts) all of which are important by virtue of their geographical position. For this reason, it is important to ensure a high level of ratification of international treaties designed to prevent illicit trafficking in

[47] Other than UNESCO's own database of stolen art, some important international databases are: INTERPOL's Stolen Works of Art database (to be updated with the help of Italy's specialist Carabinieri Unit for the Protection of Cultural Heritage under project PSYCHE), the Art Loss Register, and the IFAR database. This strategy is further discussed in: Mark Durney, 'How an Art Theft's Publicity and Documentation can Impact the Stolen Object's Recovery Rate', *Journal of Contemporary Criminal Justice*, vol 27, no 4 (2011): pp 438–48; and Constance Lowenthal, 'The Role of IFAR and the Art Loss Register in the Repatriation of Cultural Property', *University of British Columbia Law Review: 1995 Special Edition* (1995): pp 309–14.

[48] For example, Turkey is not a State Party to CITES and Turkish wild cyclamen, all species of which are listed in Appendix II of CITES, is exported under false labels as another (non-protected) species of plant or as 'cultivated'. In this way, it can enter a CITES State Party (eg the Netherlands) and then be legitimately sold on. Since all species of cyclamen are included in Appendix II of CITES they would require an export licence if exported from a State Party. See: Linda Warren, 'Trade in Endangered Species', *Environmental Law*, vol 3, no 4 (1989): pp 239–77.

[49] On a positive note, France ratified the Convention on 7 January 1997, the UK accepted it on 1 August 2002, Switzerland accepted it on 3 October 2003, Germany ratified it on 30 November 2007, Belgium ratified it on 31 March 2009, and the Netherlands accepted it on 17 July 2009.

cultural property. Moreover, regional agreements can also play an important role by cutting off possible transit routes in the vicinity of an artefact-rich country subject to the illicit export of its cultural property. The trans-shipping of antiquities through a third State may sometimes be used to circumvent specific agreements such as the 1972 US/Mexico agreement which forbids the import into the US of pre-Columbian artefacts from Mexico.[50] If the items concerned are imported via a third State (with no such agreement) it may be extremely difficult for customs officials to identify them as originating from Mexico.

Under private international law, it is the law of the place where the item is situated or was situated at the material time which governs any litigation concerning it.[51] The rule is interpreted variously in different jurisdictions with the result that: in France the law of the place of the litigation is applied; under English law, the law of the last transaction is applied; and US law favours the law of the place where the goods were at the time of the last transaction (not where the parties were or the contract was completed).[52] The effect of this rule is potentially pernicious in the antiquities trade and its application under the English or American systems would obviously encourage the 'laundering' of stolen or illegally imported items through transit States. Ironically, Italy is a favoured transit State since Italian law gives immediate good title to a good faith purchaser.[53] This rule is obviously of great use to international trade in allowing for certainty and speed in settling disputes which could otherwise be bogged down in identifying the forum which should decide a case. However, where cultural property is concerned 'the role of the law should be to establish who is entitled to it, based on an assessment of the competing values and not a mechanical rule'.[54]

The Relevant International Treaties

The four main global treaties regulating this area are: the UNESCO 'Hague' Convention on the Protection of Cultural Property in the Event of Armed Conflict (Paris, 1954) and its 1999 Protocols; the UNESCO Convention on Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 1970);[55] the UNIDROIT Convention on the International Return of Stolen or Illegally

[50] The article by Coggins on 'Illicit Trafficking in Pre-Columbian antiquities' (n 12) was an early wake-up call to the scale of this problem.

[51] This is known as the *lex situs* rule.

[52] Bator, 'An Essay on the International Trade in Art', p 277 (n 1).

[53] As does the Swiss law, a fact germane to the *Goldberg* case described below. In the case of items of an archaeological nature found below ground in Italy, however, they are automatically classed as state property and inalienable (Italian Civil Code, Art 827 ff).

[54] Oliver Sandrock, 'Foreign Laws Regulating Export of Cultural Property: The Respect Due to the Lex Fori', in *International Sales of Works of Art*, edited by Pierre Lalive (Geneva: Institute of Business Law and Practice, 1985). However, he regards any special rules to deal with objects of cultural property as extending the rules on conflict of laws to an unmanageable degree.

[55] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Paris, 14 November 1970 [823 UNTS 231].

Exported Cultural Objects (Rome, 1995); and the UN Convention Against Transnational Organized Crime (Palermo, 2000).

The 1954 UNESCO Convention

The 1954 'Hague' Convention[56] addresses the issue of the theft and illegal movement of cultural property during armed conflict in Article 4(3), which requires Parties to 'prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property'. In addition, Article 5(1) requires Parties to support the national authorities of occupied countries to safeguard and preserve their cultural property. The 1954 Protocol to this Convention is also relevant to this question.[57] Under this, each Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property, to seize such property and to return it to the competent authorities of the territory previously occupied at the end of hostilities.

The 1970 UNESCO Convention

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is an important framework within which Parties recognize the rights of other Parties to retrieve stolen or illegally exported cultural property.[58] The Preamble to the Convention sets out its philosophical framework, stressing: the importance of the (legal) interchange of cultural property among nations for scientific, cultural, and educational reasons;[59] the true value of cultural property can only be understood in relation to 'the fullest possible information' regarding its provenance; and that protection of the cultural heritage can only be fully effective if organized both nationally and internationally amongst States working in cooperation. This last point illustrates the interplay which should exist between national laws controlling the movement of cultural property and cooperation

[56] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954 [249 UNTS 240; First Hague Protocol 249 UNTS 358]. Turkey ratified the Convention and its First Protocol on 15 December 1965, but is not yet a Party to the second Protocol (1999). One of the significant provisions of the Second Protocol (not currently binding on Turkey) is found in Art 15 dealing with serious violations of the Protocol and the requirement on Parties to take the necessary measures to criminalize actions such as the theft, pillage, or misappropriation of cultural property during armed conflict.

[57] Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, The Hague, 14 May 1954 (n 56). The relevant articles referred to here are Arts 1, 2, and 3.

[58] For a recent reappraisal of the implementation of this Convention, see: Lyndel V Prott, 'The Fight against the Illicit Traffic of Cultural Property: The 1970 Convention: Past and Future, 15-16 March 2011', *International Journal of Cultural Property*, vol 18, no 4 (2011): pp 437–42.

[59] Article 2 restates the fact that 'the illicit import, export and transfer of cultural property is one of the main causes of the impoverishment of the cultural heritage of countries of origin'.

amongst States to ensure that one State's export ban, for example, is respected by the import regulations of another State. This issue of public policy is often central to government attempts to retrieve illegally exported cultural property. The definition of 'cultural property' differs from other UNESCO Conventions in that it is restricted to a finite list of 11 specific categories of property covered in order to limit possible claims to an agreed range of items.[60] In addition, five conditions are set out[61] by which cultural property should be viewed as that of a particular State. Parties are required to prevent the illicit import, export, and transfer of cultural property and, if receiving States, to help in making 'the necessary reparations' to countries of origin.[62] The Convention essentially attempts to balance the duties of importing States to limit the illicit trade with those of countries of origin to protect their cultural property within their borders and to prevent its illegal export. These measures include a system of export certification to show export of cultural property is authorized and to prohibit its export without such a certificate.[63]

The primary duties imposed on importing States[64] are to prevent the importation of stolen or illegally exported cultural property, prohibit their museums and similar institutions from acquiring items illegally exported from another State Party, and, where possible, inform other States of any offers of such property, take appropriate steps to recover and return any cultural property stolen from a museum or similar institution as requested by other State Parties. Some reciprocal obligations are placed on requesting States, including the payment of fair compensation to an innocent purchaser or other person with valid title to the property, to provide the necessary documentation and evidence to establish its claim and to bear all expenses resulting from the return of the cultural property requested. Receiving States are also required to admit actions for recovery of lost or stolen items of cultural property 'brought by or on behalf of the rightful owners' and to recognize the right of each State Party to prohibit export of certain cultural property and to facilitate recovery of such property by the State concerned.[65] They must also prevent transfers of ownership 'likely to promote the illicit import or export'[66] of cultural property which suggests an obligation on importing States to control the market in such items. However, these obligations only apply to cultural property stolen or illegally exported after the entry into force of the Convention and have no retroactive force.[67]

[60] Article 1. According to Lyndel V Prott in 'The International Movement of Cultural Objects', *International Journal of Cultural Property*, vol 12 (2004): pp 225–48, the definitions of cultural property/objects given in the 1970 UNESCO and the 1995 UNIDROIT Conventions are designed to respond to elements in national legislation and to allow for a variety of subject matter (eg Samoan orators' fly-whisks or Namibian petroglyphs).

[61] Article 4. These include items acquired through licit archaeological work.

[62] Article 2. This article makes clear the obligations placed on both exporting and importing States.

[63] Article 6. Other measures set out in Art 5 include: drafting legislation where necessary to apply the terms of this Convention; keeping a national inventory of protected property; supervision of archaeological excavations and ensuring *in situ* preservation of certain relics; and establishing ethical codes for dealers, collectors, etc.

[64] Article 7. [65] Article 13. [66] Article 13(a).

[67] They would not apply to the case of the Lydian treasure acquired by the Met, for example, since it is thought to have been illegally exported from Turkey in 1966.

Until recently, most major market States were not ready to ratify the Convention in the belief that it favoured the interests of States of origin over market States; however, there have been positive moves in this direction since the late 1990s.[68] This general lack of support from leading market States has certainly limited the impact of this Convention. Moreover, the regime established by the Convention has a predominantly diplomatic character which has meant that it lacks enforcement 'teeth' and is based on the willingness of Parties to cooperate within its framework. At the same time, there have been a steady number of stolen items traced, identified, and returned worldwide under the terms of the Convention and the mechanism provided by UNESCO under it.[69] It should also be borne in mind that it does not apply to items that have entered the territory of a State illegally before it became a Party to the treaty. Hence, for example, the US has no obligations with regard to cultural objects illegally brought into that country before 1983 and so the terms of the 1970 Convention do not apply in most of the cases mentioned below.[70] As a result, the effect of this Convention over the years since 1970 has been rather limited, although a steady number of stolen items have been traced, identified, and returned under the terms of the Convention and the diplomatic mechanism provided by UNESCO.[71]

In many ways, the institutional and awareness-raising aspects of the 1970 Convention have been its most effective elements and it has had a limited effect in terms of developing the legal framework for return and restitution of stolen and illegally exported cultural objects. As a result, the likelihood of a foreign State retrieving an item of stolen or illegally exported cultural property from the US remains a question of precedent in the US courts or those of other market States. It is in recognition of the limited effectiveness of the 1970 Convention that work began on developing an international Convention within the framework of UNIDROIT aimed at making it easier for States to initiate litigation for return and restitution of cultural objects in the courts of fellow Parties while, at the same time, safeguarding the interests of buyers and market States.

[68] On a positive note, France ratified the Convention on 7 January 1997, the UK accepted it on 1 August 2002, Switzerland accepted it on 3 October 2003, Germany ratified it on 30 November 2007, Belgium ratified it on 31 March 2009, and the Netherlands accepted it on 17 July 2009.

[69] Etienne Clement, 'The 1970 UNESCO Convention', *International Cultural Property Review* (Summer 1994): pp 71–5 at pp 72–3. For example, the prehistoric statuette of a goddess stolen in 1990 while on loan from the Anatolian Civilisations Museum in Ankara to the Kunsthistorisches Museum in Vienna was returned after a letter from the UNESCO Secretariat was circulated to the Ministries of Culture of States Parties with details of the stolen item and a reminder of the duties of Parties under Art 7 of the 1970 Convention.

[70] Such as the case of *Republic of Turkey v OKS Partners* cited and discussed at n 173 below. For the US and the 1970 Convention, see: Ann Guthrie Hingston, 'U.S. Implementation of the Unesco Cultural Property Convention', in Phyllis Mauch Messenger (ed), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* 2nd edn (Albuquerque: University of New Mexico Press, 1999).

[71] Clement, 'The 1970 UNESCO Convention' (n 69) at pp 72–3.

The 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects[72] was adopted in June 1995 with the aim of providing an acceptable framework for 'claims of an international character' (Article 1) for the restitution of stolen cultural artefacts and the return of those illegally exported.[73] This was the culmination of a very lengthy process that began in 1983 with a report commissioned by UNESCO recommending that it address the issue of the illicit trafficking in cultural property in partnership with an international private law body.[74] UNIDROIT then drafted a preliminary text which was presented to the Governmental Experts who met over four sessions to negotiate it. It should be noted here that this draft represented a compromise between different legal systems and philosophies, a wide variety of interests and stakeholders (from cultural specialists to dealers and collectors and from States of origin to art market States) as well as recognizing pre-existing public and private international law rules, including trade law rules.[75] It was therefore an extremely difficult and complex set of requirements to negotiate.[76]

An issue of immediate importance was: What relationship would the UNIDROIT Convention have with the 1970 UNESCO Convention? UNESCO was closely involved in the process of drafting the former text and the influence of the 1970 treaty can be seen in the UNIDROIT treaty, especially in its definition of terms.[77] The 1995 UNIDROIT Convention was drafted in order to create a text more acceptable both to market States and source countries and, at the same time, providing a framework for international litigation. As noted by Prott: 'The 1995 UNIDROIT Convention has the effect of a protocol in that it plugs the gaps felt to be in the 1970 Convention (detailed provisions on "good faith" acquisition; the status of archaeological objects, time limitations on action, ability of nonstate owners to sue).'[78] In general, although States of origin were favourable to

[72] UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Rome, 1995) [34 ILM 1322].

[73] For background and commentary on this Convention, see: Lyndel V Prott, *Commentary of the UNIDROIT Convention* (Leicester, UK: Institute of Art and Law, 1998). See also: Frédérique Coulée, 'Quelques remarques sur la restitution interétatique des biens culturels sous l'angle du droit international public', *Revue Générale de Droit International Public*, vol 104 (2000): pp 359–92; UNESCO (2005) *Information Note* submitted to the Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 2005, UNESCO Headquarters, Paris [Doc CLT-2005/Conf/803/2, 16 June 2005].

[74] Lyndel V Prott and Patrick O'Keefe, *National Legal Control of Illicit Traffic in Cultural Property*, commissioned by UNESCO (1983) [Doc CLT/83/WS/16].

[75] Prott, *Commentary of the UNIDROIT Convention* (n 73) at p 16. The preamble (para 4) makes specific reference to achieving 'common, minimal legal rules for the restitution and return of cultural objects between Contracting States' as a fundamental aim of the Convention.

[76] A working group representing both 'exporting' and 'importing' States was established during the final week of the discussion.

[77] Lyndel V Prott, 'UNESCO and UNIDROIT: A Partnership against Illicit Trafficking', *Uniform Law Review*, vol 1 (1996): pp 59–71.

[78] Lyndel V Prott, 'The Fight against the Illicit Traffic of Cultural Property: The 1970 Convention: Past and Future, 15-16 March 2011', *International Journal of Cultural Property*, vol 18, no 4 (2011): pp 437–42 at p 441.

the idea of developing such a text, they have preferred the UNESCO Convention which more clearly espouses the cause of art-exporting States. Initially, it was not decided whether the text should be a set of model provisions or an international Convention. Although the text refers to 'importing' and 'exporting' States, this is an over-simplification since most States are either both or simply 'transit' States on trafficking routes: there is, in reality a much greater commonality of interest among States than may be immediately apparent. Despite this, it became clear during the drafting process that a set of minimum rules was necessary and that the acceptance by some States of certain duties depended on the acceptance by other States of balancing duties.

As the 1970 UNESCO Convention, the Preamble to the 1995 UNIDROIT Convention states the need for 'cultural exchanges for promoting understanding between peoples' and strongly underlines the link between this illicit trade and the 'irreparable damage frequently caused by it . . . in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information'.[79] It also makes explicit that the heritage damaged is often that of local and indigenous communities, placing the Convention in a framework beyond that of the rather narrow 'internationalist' versus 'retentionist'[80] (ie unrestricted trade versus national controls on movement) debate that has bedevilled the 1970 Convention. Recognizing that it cannot alone provide a solution to the problem, its purpose is explained as being in 'initiat[ing] a process that will enhance international cultural cooperation'.[81] It should therefore be used alongside other measures such as: the development of registers of cultural objects; the physical protection of archaeological sites; and technical cooperation amongst States. A further point made in the Preamble is that 'a proper role for legal trading' in cultural objects must be safeguarded alongside these measures to combat illicit trade. This is a significant shift from the 1970 UNESCO Convention towards accepting the existence of a controlled licit trade as a necessary part of the global control of the market. This also recognizes the very diverse interests of artefact-rich and art market States and, as a result, renders it much more acceptable to the latter than the 1970 UNESCO Convention. Certainly no such instrument can be effective in a vacuum and needs support from art market States in order to be effective.

A further essential difference of approach between the two Conventions is that the UNESCO treaty employs administrative procedures and diplomacy to prevent illicit trafficking in cultural property and seek return of such property while the focus of the UNIDROIT text is to provide direct access to the courts of one State by the owner of a stolen cultural object or the State from which it has been illicitly exported.[82] Moreover, the later Convention covers all stolen objects and is

[79] Preamble.

[80] This is the characterization of the 1970 Convention given by John Henry Merryman in 'The Nation and the Object', *International Journal of Cultural Property*, vol 3, no 1 (1994): pp 61–76.

[81] Preamble.

[82] Prott, 'The Fight against the Illicit Traffic of Cultural Property' (n 78).

not restricted (as is the UNESCO Convention under Article 7) to those that have been inventoried in institutions. Further, the UNIDROIT Convention provides for a sophisticated means of dealing with the different approaches taken by legal systems towards protection of a 'good faith' acquirer of cultural property. This is important since some legal systems (as in Switzerland) have a relatively generous interpretation of a good faith buyer while others (such as the US) place a much greater burden of proof on the acquirer of cultural property.[83] The title of the Convention[84] was itself the subject of lengthy negotiation: the decision was taken to use (in the English text) the neutral term 'objects' in place of the more loaded term 'property' although the French text retains the notion of '*biens culturels*' and to avoid any reference to 'restitution' since this term does not have the same meaning in French and English law.[85] Even the choice of the term 'stolen' is not without difficulties since it is treated differently in civil and common law systems, but it was decided to leave it to the court in which a complaint is made to apply their own law to this question.[86] As noted, the main thrust of the Convention is to provide a framework for 'claims of an international character',[87] but the wording is ambiguous as to whether it would apply in cases that concern a stolen cultural object that is subsequently sold on in a second jurisdiction and, thus, effectively laundered before being put up for sale in the original jurisdiction in which the theft took place.[88] A brief survey of the main approaches and provisions of the 1995 UNIDROIT Convention is given in the following section.[89]

As is expected for a treaty with this subject matter, 'cultural objects' are defined in detail. A broad definition is given in the main text as those which 'on religious or secular grounds, are of importance for archaeology, prehistory, history, literature art or science'.[90] The Annex to the treaty then provides a much more exhaustive

[83] This point was notable in the *Republic of Cyprus v Goldberg* case where the issue of the place of the appropriate forum to hear the case (*lex situs*) became a key issue.

[84] Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT, 1995).

[85] The UNESCO use of the terms 'return' and 'restitution' is different again.

[86] The latter do not include conversion or fraud in the scope of this term while the former do. Similarly, use of the term 'possessor' (in place of 'owner'), which has specific connotations in common law systems not intended in this text: in view of the problems associated with systems where a bona fide purchaser does not become the owner, it was thought better to keep this term and rely upon a common, general understanding of its meaning.

[87] Article 1(a).

[88] Such as the case of *Winkworth v Christie Manson and Woods Ltd and another* [1980] All ER 1121. In this case, the litigation was initiated in the latter jurisdiction and not the one in which the first transaction took place and it is probable that, had the rules of the 1995 UNIDROIT Convention applied to it, a different decision would have been taken. Prott, *Commentary of the UNIDROIT Convention*, p 22 (n 73).

[89] For a fuller discussion, please refer to: Prott, *Commentary of the UNIDROIT Convention* (n 73). The UNIDROIT Convention is also discussed in Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, 2006); and Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2011) at pp. 196–223. See also, A Browne, 'UNESCO and UNIDROIT: The Role of Conventions in Eliminating the Illicit Art Market', *Art, Antiquity and Law*, vol 7 (2002): p 379.

[90] Article 2. This is a fairly standard definition that reflects those found in a large number of national legislative acts and avoids the approach of listing *types of* cultural objects in the definitional clause taken by the 1970 Convention.

set of categories of cultural objects covered.[91] This definition applies *in full* only to stolen cultural objects.[92] Unlike the 1970 Convention, there is no requirement for these items to be designated by each State: very different approaches are required for States that assert ownership over a large proportion of cultural property and those where state ownership is the exception and where the interests of private owners need protection. The UNIDROIT Convention relies on private law and therefore is also able to protect this latter range of cultural objects.[93] The action of 'illegal export' is also defined as removal from the territory of a Party 'contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage'. However, the range of objects to which this applies is limited only to those that are of considerable importance to the requesting State.[94]

At all stages of the drafting of this Convention, it was felt strongly that stolen cultural objects and illegally exported cultural objects should be treated separately since the two cases raise quite distinct legal and even philosophical issues in different countries. Hence, the Convention is divided into Chapter II (Articles 3–4) on the recovery of stolen cultural objects and Chapter III (Articles 5–7) on the return of illegally exported cultural objects. The Convention seeks to avoid the strong protection of a good faith purchaser under civil law systems and the use of time bar rules in some common law systems that, we shall see, have made litigation for recovery and return so problematic.[95] This unequivocal approach, then, does not protect the good faith purchaser of a stolen cultural object even when they have made the necessary enquiries at the time of purchase, in order to achieve an effective regime to combat trade in stolen cultural objects. The Convention treats 'a cultural object that has been unlawfully excavated or lawfully excavated but unlawfully retained' as stolen if this is in accordance with the law pertaining in that State.[96] The history of international litigation (see below) demonstrates that blanket state ownership claims to cultural objects have not always been upheld in other countries' courts. This is necessary and, under this Convention, most clandestinely excavated cultural objects can be subject to suit.[97] The problem of

[91] Including: rare scientific collections and specimens; property related to history; archaeological artefacts; parts removed from artistic, historical, or archaeological monuments; antiquities (such as coins or inscriptions) over 100 years old; objects of ethnological or artistic interest; rare manuscripts, books, documents; postage stamps; archives; and furniture and musical instruments over 100 years old.

[92] Illegally exported cultural items covered by the Convention are subject to limitations imposed by Arts 5 and 7.

[93] Prott, *Commentary of the UNIDROIT Convention*, p 26 (n 73).

[94] Article 5(3).

[95] Article 3(1) contains a very clear statement that '[t]he possessor of a cultural object which has been stolen shall return it'. For more on this rather technical point, see: Prott, *Commentary of the UNIDROIT Convention*, p 30 (n 73). In a similar fashion, the UNIDROIT Draft Convention for a Uniform Law on the Acquisition of Good Faith of Corporeal Movables (LUAB) of 1974 [1985 I Unif L Rev os 42 1985] stated in Art 11 that '[t]he transferee of stolen movables cannot invoke his good faith'.

[96] Article 3(2). 'Excavation' for the purposes of this article also includes underwater sites as is the common practice nowadays in national legislation.

[97] By combining Art 3(2) with Art 5(3) (a), (b), and (c) and its final phrase. Proof of its identity and provenance must be established or it has to be shown that it was exported in contravention of export rules requiring an export permit.

establishing the identity and provenance of such objects remains, of course: how can one be sure of the exact provenance of an illicitly excavated Imperial Roman coin from a period in which the Roman Empire spread over Europe and much of the Middle East?

The issue of statutes of limitation is one of the most challenging of all in this area of law. A dual-track solution is taken here that reflects the rules in several legal systems,[98] and it represents a compromise between a wide range of positions. The time limit for any claim for restitution is set at three years 'from the time when the claimant knew the location of the cultural object and the identity of its possessor';[99] this is relatively generous and takes account of the fact that these objects (and the identity of their possessor) are often concealed for a long time after their theft.[100] Where an identified cultural object 'forms an integral part of' a monument or archaeological site or belongs to a public collection, it shall not be subject to any time limit beyond that set out in the treaty. Some States had wished for certain very important cultural objects to be subject to no limitations at all, but this was not acceptable to others.[101] It should be noted, however, that there is no retroactivity in this Convention and such limitation provisions apply only to claims made under the Convention and not, for example, to claims relating to property removed during the Second World War.

Although many commentators have taken the view that a person returning a stolen cultural object to its true owner should not receive any compensation, given that the rules of many systems on return by a bona fide purchaser had already been substantially changed, a compromise needed to be found. Essentially, the compromise offered here is to make some provision for compensation but only where the acquirer of the object could prove their due diligence in the acquisition.[102] This, it was hoped, would also act as a deterrent to purchasers acting without obtaining the necessary information to fulfil this test. In avoiding the notion of 'good faith', the text takes into account all the circumstances of the acquisition and fixes on the elements of 'due diligence' which might include an unusual place of transfer (such as the Free Port area of an airport as in the *Goldberg* case). Many of these specific elements[103] are ones one would commonly expect a serious purchaser of art and

[98] It is addressed in Art 3. The various approaches include a longer time limit (or even inalienability) for state property, longer general terms such as 30 years and relative terms depending on the knowledge of the claimant.

[99] Article 3(3).

[100] As in the *Goldberg* case of the Kanakaria mosaics (discussed below).

[101] Article 3(5) allows for extended periods for cases where a Party declares that a claim is subject to a longer time limit of up to 75 years or where a claim is made in the courts of another Party over the restitution of a cultural object taken from a monument or archaeological site or from a public collection. This is subject to a declaration having been made by the Party in question on ratification of the Convention (Art 3(6)). Public collections are described in Art 3(7) and, since such collections often do not include cultural objects of significance to indigenous and tribal communities, the 'sacred or communally important object[s]' of such communities are included in the scope of this provision by Art 3(8).

[102] Article 4.

[103] Set out in Art 4(4) and including: 'the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could have reasonably obtained, and whether the

antiquities to undertake, especially ones that are often of dubious provenance. Fair and reasonable compensation is to be paid to a purchaser on return of a stolen cultural object provided that 'they neither knew nor ought reasonably to have known' that it was stolen and can prove that they 'exercised due diligence' on acquiring it.[104] The onus of paying the compensation is placed on 'the person who transferred the cultural object to the possessor, or any prior transferor', although they may be extremely difficult to identify in cases of theft.[105]

Chapter III (Articles 5–7) deals with illegally exported cultural objects which may, of course, be stolen and, in such cases, action under both Chapters of the Convention is possible; only in cases where cultural objects have been illegally exported that are not stolen will Chapter III apply alone. A key issue that Chapter III had to address was how far States were ready to recognize foreign public laws in the form of export controls. Given the lack of consensus on this question, it was agreed to limit the range of cultural objects to which this part of the Convention would apply to those whose loss would seriously damage the cultural heritage of the State from which they were exported.[106] The Party must then prove this in relation to an interest such as: the physical preservation of the object or its context; the integrity of a complex object (eg an architectural sculpture, mural, mosaic, etc); the preservation of scientific, historic, or other information; and traditional or ritual use of the object by a tribal or indigenous community.[107] It is the State Party from which an object has been exported illegally that must request a court or competent authority (such as an administrative tribunal) to return it.[108] The burden is firmly placed here on the requesting State to persuade a court on the basis of evidence it provides. A period of limitation ranging from three years after the requesting States 'knew of the location of the cultural object and the identity of its possessor' to a maximum of 50 years after its illegal export (or failure to return it) is placed on such cases.[109] The question of the compensation of a possessor who acquired a cultural object *after* its illegal export, payable on its return,

possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances'.

[104] Article 4(1). No provision is made here for the costs of restitution, although this is regulated for return of illegally exported objects by Article 6(4).

[105] Some specific circumstances are covered in Art 4(5), such as when a collector purchases an object in the knowledge that it is of suspect provenance and then gains a tax advantage by donating it to a museum.

[106] Article 5(3). Two additional limiting factors are set out in Art 7: (i) where the export of a cultural object is no longer illegal at the time its return is requested; and (ii) if the object was exported during the lifetime of its creator or within 50 years of their death. An exception is given in Art 7(2) for ethnographic items whose creator is not known, specifically traditional ritual objects of tribal and indigenous communities, allowing claims for the returns of such items under the Convention.

[107] This list is not exhaustive since Art 10 allows a Party to apply more favourable rules to the return of illegally exported cultural objects, although two other specific limitations to the range of objects normally covered are provided in Art 7.

[108] Article 5(1). This includes items (legally) temporarily exported for purposes of exhibition, research, or restoration which have not been returned as required by the terms of the export permit (Art 5(2)) and follows the approach of Art 3(2) and (6) of the ICOM Code of Ethics.

[109] Article 5(5), but without the exceptional extensions allowed in Art 3 for stolen cultural objects.

is also addressed.[110] An owner who knowingly arranges the illegal export of a cultural object is not entitled to compensation. Again, the tests a court should apply to determine if a possessor acted with due diligence when acquiring an illegally exported cultural object are set out, such as the absence of an export certificate as required by the requesting State.[111] Since it was felt that requiring the possessor to forfeit ownership on an object's return would be too onerous, they are allowed to forgo compensation in return for (a) retaining ownership of the item (on its return) or (b) transferring ownership to a third party of their choice who is resident in the requesting State.[112]

Claims under Chapters II and III can be brought in the jurisdiction in which the object is located or any other jurisdiction with competence over the possessor. This would allow for a claim to be brought when the possessor is in a jurisdiction not covered by the Convention, as might happen when the object is discovered at the time it is offered for sale in an auction house.[113] Applications for provisional measures (such as withdrawal of the object from auction) from a court of the State of location of the object are provided for[114] to enable its safeguarding while a claim for restitution or request for return is made in another State Party. Parties may apply 'rules more favourable to the restitution or the return of stolen or illegally exported cultural objects':[115] this is important since States may have already provided for a more extensive protection of a dispossessed owner than is required by this treaty.

The question of retroactivity was one of the most controversial issues throughout the drafting process[116] despite the fact that Article 28 of the Vienna Law of Treaties clearly states the customary rule that treaty clauses are not retroactive unless this is explicitly stated.[117] With regard to illegally exported items, the Convention's rules only apply to objects illegally exported after the Convention entered into force in the requesting State as well as the State where the claim is brought; the status of the State in which the object is located (if different) is not material in this provision. However, some uncertainty remains over interpretation such as whether it can apply to objects stolen while on temporary loan in a State that was not a Party at the time of its theft. These anti-retroactivity provisions therefore exclude objects stolen or illegally exported in the past and render the

[110] Article 6(6). The wording is similar to that of Art 4(1) dealing with compensation for the return of a stolen object.

[111] Article 6(2). The relevant circumstances would include an item of which every exemplar known originates from a State or States that regard export of such objects illegal, or where a condition of the sale contract would require the buyer to keep the object secret for a period of time.

[112] Article 6(3). In order to prevent abuse of this provision (such as re-export to a non-Party State), this can only be done on the agreement of the requesting State.

[113] In addition, Art 8(2) allows the parties to submit the dispute to any court or competent authority or to arbitration, an essential procedural freedom to ensure acceptance of the Convention.

[114] Article 8(3). [115] Article 9(1).

[116] Prott, *Commentary of the UNIDROIT Convention*, p 78 (n 73).

[117] Article 10 makes explicit the non-retroactive character of the Convention's rules. Article 10(1) restricts claims regarding restitution of stolen cultural objects to those (a) stolen from the territory of a Contracting Party after the Convention enters into force in that State or (b) located in a Party after the Convention enters into force in that State.

Convention much easier for art market States to accede to. It also signals that its purpose is to prevent future looting and trafficking of cultural objects to feed an ever-hungry market rather than to amend past wrongs.[118] States (and private individuals, where appropriate) retain the right to claim back such items in private law, under bilateral agreements, inter-institutional arrangements, or through the UNESCO Committee (under the 1970 Convention).

Overall, the UNIDROIT Convention achieves a reasonable compromise between the interests of market and 'source' States. For example, although the provision of compensation for a good faith purchaser who restores stolen cultural property to its owner is a controversial one with source States, the accompanying requirement that the possessor show they had exercised due diligence in acquiring the object renders this provision more acceptable. Such pragmatism in the area of controlling the exportation, importation, and trade in antiquities is necessary to achieve widespread acceptance of the Convention by both source and importing States. It also achieves wider acceptability by limiting the category of claims for restitution and return which can be covered by the Convention,[119] placing strict time limits on the admissibility of claims within its framework[120] and attempting to rationalize conflicting approaches and policies in different jurisdictions towards the treatment of good faith purchasers.

The UN Convention against Transnational Organized Crime (Palermo, 2000)

The 'Palermo Convention', as it is generally known, was developed to address criminal activity that crosses international borders and the need for an effective legal framework to address the criminal law aspects of the problem. It treats as international criminal actions the following activities that can be relevant to the trafficking in stolen and/or illegally exported cultural objects: participation in an organized criminal group, laundering of proceeds of crime, corruption, and obstruction of justice.[121] The problem of transnational criminal activity involving cultural property was considered by the drafters, the Preamble notes that it would 'constitute an effective tool for international cooperation in combating, inter alia, money-laundering, corruption, trafficking in endangered species of flora and fauna, *offences against cultural property*, and growing links between transnational organized crime and terrorist crimes' (emphasis added). Despite this explicit mention of trafficked cultural property, however, this issue was largely ignored by the States Parties to it in the first few years following the Convention's entry into force in 2003.

[118] At the same time, Art 10(3) makes it clear that the Convention in no way legitimizes any illegal transactions that may have taken place before its entry into force.

[119] Articles 4, 5, and 7. [120] Article 10.

[121] Articles 5, 6, 8, and 23, respectively.

The question of cultural property was returned to at the 5th Conference of the Parties (COP) of the Palermo Convention in 2010[122] at which States Parties announced a list of types of 'emerging' crime on which the Convention and its members should focus in the near term: trafficking in cultural property was included among these, along with cybercrime, piracy, environmental crime, and others. This demonstrates that the Palermo Convention is now viewed by the international community as having the capacity to assist in addressing international crime against cultural property. As with the regime of the 1995 UNIDROIT Convention, this crime is seen as comprising two related issues: the looting of and the trafficking in cultural property.[123] In 2010, the UN Office for Drugs and Crime (UNDOC) noted that illegal 'removal' (ie looting) of cultural property was still taking place in source countries and the items smuggled to rich market countries.[124]

Key aspects of the Convention of relevance to this book include the requirement to create domestic criminal offences that include participation in an organized criminal group, money laundering, corruption, and obstruction of justice. This is important since States of origin also have a role to play in preventing and/or reducing the crime at source. Parties must also adopt the frameworks vital to international cooperation, including extradition, mutual legal assistance, and law enforcement cooperation, of which the last two can be particularly relevant to crimes against cultural heritage. In addition, they should promote training and technical assistance for building the capacity of national authorities. Again, it is the weak capacity in some source States that makes this a relatively easy crime to commit, despite its potentially large returns. Generally, the Palermo Convention is intended to serve as a tool for international cooperation for many different types of transnational crimes, as long as the criminal activities concerned fit the following requirements. First, the Convention applies to the activities of an 'organized criminal group', which is defined as a 'structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes'.[125] The second requirement is for it to be a 'transnational' crime, namely one that is committed in more than one country or involves more than one country in its planning, the operations of the criminal group, or the effects of the crime. The third requirement is that the crime must be considered a

[122] Conference of the Parties to the UN Convention against Transnational Crime (2010) *Use of the UN Convention against Transnational Crime for protection against trafficking in cultural property*, Vienna, 18–22 October 2010. Available online at: <http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_17/CTOC_COP_2010_17_E.pdf>.

[123] These are analogous to the theft and illegal export of cultural objects.

[124] Discussion guide for the thematic discussion on protection against trafficking in cultural property: Note by the Secretariat, E/CN.15/2010/6 (para 11), 23 February 2010.

Use of the United Nations Convention against Transnational Organized Crime for protection against trafficking in cultural property: Note by the Secretariat, CTOC/COP/2010/12 (para 30(e)), 13 August 2010.

[125] Article 5. The offence of participating in an organized criminal group involves agreeing with one or more other persons to commit a serious crime for financial or other material benefit, or knowingly take part in criminal or related activities of an organized criminal group to contribute to their criminal aim.

'serious crime', which is defined as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. This last may require redrafting of some national cultural heritage laws if they fail to include sufficiently steep penalties. In addition, States Parties shall ensure that domestic law covers all serious crimes committed by organized criminal groups (including conspiracy, criminal association, money laundering, etc).

Other articles of the Convention that can be of relevance to trafficking in stolen cultural property include the criminalization of the laundering of proceeds of crime and measures to combat this,[126] the criminalization of corruption and measures against this,[127] the criminalization of obstruction of justice,[128] the liability of legal persons for participation in the crimes set out in Articles 6 to 8 and 23,[129] confiscation and seizure,[130] and the assertion of jurisdiction (on territorial, flag State, and nationality bases) over these crimes.[131] In addition to these, the Convention also encourages Parties to provide assistance to other States in cases where the above requirements are met. Forms of 'mutual assistance' may apply across many different types of crime and can include: taking evidence or statements from persons; executing searches and seizures; providing information and evidence; and any other type of assistance that is not contrary to the domestic law of the requested State. This last could, for example, include providing experts in specific types of cultural objects in order to advise or act as expert witnesses. Such forms of mutual assistance can obviously serve as a strong tool for cooperation in criminal investigations and could be used in many different types of criminal investigations, including cultural property crime.

International Litigation for the Recovery of Cultural Objects

As mentioned above in relation to the UNIDROIT Convention, private individuals and States remain free to initiate private civil suits for the return of stolen and/or illegally exported cultural property. However, before discussing further international litigation for the recovery of cultural property, it is useful to clarify the use of terms. The terms commonly used in this context, namely 'return' and 'restitution', are potentially confusing since they are sometimes used interchangeably but may also be loaded with special meaning.[132] According to the *IGC Guidelines*,[133] the term 'restitution' should be used in cases of illicit appropriation where objects

[126] Articles 6 and 7, respectively. [127] Articles 8 and 9, respectively.
[128] Article 23. [129] Article 10.
[130] Article 12. In the case of cultural objects, this can include the objects themselves as well as any tools or vehicles used in their illegal removal/export (eg ships for underwater looting, airplanes employed in their transport, etc).
[131] Article 15.
[132] In a strict sense, 'restitution' is used where cultural property removed from a State's territory without its consent or in contravention of its export laws and to use 'return' where cultural property has been removed *before* such laws had been enacted.
[133] Guidelines prepared by the UNESCO Intergovernmental Committee on the Return of Cultural Property to its Countries of Origin or Its Restitution in the Case of Illicit Appropriation.

have left their countries of origin illegally, according to the relevant national legislation (and with particular relevance to the 1970 UNESCO Convention). The term 'return', on the other hand, does not have specific meaning in either international or national law and should apply to cases where objects left their countries of origin prior to the crystallization of national and international law on the protection of cultural property.[134] Such cases often concern the removal of items from a colonized territory to the territory of a colonial power or from a territory under foreign occupation. The removal to the British Museum of the Benin bronzes in the 1870s or of the Parthenon Frieze by Lord Elgin from Athens under Ottoman rule would be clear examples of this.[135] Prott and O'Keefe add that 'return' may also be a useful term in cases where the context of removal was not colonial (or foreign occupation) but where it is not clear whether an international wrong has been committed by another State. As mentioned above, when drafting the title of the 1995 Convention, UNIDROIT decided to drop references to both 'return' and 'restitution' in the final version given uncertainties surrounding the meaning of 'restitution' which is not exactly the same in both French and English.[136]

Problems faced by a potential litigant

There is by now a large body of documentation and practice in public international law dealing controlling the illicit movement of antiquities and the return of such items in the form of UNESCO Conventions and Recommendations, UN General Assembly Resolutions, and other regional and intergovernmental agreements. There is also older international custom covering the illegal removal of cultural property during time of armed conflict.[137] However, when a State or individual sues for the return of an antiquity allegedly stolen and illegally exported to a third State, this will certainly involve issues of private international law. The complex nature of cultural heritage law which mixes private international law with public international law rules and principles is set out by Prott: 'Cultural heritage law tends to involve many areas of law, public, private, national and international, a complexity from which lawyers who have particular specializations tend to retreat.'[138] An example of the latter point is found in the *Bumper Development* case (cited above) in which an Indian agricultural worker discovered a bronze idol of Siva Nataraja in 1976 and it was sold on in London in 1982.[139] When the idol

[134] UNESCO Intergovernmental Committee Guidelines (n 133).

[135] On the 'Elgin Marbles', see: David Gill and Christopher Chippindale, 'The Trade in Looted Antiquities and the Return of Cultural Property: A British Parliamentary Inquiry', *International Journal of Cultural Property*, vol 11, no 1 (2002): pp 50–64. On the Benin bronzes and other African examples, see: Shyllon, 'The Recovery of Cultural Objects by African States' (n 10). See also: Messenger (ed), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* at p 17 (n 70).

[136] Prott, *Commentary of the UNIDROIT Convention* at p 17 (n 73).

[137] Wojciech A Kowalski, *Art Treasures and War: A Study on the Restitution of Looted Cultural Property, Pursuant to Public International Law* (Leicester: Institute of Art and Law, 1998).

[138] Prott, 'Problems in Private International Law' at p 224 (n 27).

[139] *Bumper Development Corp Ltd v Commr of Police* [1991] 4 All ER 638 [United Kingdom].

was subsequently seized by the Metropolitan Police in 1984, the Indian Government sued the purchaser (the Bumper Development Corporation) in the High Court for return of the idol. An unusual case, it involved complex issues of art history (identification of the idol concerned), analysis of foreign law with the help of expert witnesses, limitation periods and, most importantly, whether the idol's temple which is regarded as a juristic entity in Indian law could be so viewed under English law. The complexity of the arguments involved illustrates the difficulties facing claimants of cultural property in foreign courts.

Unfortunately, the rules governing international trade and commerce are often inimical to the needs of the cultural heritage. As Prott points out, relationships involving cultural objects are not normally based on ownership but often on intangibles such as their archaeological and historical importance to a people which are not often recognized by western legal systems.[140] This is especially true with regard to the rules of extra-territoriality (discussed above) which generally arise in a middle zone between relatively clear questions of public international law (such as state practice) and of private international law (such as contracts between private individuals). Knighton and Rosenthal noted that the conflict is frequently between one country's public policy and the private rights created, and the private responsibilities imposed, by another.[141] There are some other specific rules governing private international litigation for the return and restitution of stolen and/or illegally exported cultural objects that, as we will see in the cases discussed below, can seriously impede the success of such claims. In view of their great legal complexity and the limited space available here, they are introduced in brief and then their impact on the specific cases illustrates their effect. The main ones are as follows.

The lex situs rule

This rule states that it is the law of the place where the item is situated or was situated at the material time which governs any litigation concerning it. The rule is interpreted differently in different jurisdictions with the result that: in France the law of the place of the litigation is applied; under English law, the law of the last transaction is applied; and US law favours the law of the place where the goods were at the time of the last transaction (not where the parties were or the contract was completed). This rule is potentially pernicious where cultural property is concerned since: 'Possession of the item is paramount and the role of the law should be to

[140] Prott, 'Problems in Private International Law' (n 27).

[141] Douglas E Rosenthal and William M Knighton, *National Laws and International Commerce: The Problem of Extraterritoriality* (London, Boston: Routledge & Kegan Paul, 1982) [Published for the Royal Institute of International Affairs]. However, Prott 'The International Movement of Cultural Objects' (n 60) notes that new rules have now emerged in areas such as family, administrative, and consumer protection law that are eroding this strict approach. For the impact of this on cultural heritage-related cases, see the *Iran v Barakat* case described below.

establish who is entitled to it, based on an assessment of the competing values and not a mechanical rule.'[142]

Conflict of laws and extra-territoriality

This is an issue which is almost exclusively dealt with in the context of international trade and commerce law and the rules developed therefore are often inimical to the needs of the cultural heritage: They essentially relate to whether a court will apply a public law of a foreign jurisdiction, often export regulations. As a general rule, a court will not entertain a case based on another State's export prohibitions alone but will also require proof that the items were stolen (normally by proving state ownership under antiquities legislation).[143]

Statute of limitations rules

The question as to whether a case for the recovery of an artwork or antiquity is to be time-barred under the statute of limitations of the jurisdiction within which the case is raised is often central to cases concerning cultural property. This is usually due to the fact that there has often been a considerable delay between the offence (of theft and/or illegal export) and the whereabouts of the item being known to the plaintiff. This was a central issue in the case of *Republic of Turkey v the Metropolitan Museum of Art*.[144]

Standing to sue (*locus standi*)

In order to be able to be a party to a court action it is necessary to be a juristic person (an individual, a State, or other entity) recognized by the court and to have a legal standing (*locus standi*). In addition, Parties also need to have a direct, material interest in the subject of the case, but not necessarily that of ownership. In the *Goldberg*[145] case below, the standing of both the Turkish Republic of Northern Cyprus and the Government of the Republic of Cyprus were tested.

[142] Sandrock, 'Foreign Laws Regulating Export of Cultural Property' (n 54). However, he regards any special rules to deal with objects of cultural property as extending the rules on conflict of laws to an unmanageable degree.

[143] This issue proved important in the case of *Attorney-General of New Zealand v Ortiz and others* [1982] QB 349 and [1984] AC 1 in the English courts concerning some Maori carvings offered for sale in Sothebys (London) in 1978 which the New Zealand Government claimed had been illegally exported. A central argument in this case concerned whether the New Zealand export prohibition on cultural artefacts could be enforced in the English courts.

[144] *Republic of Turkey v Metropolitan Museum of Art*, 762 F Supp 44 (SDNY 1990) (denying motion to dismiss); case settled in an out of court agreement on 23 September 1993. For more on this case, see: Lawrence Kaye and C T Main, 'The Saga of the Lydian Hoard Antiquities: From Ushak to New York and Back and Some Related Observations on the Law of Cultural repatriation', in *Antiquities Trade or Betrayed: Legal, Ethical and Conservation Issues* edited by Kathryn T Tubb (Archetype, 1995) pp 150–62.

[145] *Autocephalos Greek Orthodox Church of Cyprus and the Republic of Cyprus v Goldberg and Feldman Fine Arts, Inc*, 717 F Supp 1374 (1989); upheld on appeal 917 F 2d 278 (1990), US Court

Some illustrative cases of international litigation

In this section, some important cases are reviewed in order to illustrate the potentials and pitfalls of this approach. These cases have been chosen both for the specific issues they highlight and also the evolution of case law, especially in the US courts, on this subject. The US is of primary interest as the world's leading market for classical antiquities and there have been one or two previous cases in the US which have set important precedents for restitution suits.[146] There is a tendency in US law to favour the original owners in such cases if the facts of the case support their claim since the transferor of goods can only convey as good a title as s/he has and so a thief cannot convey good title under any circumstances. This contrasts with certain other jurisdictions in which good title is immediately transferred to a good faith purchaser. According to Moore, the US courts have recognized the distinct nature of the art market and have 'modified legal standards accordingly' by viewing the art (or antiquities) aspect of the commercial transaction as a unique feature.[147] There remains, however, a major difficulty of satisfying the courts on the facts in the case where previously undocumented artefacts are involved as well as other legal hurdles which make these cases complex and costly to pursue. Other problems which can be faced by potential litigants include: lack of documentation (obviously the case with illegally excavated items) and the associated difficulty of proving provenance; time-barring of cases under statute of limitation rules, especially where items have disappeared from view for many years; and the difficulty of imposing one State's export regulations in the court of the recipient State.[148]

US v Hollinshead *(1971)*

This relatively early US case concerned a *stela* (a large standing stone) from the Mayan culture that was illegally removed from an archaeological site in Guatemala, cut into pieces, transported to the US where it was offered for sale to the Brooklyn Museum (New York) in 1969. In an expert opinion for the museum, an archaeologist was able to identify it as the *stela* 'Machaquila 2' from an identified site in Guatemala which he himself had photographed and recorded in 1962. This incontrovertible documentary evidence made it easy to prove that this piece had been stolen under the Guatemalan law existing at the time. Under

of Appeals, 7th Cir (No 89-2809); petition for rehearing denied in decision of 21 November 1990 in *US App LEXIS* at 20398.

[146] Judith Church, 'Evolving US Case Law on Cultural Property', *International Journal of Cultural Property*, vol 2 (1993): pp 47–72.

[147] Moore, 'Enforcing Foreign Ownership Claims' (n 26).

[148] See: Quentin Byrne-Sutton, 'A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects', *International Journal of Cultural Property*, vol 1 (1992): pp 59–76; Peggy Gerstenblith, 'The Kanakaria Mosaics and United States Law—on the Restitution of Stolen and Illegally Exported Cultural Property', in *Antiquities Trade and Betrayed—Legal, Ethical and Conservation Issues* edited by Kathryn W Tubbs (London: Archetype Publications, 1995); and John Henry Merryman, 'The Nation and the Object', *International Journal of Cultural Property*, vol 3 (1994): pp 61–76, respectively.

the National Stolen Property Act (NSPA),[149] US law regards as a crime the receiving, concealing, storing, selling, or disposing of in the US goods (with a minimum value of $5,000) from interstate or foreign trade which are known by the holder to have been stolen. A prosecution was therefore brought against Hollinshead, the dealer who had offered the *stela* for sale to the Brooklyn Museum, under the NSPA and he was convicted. Since it could be proved that the goods had been stolen and that he was aware of this fact, this was an unusually simple case. The second case to be brought under the NSPA, *US v McClain*, was much more complex and caused great controversy in the US.

US v McClain *(I and II) (1977–1979)*

This case concerned some artefacts from the pre-Colombian civilization about which, although they were indisputably from Mexico, it was not possible to prove when or where they had first been found. The defendants were charged after attempting to sell these objects to an undercover US Government agent after having made it clear that they were aware that: the items came from an illicit excavation contrary to Mexican law; the Mexican Government might claim ownership of the objects; and that they were illegally exported from Mexico. The case against McClain was also brought under the NSPA and the judge in the initial case ruled that the NSPA could be applied to illegally exported artefacts declared by Mexican law to be State-owned. The crux of the case was (i) whether illegal exportation of artefacts from Mexico (a State operating a policy of umbrella state ownership of antiquities) could constitute theft under the terms of the NSPA; and (ii) whether it was necessary for the artefacts to have been reduced into possession by the Mexican authorities before their export in order for it to assert ownership.[150] This point is obviously crucial when dealing with illegally excavated artefacts which, by their very nature, are extremely unlikely ever to be known of by the authorities of the State at any time before their exportation.

In the appeal stage of the case, the American Association of Dealers in Ancient, Oriental and Primitive Art submitted an amicus curiae in which they strongly articulated their opposition to the implied treatment of objects illegally exported from Mexico and regarded under a Mexican law of 1897 as stolen: the implications of the *McClain Case* (I and II) for the return of cultural property from the US to the countries of origin are considerable as subsequent attempts to override the McClain ruling show.[151] Merryman[152] expressed this concern that the US could end up applying laws of another State that may be unreasonable and even of a 'rhetorical' nature. He argued that the distinction between stolen and illegally exported artefacts (said to have been 'eroded' by *McClain*) was of fundamental importance to the art trade and the *McClain* decision was 'arguably contrary to

[149] 18 USC 2311–2315.

[150] Moore, 'Enforcing Foreign Ownership Claims' (n 26).

[151] One example of this is the 'McClain Override Bill' passed in 1985 which was designed to amend the NSPA to prevent its use in prosecuting certain cases involving cultural property.

[152] Merryman, 'The Nation and the Object' (n 148).

the settled rule of private international law that one nation will not enforce the criminal laws of another'.[153] As support for this view, he also argued that many of the countries with umbrella ownership statutes have thousands of unexplored sites and objects which they do not conserve or display adequately and so: 'An expanded, licit, international trade in art is more likely to advance the general interest in the cultural heritage of mankind.'[154] Moore[155] set out the opposing view that: 'The enforcement of umbrella statutes is the most efficient means of limiting the continued destruction of archaeological data that the trade in antiquities promotes.' As Moore pointed out, the existence of such statutes in national legislation greatly helps in prosecuting purchasers of illegally exported items in the US. Although the enforceability of such statutes may be limited, they are a necessary element in the protection regime and are often crucial in providing the legal basis for international restitution claims.[156] This is particularly true given the scenario, to which Merryman also alluded but with rather different conclusions, of a State which is unable to police all its known sites effectively, faces the looting of unidentified sites and has an understaffed and often underpaid customs service.

The problem with objects removed illegally from undocumented sites, of course, is the difficulty in proving their provenance. Central to the *McClain* case was the need for the prosecution to prove that the artefact did come from the country in question whose blanket ownership of antiquities was unambiguous.[157] This discussion is relevant to attempts by other States with similar legislation (such as Turkey and Iran) to retrieve stolen antiquities. In the case of undocumented finds, however, this fact can render it impossible to prove their provenance in the State of origin if similar material culture is found in neighbouring States also.[158] The import controls operating in art market States may thus cover either illegally exported or stolen items: this is a distinction which can be hard to prove as the *McClain* case shows. It is extremely difficult to demonstrate that an item has been stolen unless it is already documented as part of a museum collection or from an archaeological excavation. Bator took the view that the NSPA is not the appropriate legislation to apply where all that can be shown is that the defendant illegally exported the item after the enactment of an umbrella statute but when it cannot be proved where, when or how they were discovered. In such cases, he argues, civil litigation would be more appropriate although it is still necessary for the plaintiff in such cases to prove that illegal export occurred *after* the enactment of an umbrella statute. In civil as opposed to criminal cases (such as *McClain*), if the rightful owner can prove good title under an umbrella ownership statute, even a bona fide purchaser is vulnerable in US courts.

[153] Merryman, 'The Nation and the Object' (n 148).
[154] Merryman, 'The Nation and the Object' (n 148).
[155] Moore, 'Enforcing Foreign Ownership Claims' (n 26).
[156] For more on the difficulties of enforcing the export regulations of another State in the courts, see: Bator, 'An Essay on the International Trade in Art' (n 1); Moore, 'Enforcing Foreign Ownership Claims' (n 26); and O'Keefe and Prott, *Law and the Cultural Heritage* at pp 621–32 (n 22).
[157] Bator, 'An Essay on the International Trade in Art' (n 1) examined the impact of the *McClain* ruling on civil litigation for the return of antiquities illegally exported from a country with blanket legislation.
[158] See, for example, the *Peru v Johnson* (1986) case discussed below.

Peru v Johnson *(1989)*

A later test of US judicial attitudes to the enforcement of overseas export prohibitions is that of *Peru v Johnson*.[159] This case concerned 89 pre-Columbian artefacts seized by US customs from Johnson that were claimed by the Government of Peru. Despite expressing considerable sympathy for the plight of Peru over its problem with the looting of archaeological sites, the court was not persuaded that the items could be conclusively proved to originate from Peru nor from a neighbouring State such as Bolivia or Ecuador. Even if this could be proved, it was also necessary to show that the Government of Peru was the owner of the items at the time of their removal: to ascertain this entailed a detailed examination of the Peruvian legislation and the facts of the case. It was decided that, '[t]he laws of Peru concerning its artefacts could reasonably be considered to have no more effect than export restrictions' as is illustrated by the *McClain* case and that, since 'export restrictions constitute an exercise of the police power of a State' they 'do not create "ownership" in the State'.[160] As a result, Peru's claim was denied and this decision was affirmed by the Court of Appeals in 1990. An important issue at question here is whether the concept of ownership taken by the court in *Peru v Johnson* is too narrow where items of cultural importance to a State or people are concerned. *Peru v Johnson* is also a good illustration of the difficulties of proof in such cases as well as the difficulty of enforcing foreign export prohibitions since a detailed examination of the relevant Peruvian legislation did not suggest a sufficient basis for proving illegal export.

Greek Orthodox Church v Goldberg *(1989)*

The case of the *Autocephalos Greek Orthodox Church v Goldberg*[161] concerned a mosaic from the sixth century apse of a church located at Kanakaria in northern Cyprus which was looted from the church sometime between 1976[162] and 1979 when the theft of the mosaics was reported to the authorities of the Republic of Cyprus. The mosaics were shipped in 1988 from Munich (to where they had been smuggled from Cyprus) to Geneva Airport where they did not pass through Swiss customs but remained in the airport's free-port area. The mosaics were then bought by an American art dealer, Peg Goldberg, in 1988 for $1,080,000. A suit for the return of the mosaics was initiated in the Indianapolis District Court in 1988 by the Greek Orthodox Church of Cyprus and the Government of the Republic of Cyprus.

Since the agreement for the sale of the mosaics had been concluded within the free-port area of Geneva airport, this led to a debate in the District Court as to whether to apply the substantive rules of Swiss law or the Indiana State law to

[159] *Government of Peru v Benjamin Johnson et al*, 720 F Supp 810 (US Dist Cal 1989); decision affirmed by the Court of Appeals in unreported decision at 1992 *US App LEXIS* at 10385.

[160] Ibid.

[161] *Autocephalos Greek Orthodox Church v Goldberg* (1989) (n 145).

[162] When the church had finally been evacuated by the priest after the Turkish landings and subsequent occupation of the North of the island in 1974.

the case. If the court had chosen to apply Swiss law to the case, this would have been on the grounds of Switzerland as the place where the object was located at the time of transfer and by applying the *lex situs* rule (see above). The choice of Indiana State law was made on the grounds that Indiana was the place with the 'most significant relationship' with the case given that the mosaics had never actually passed through Swiss customs. The court decided that Swiss law had 'an insignificant relationship' to the case while Indiana law 'had greater contact and a more significant relationship' to the suit. Swiss law might have looked more favourably on Goldberg as a 'good faith' purchaser of the mosaic, but the Court's decision in favour of the plaintiff in this matter (based on Indiana law) was quite uncompromising as set out by Judge Noland in his summary of the case:

> A thief obtains not title or right to possession of stolen items. Therefore a thief cannot pass any right of ownership of stolen items to subsequent purchasers. Because the mosaics were stolen from the rightful owner, the Church of Cyprus, Goldberg never obtained the right to possession of the mosaics.

The question as to whether the action should be time-barred was also an important issue in this case: Under Indiana law, a case is time-barred under the statute of limitations once six years have elapsed since the cause of the action has accrued. Goldberg argued that the time from which the statute of limitations should be seen to accrue was 1979 (when the Government of the Republic of Cyprus was first aware of the theft) while the plaintiffs argued that it should be 1988 which was the first time they were aware of the *location of the mosaics* after learning of their theft. This issue was decided in favour of the plaintiffs and the case was allowed under the discovery rule whereby the statute of limitations runs from the moment when the loss was or should have been discovered and before which the plaintiff could not have known there was cause for action. The question of the legal standing (*locus standi*) of a potential party was also raised in relation to the attempt by the Turkish Republic of North Cyprus (TRNC) to intervene as a plaintiff for recovery of the mosaics. The TRNC's motion to intervene in May 1989 was not admitted since it was not recognized by the US Government. The TRNC then attempted to raise an amicus curiae brief, but this was also denied. The standing of the Government of the Republic of Cyprus was also considered and it was accepted as having 'a recognized and legally cognizable interest' in the mosaics as a part of the 'cultural, religious and artistic heritage of Cyprus'.[163] Where a foreign State claims illegally exported or stolen cultural property, its standing has traditionally proved to be a problem when the claim is based on its own public law: Byrne-Sutton[164] notes in this case, however, that the District Court had no difficulty in recognizing the standing of the Republic of Cyprus to claim cultural property on the basis of its own domestic laws.

[163] The issue here was not recognition of the Government of Cyprus but whether its interest in the case was sufficient to give it standing in the case.

[164] Byrne-Sutton, 'A Confirmation of the Difficulty in Acquiring Good Title' (n 148).

Thus in their treatment of the issues of the choice of law to be applied and the application of the statute of limitations rules, the decisions taken in the *Goldberg* case were in favour of the plaintiffs suing for the return of stolen items. This and the recognition of a foreign government's standing provided a favourable precedent for the Turkish Government's civil suit for the return of the Lydian treasure described below. It is worth noting that an art expert[165] called for the plaintiffs in the *Goldberg* case described the use of legal means for the retrieval of stolen or illegally excavated antiquities as: 'consistent with what is happening in the art world today [where] the goal is to stifle the trade at the point of destination'. Bourloyannis and Morris[166] saw the importance of the *Goldberg* decision as even more significant in that it offered 'an effective judicial remedy to foreign governments seeking to recover stolen property'.

Republic of Turkey v the Metropolitan Museum *(1987–1990)*

This case[167] concerned a hoard of over 360 classical Greek artefacts of the Lydian culture, mostly gold and silver jewellery and vessels and a wall fresco, which the Turkish Government claimed to have been illegally excavated in the Ushak region of southwest Turkey during the 1960s and illegally smuggled out of the country in 1966. The Metropolitan Museum ('the Met') bought this hoard and included some objects from the collection in exhibitions in 1970 and 1975. In 1984, it held another exhibition displaying a wider range of 55 items from the collection which appeared in the museum's summer catalogue. After these items had been identified from the catalogue, the Turkish ambassador to Washington made a formal demand in 1986 to the Met for the return of the items. This was refused and, in May 1987, the Turkish Government filed a complaint in the New York District Court against the Met, claiming that 'the plaintiff is the legal owner and is entitled to immediate possession of the Lydian Antiquities'. It was also asserted that the Met had acted in bad faith when it bought the objects and that the museum had hidden the illicit origin of the items through various acts of concealment. Under the provisions of the Turkish antiquities legislation in force in 1966, both the unauthorized excavation of the artefacts and their exportation to the US were in contravention of Turkish law.[168] This law also provided for the blanket ownership by the Turkish Government of all antiquities found within Turkey.

[165] Dr Gary Vikan in *Republic of Turkey v Metropolitan Museum of Art*, case citation at n 144, at p 1389.

[166] M-Christiane Bourloyannis and Virginia Morris, 'Cultural Property—Recovery of Stolen Art Works—Choice of Law—Recognition of Governments', *American Journal of International Law*, vol 86 (1992): p 128.

[167] *Republic of Turkey v Metropolitan Museum of Art*, 762 F Supp 44 (SDNY 1990) (denying motion to dismiss); case settled in an out of court agreement on 23 September 1993. For more on this case, see Kaye and Main, 'The Saga of the Lydian Hoard Antiquities' (n 144).

[168] Turkish Antiquities Law of 1906. Similar provisions are included in the legislation currently in force. For more on this, see: Janet Blake, 'Turkey' (n 25).

These provisions formed the basis of the action initiated in 1987 by the Turkish Government's lawyers against the Met for the return to Turkey of the hoard.

In this case, statute of limitation rules were invoked which, under the rules of the New York District Courts, required that an action to recover chattels be brought within three years of the time at which the action accrues. The defence argument was based on the assertion that the Turkish Government had had sufficient information in 1973 to demand the return of the Lydian hoard but had failed to act on this. Thus they argued that the action had accrued in 1973 and so the case in 1988 would have been time-barred under the three-year rule.[169] Significantly, Judge Broderick ruled that the defendant's claims of an unnecessary delay did not amount to a defence based on the statute of limitations rules.[170] The question as to whether the Met had been a good faith buyer when it acquired the artefacts was also raised. The defence introduced a motion challenging the plaintiff's assertion that it had purchased the items in bad faith. Judge Broderick denied this motion on the grounds that 'genuine issues of material fact exist' as to whether the defendant was a good faith purchaser. This is interesting in view of the fact that the Met is a major US cultural institution and would be expected to apply the highest standards in its acquisition policy.

Had the case proceeded to judgment, a decision in favour of the Republic of Turkey was a reasonably likely outcome. Such a decision would have further strengthened the influence of the *Goldberg* case on similar US cases. This is particularly true since the Lydian artefacts had been stolen after illegal excavation during the 1960s without the items ever having been reduced to possession by the Turkish authorities before their illegal export from Turkey. It is of no little significance that the defendant in this case was a prestigious American museum and the holder of a large collection of antiquities some, no doubt, of similarly dubious provenance.[171] A decision against the Met in this case could have created a potentially dangerous precedent for all museums in the US (and, possibly, beyond) with important collections of antiquities that would encourage other States to attempt to sue for the return of items in museum collections they believed to have been stolen. These issues were no doubt a strong influence on the decision of the Met's trustees to enter negotiations with Turkish Government officials in December 1992 over reaching an out of court settlement to the dispute. An agreement was finally signed on 23 September 1993 between the Turkish Government and the Metropolitan Museum for the return of the hoard to Turkey. The settlement reached also contained clauses concerning the exchange of professional expertise

[169] S Bibas, 'The Case against Statutes of Limitations for Stolen Art', *International Journal of Cultural Property*, vol 5 (1996): pp 73–110.

[170] The decision in the case of *Solomon R Guggenheim Foundation v Lubell*, 567 NYS 2d 623 (1991) [United States]. In this case, the Court of Appeal reversed the lower Court's decision that the case had been dismissed as time-barred was referred to here. Crucial to this decision was whether the Foundation's attempts to locate its stolen property had been sufficiently diligent to prevent the case being time-barred.

[171] A fact true of any such major museum with a large collection acquired over a long period of time.

as well as collections under future loan arrangements. The return of the hoard was completed on 22 October 1993 when all the items subject to the agreement arrived in Ankara, comprising six crates containing mural frescoes, gold and silver jewellery, and other artefacts. This success required a six-year court battle by the Turkish authorities and involved enormous costs but has clearly been the catalyst for the subsequent return of other illicit Turkish antiquities (mainly from the US) without the need for litigation.[172]

Turkey v OKS Partners *(1989)*

The subject of this case was a collection of over 2,000 silver fifth century BC Greek coins which had been illicitly excavated at Elmalı (near Antalya) in 1984 and illegally exported to Germany.[173] Over 1,700 coins, representing the bulk of the collection, were sold to US-based dealers called OKS Partners in 1984 for $2.7 million. Turkey filed a suit for their restitution in the Massachusetts District Court against OKS Partners in 1989 when requests for their return had been denied.[174] It claimed that the coins had been illegally removed from the country by persons other than the defendants, OKS Partners, who had later purchased them with knowledge of their illegal character.

The defendants initially moved to dismiss the case on four motions, including that Turkey did not have requisite ownership interest to maintain its claims and that the case should be time-barred under the Massachusetts statute of limitations. In the third hearing of the case which was decided on 8 June 1994, the defendants moved for summary judgment on the ground that the plaintiff's claims were barred by the statute of limitations rules. In deciding this, the 'discovery rule' was applied under which Turkey only had to show that it had initiated the case within three years of the time at which it knew (or reasonably should have known) of the existence of the coins in the possession of the defendants. Although the judge conceded that the publicity surrounding the defendants' acquisition and display of the coins 'strongly suggests that a diligent government should have learned of the defendants' possession', this was not sufficient for a summary judgment based on the statute of limitations. The defendants also moved for summary judgment on the question as to whether Turkey had a sufficient proprietary interest in the Elmalı hoard to give it standing to sue in this case. They argued that the 1983 Antiquities Act had changed the meaning of the phrase 'state ownership'

[172] For more on this, see: Blake, 'Turkey' (n 25).

[173] *Republic of Turkey v OKS Partners*, 797 F Supp 64 (D Mass 1992) (denying motion to dismiss), *discovery motion granted in part and denied in part*, 146 FRD 24 (D Mass 1993), *summary judgment denied*, No 89-CV-2061, 1994 US Dist LEXIS 17032 (D Mass June 1994), *summary judgment on different claims denied*, No 89-CV-3061-RGS, 1998 US Dist LEXIS 23526 (D Mass Jan 23, 1998). The case was settled in 1999. Case described in Acar and Kaylan, 'The Turkish Connexion' at pp 130–7 (n 14).

[174] J Eyster, 'United States v Pre-Columbian Artifacts and the Republic of Guatemala: Expansion of the National Stolen Property Act in its Application to Illegally Exported Cultural Property', *International Journal of Cultural Property*, vol 5, no 1 (1996): pp 185–92 at p 186.

of antiquities as used in the 1906 and 1973 versions of the law to a lesser interest of 'having the property of state ownership'. Experts for Turkey testified that the change in wording in the 1983 Act did not signify any change in meaning and the judge accepted that Turkey had an unconditional right of possession, based on its antiquities legislation, from the moment of the discovery of the antiquities.[175] On this basis, the judge ruled that Turkey did have a sufficient proprietary interest in the hoard through its absolute right of immediate possession to maintain all the claims contained in its complaint. Thus, on both counts, the defendants' motions for summary judgment were denied.

The Iran v Wolfcarius Case *(1981–2011)*[176]

This case concerned certain Iranian antiquities that were exported from Iran in 1965 by Mme Wolfcarius, the widow of Dr Maleki the private physician of the late Shah of Iran without the required export licence. She had acquired this very valuable collection of 349 ceramics and one bronze (dating from 1300 to 800 BC) from the necropolis of Khurvin, either by purchasing them from local traders or through excavations that she herself organized. They had been removed from Iran without a valid export certificate which was in contravention of the antiquities law prevailing at that time.[177] A complicating factor was that they had not been subject to customs inspection since they had been removed in the baggage of a Belgian diplomat who enjoyed immunity. In November 1981, following the Islamic Revolution of 1979, Mme Wolfcarius sought to retrieve them from the University of Ghent Museum where they had been deposited in 1971 because she feared an attempt at their retrieval by the new Iranian Government. After two years of negotiation with the Belgian Government (regarded by them as implicated in the actions of its diplomat in 1965), the Iranian Government initiated an action in Belgium in July 1982 for the return of the items which it claimed were contraband and therefore forfeit. Notably, the Iranian Government did not seek at that time to claim title of the collection, but simply its return to Iran. It was decided to hear both cases together.

On 4 August 1982, the judge in this initial case refused both the demand for return of the items made by the Islamic Republic of Iran and the demand by Mme Wolfcarius for the return of the items to her possession. In 1989, Mme Wolfcarius initiated an appeal against this decision. In 1991, Iran itself lodged an appeal in which it introduced, for the first time, a claim of ownership of the collection in addition to the demand for the re-exportation of the items to Iran. In a 2004 hearing of the case,[178] Mme Wolfcarius' daughter and heir Mme Dutreix requested,

[175] Under Art 5 of the 1983 Turkish Law No 2863 for the Conservation of Cultural and Natural Property (as amended in 2009), archaeological finds must be presented to the Turkish Minister of Culture or a State museum for possible purchase; unreported objects become the property of the State, their finders criminally liable for failing to deliver them to the appropriate authorities.

[176] Case report of the Tribunal de 1re Instance de Bruxelles, R.G. o.114.084.

[177] Law of 3 November 1930, Art 36.

[178] The court had decided to hear both cases simultaneously.

inter alia, that the court reject Iran's claim to be the owner of the objects and its demand for re-export to Iran. She also attempted to have the Iranian claim proscribed on the grounds of a time bar since the items had been acquired during the period 1950–1954.[179] With regard to Iran's claim of ownership, the court noted that the previous case had been limited simply to a demand for the re-export (ie return) of the items and so it could not rule on this matter.

The final ruling on the case is from 2011[180] in which the court ruled that Iran's demand for re-export of the items would be prevented by Belgian private international law since it was based on an Iranian export law, ie a public and penal regulation.[181] The court also addressed the question of ownership of the collection through examination of the relevant Iranian law on the basis of the rule that the applicable law is that of the State in whose territory the items were situated at the time of the acts and/or facts invoked as the basis for acquisition. The Iranian Antiquities Law of 3 November 1930 was examined in detail by the court as the law applicable at the time: Based on this, it considered the facts of the acquisition of the collection by Mme Wolfcarius. She was found to have acted with the necessary excavation permit, to have informed the Iranian authorities of her acquisition of other objects from Khurvin and to have acted in good faith by presenting to the relevant authorities some of the items she had discovered at Khurvin and that they showed no interest in seizing any of the other objects. In view of the above facts, the court did not regard her failure to follow the export regulations as a justification for returning them to Iran.[182] Moreover, the sanction provided by the applicable Iranian law was confiscation of the items and, thus, not a basis for their re-export to Iran. Since the ownership of Mme Wolfcarius was not in doubt, the collection did not form part of Iran's cultural heritage.

The final plank of Iran's case was based on the requirement for international cooperation for the protection of illegally acquired and exported cultural heritage in view of the fact that the collection had been removed from Iran among the possessions of a Belgian diplomat. This, Iran argued, was a breach of diplomatic immunity. However, the court did not accept that the requirement of international cooperation would require restitution of the objects to Iran on the grounds of an abuse of the rules of diplomatic immunity. In relation to existing international law, the court noted that the 1970 Convention of UNESCO was not directly applicable in the internal law of contracting Parties (Belgium did not become a Party until 2009) and that the UNIDROIT Convention of 1995 also did not apply since Belgium was not a Party.

[179] This would have barred a case based on ownership since it would need to have been initiated before 1984 under Art 2262 of the Belgian Civil Code that sets the time period at 30 years. Iran counterclaimed that, on its initiation of the 1982 suit, the time bar proscription would have been interrupted but, since this was just a demand for return of the items and not a claim for ownership (as made in 1991) the court ruled that it did not materially affect the proscription.

[180] Cour d'Appel de Bruxelles, 4eme Chambre—R.G. No. 2002/AR/1993 of 20 April 2011.

[181] On the basis of the principle of extra-territoriality.

[182] As additional support for this view, the court noted that the applicable rule for time barring the case (regarding export) under Iranian law was 15 years which would, therefore, have become active in 1979, ie before the case initiated in 1982.

Iran v Barakat Galleries *(2006–2008)*[183]

In this case, the Government of the Islamic Republic of Iran sued the London-based Barakat Galleries seeking the restitution of a collection of antiquities (18 carved jars, bowls, and cups) dating from between 3000 to 2000 BC and which it alleged had originated from recent clandestine excavations conducted in the Jiroft region of Southeast Iran and illegally exported between 2000 and 2004. The case was of significance in view of the Court of Appeals decision which overturned the trial court decision made in 2007 to dismiss the claim (on the ground that Iran had not established its ownership of the collection under Iranian laws). The Iranian Government initially demanded the restitution of the objects, claiming that they had recently been unlawfully excavated in the Jiroft region of Iran and, in 2007, sued for their return on the grounds that the antiquities had been stolen since they had been taken in violation of its national ownership law that vests ownership of all antiquities in the State. This claim was dismissed by the High Court of London on the ground that Iran had not established its ownership of the Jiroft collection under Iranian laws and, consequently, did not have title to claim their theft. On appeal, the Court of Appeal accepted in late 2007 that the relevant Iranian legislation was sufficiently clear to vest ownership title and gave an immediate right of possession of the artefacts to the Iranian State. In 2008, the House of Lords rejected Barakat's application to appeal the Court of Appeals decision.

Certain specific issues involved in this case are worth noting. First, the courts accepted that the Iranian law was the applicable law (under the *lex situs* rule) to apply to questions concerning the acquisition and transfer of title to the antiquities; it was also assumed to be correct for the purpose of the trial that the antiquities originated from Iran. This, as we have seen, is important since proving provenance can frequently prove a stumbling block for claimant States in foreign courts. Barakat asserted that it had purchased the objects at auction or from other dealers in England, France, Germany, and Switzerland and that these jurisdictions have given it good title to them.[184] Here, the decision to apply the Iranian legislation to the case was crucial. Once Iranian law had been chosen for the case, Iran was required to prove that it had acquired title to the artefacts under Iranian law and how they had done so. If they could satisfy the court on this point, they then had to persuade it to recognize and/or enforce that title. This latter issue goes back to the problem of extra-territoriality and the traditional reluctance of the English courts (as in the *Ortiz* case) to entertain legal actions based on foreign penal, revenue, or other public laws.

This Court of Appeal decision was a landmark one for the English courts since the Court affirmed that the Iranian claim should not be excluded on the ground

[183] *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2009] QB 22; [2007] EWCA Civ 1374. This case is described in detail by: Alessandro Chechi, Raphael Contel, and Marc-André Renold, 'Case Jiroft Collection—Iran v. The Barakat Galleries Ltd.', Platform ArThemis, Art-Law Centre, University of Geneva, accessed 30 September 2014, <http://unige.ch/art-adr>.

[184] *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd.* [2007] EWHC 705 QB, paras 2, 10.

of the principle of extra-territoriality.[185] Moreover, the Court expressed the view that allowing such claims by a State to recover its national heritage might be regarded as in keeping with public policy.[186] In this way, the court affirmed that it is British public policy to recognize the ownership claim of foreign nations to antiquities that belong to their patrimony. This is important since it established a clear precedent for source countries to bring legal claims in English courts on the basis of violations of domestic patrimony laws when art objects appear for sale in the United Kingdom. As Chechi and his colleagues note, '[t]he central legal issue at stake in the instant case was the problem of the recognition of foreign heritage laws' and the position taken by the English courts in this case would provide a source of optimism for other would-be claimant States. A further, very significant, position taken by the Court was the approach it took to statutory interpretation in which it gave a clear precedence to those concerning antiquities: 'statutes should be given a purposive interpretation and special provisions dealing with antiquities take precedence over general provisions'.[187] This decision brings the English courts closer into line with the US courts which have recognized the ownership title of foreign States to clandestinely excavated cultural materials, even where States never had possession.

Assessing the effectiveness of litigation

The outcome of the *Turkey v The Met* case has demonstrated the potential deterrent value of litigation and that major museums are very keen to avoid allowing precedents to be set that weaken their claim on disputed artefacts. As Boylan has pointed out with regard to some disputed silver objects of Roman origins known as the 'Sevso Hoard':

> It seems unthinkable that those with ultimate legal responsibility for the financial assets of museums would be prepared to risk millions of trust funds [to buy an antiquity of dubious provenance]... If any are tempted for the moment, the sight of the New York's Metropolitan Museum emptying its showcases and strong-room of the so-called Lyrian (*sic*) hoard of gold in readiness for its return to Turkey after more than a decade of drip by drip damaging revelations about the legality of its excavation and export to the Metropolitan should be enough to stiffen their ethical resolve.[188]

[185] The principle of extra-territoriality has hitherto prevented domestic courts in England from entertaining legal actions based on foreign penal, revenue, or other public laws. *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWHC 705 QB, paras 98 ff.

[186] It stated at *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWHC 705 QB, paras 154–5 'There are positive reasons of policy why a claim by a State to recover antiquities which form part of its national heritage... should not be shut out... Conversely,... it is certainly contrary to public policy for such claims to be shut out... There is international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiquities.'

[187] *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374, para 54.

[188] Patrick Boylan, 'Treasure Trove with Strings Attached', *The Independent*, 9 November 1993.

The readiness of Turkey and other source States to undertake such litigation has certainly put pressure on the market—both buyers and dealers—and has been a significant factor in raising the profile of the issue of trafficking in antiquities. As has been noted before, the profile of trafficking in cultural objects means that it is important to put pressure on destination markets. International litigation is one means of doing this. We can see its effect in the return in 2011 to Turkey by the Boston Museum of Fine Arts (MFA) of the top half of the Weary Heracles statue which it had acquired in 1982; the bust is now reunited with its lower half at the Antalya Museum.[189] A historic Roman ring, dating from 161–169 AD, which is thought to have been taken from an archaeological dig at Ephesus in Turkey and illegally imported into the UK was also returned, having been seized by HM Revenue and Customs when it was taken to Derby Museum for valuation.[190] Major auction houses are also coming under similar pressures which reinforce the terms of professional codes of practice requiring them to ascertain the provenance of an item before accepting it for sale.[191] The withdrawal from sale by Sothebys (New York) in December 1993 of the torso of a *kouros* Greek statue from *c.*500 BC after Turkey claimed it had been stolen bears witness to this attitude.

However, the prohibitive nature of the costs of such cases[192] means that they can only be one part of a wider strategy by source States. However, the huge costs of bringing such cases to court are not the only obstacle to be faced by any government seeking the return of antiquities by this means. Moreover, as we have seen, there are a number of legal hurdles facing litigating States (or individuals), including the difficulty in proving provenance or antiquities where examples can be found in several countries (eg those from the Greek, Roman, and pre-Colombian civilizations).[193] The difficulties mean that non-litigious methods of recovery may often be more effective and the advantages of avoiding a confrontational situation are undoubted.[194] However, the two approaches must be seen as related in so far as the threat of litigation can be a necessary element in putting pressure on

[189] 'Weary Herakles Bust to be Returned by US to Turkey', *The Times*, 22 July 2011.

[190] 'Roman ring handed back to Turkey', *VOANews*, 22 May 2007. See, more generally: Norman E Palmer, 'Sending Them Home: Some Observations on the Relocation of Cultural Objects from UK Museum Collections', *Art, Antiquity and Law*, vol 5 (2000): pp 343–54. This case suggests also that the museum acted according to ethical codes for museums.

[191] O'Keefe, *Feasibility Study of an International Code of Ethics for Dealers in Cultural Property* (n 40).

[192] For example, the annual budget of the Turkish Department of Antiquities to carry out official Turkish excavations was 20 billion Turkish Liras (about 600,000 DM) in 1995 while a case such as *Turkey v the Met* costs several million dollars to pursue.

[193] The decision by a jury in New York to dismiss the claims of both Hungary and Croatia to the 'Sevso Hoard' of 14 silver late-Roman objects that had been purchased by Lord Northampton. It may be very difficult in such cases for a State to prove that illegally excavated items originated on its territory: initially, Lebanon had also been a claimant. Seven pieces of late-Roman silver and a copper cauldron were eventually returned to Hungary in March 2014, after protracted negotiations. For more on this case, see: Boylan, 'Treasure trove with strings attached' (n 188).

[194] Coggins, 'A Licit International Trade in Ancient Art' at p 73 (n 28). See also: Guido Carducci, 'The Peaceful Settlement of Disputes and Cultural Property', *ICOM News, 'Mediation'*, vol 59, no 3 (2006): p 8; and Isabelle Fellrath Gazzini, *Cultural Property Disputes: the Role of Arbitration in Resolving Non-contractual Disputes* (New York: Transnational Publishers, 2004).

collectors and museums to return items of dubious provenance. The voluntary return of stolen and illegally exported artefacts by museum institutions and private collectors is an important element in fostering an environment within which loan agreements in general are arranged, facilitating the legitimate movement of antiquities and other cultural materials. This type of settlement may point the way forward both for governments seeking the return of stolen antiquities as well as for the institutions which often hold these items. It allows for an accommodation to be reached which avoids the huge costs of a lengthy civil suit (which may be prohibitive for a developing country) and a face-saving formula for the institution concerned which will not deprive it totally of the collection concerned (or similar items) owing to the loan arrangements involved. At the same time, major collecting institutions will be wary of entering into too many such agreements for such reasons as fears of non-return of the items on loan, issues of security, complicated insurance arrangements etc. For this reason, the whole area of the loan of cultural objects needs to be much better developed and an agreed international framework for this put in place.[195]

Diplomatic cooperation between governments can also be effective in securing return of items without recourse to law. Greenfield[196] gives several examples, many of which are from museums, and include: the return of the Afo-A-Kom (a culturally important wooden carving of the Kom people) to Cameroon from the US in 1973; the return to Turkey in 1987 by the Voderasiatisches Museum (Berlin) of over 7,000 cuneiform tablets which had lain in a basement for 70 years and were a historical record of the Hittite Empire from 1700–1200 BC; the return to Turkey in 1982 by a Swiss private collector of a Hellenistic bronze jug that had been stolen from Ephesus Museum; and the return in 1982 by the UK to Kenya of the skull of 'proconsul africanus' dating from approximately the second millennium BC. More recently, the Minister of Culture and Tourism of Turkey stated that in 2012 over 4,000 artefacts had been returned to Turkey from world museums and collections in the ten-year period since 2002.[197] A potentially fruitful, non-adversarial tool for resolving inter-state disputes over cultural property is that of arbitration which is presented as an option in the 1995 UNIDROIT Convention. Although lacking the detail of similar clauses in environmental treaties, for example, this is a 'civilised method of settling disputes'[198] and has a

[195] For more on this important question, see: Norman Palmer, *Art Loans* (London: Kluwer Law International and International Bar Association, 1997). In April 2014, the Cultural Heritage Committee of the International Law Association adopted in Washington a draft Convention on Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purposes which aims, in part, to an environment within which such temporary loans would be encouraged.

[196] Greenfield, *The Return of Cultural Treasures* (n 31).

[197] Dorian Jones, 'Turkey lobbies museums around world to return artefacts', *VOANews*, 3 September 2012. He quotes Nezih Basgelen, the editor of a leading Turkish archaeological magazine: 'We have some lists…for Germany, United Kingdom, United States, for France and maybe Austria. More than a thousand—thousands of pieces, some ceramic material…some of them coins. Many marble things, big objects—sarcophagus, and big statues…'

[198] Shyllon, 'The Recovery of Cultural Objects by African States' (n 10). The relevant article of the UNIDROIT Convention is Art 8(2).

number of advantages.[199] First, an arbitration body differs from a domestic court in that it is not attached to any specific State or jurisdiction. Second, the methods used to appoint arbiters could allow for the selection of experts in a rather complex and little-known area of law. Third, arbitration processes are usually designed for speed and ease of application (unlike court procedures) and would be considerably less costly than undertaking private litigation in a foreign court. Given that arbitration requires the consent of the parties, it would also be less likely to face problems of enforcement of its binding decisions than a foreign court might. In recognition of the potential value of arbitration as an approach to cultural property disputes, UNESCO's General Conference added mediation and conciliation to the mandate of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (Amended Article 4 of its Statutes).[200] It should be noted, however, that the outcome of this mediation and conciliation process is not binding on the Member States concerned.

In conclusion, it should be remembered that the market in antiquities represents an important source of earnings for market States such as the UK which hosts large auction houses and all the ancillary services which operate alongside the market.[201] Although the market has accepted the principle that it should not deal in artefacts known to be illicit,[202] dealers and auction houses remain prepared to deal in items whose provenance is not known or even dubious. The secrecy surrounding the acquisition and sale by auction houses of antiquities and works of art is a real problem for the enforcement of ethical codes in this area. The need for disclosure both by auction houses and museum institutions over the sale and acquisition of antiquities is without doubt an important issue in providing for a more transparent and regulated market.[203] The potential dangers of such secrecy over the provenance of items for sale even by the large auction houses are well illustrated by the difficulties faced by Sothebys in 1997 over allegedly illegal dealings by staff in its Italian office.[204]

The actions of Turkey and other States in forcing institutional and private buyers of stolen antiquities to face litigation for restitution have, however, been of immense importance in creating a climate in which the market and market States are ready to consider greater cooperation with source States in controlling the problem. The timing of the 1995 UNIDROIT Convention in the wake of some major civil suits of this kind can be interpreted as evidence of this shift of policy. It signals the recognition that a workable framework for the restitution and return

[199] Set out in E Sidorsky, 'The 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects: The Role of International Arbitration', *International Journal of Cultural Property*, vol 5 (1996): pp 19–35 at pp 33–4.

[200] 33 C/Resolution 44 adopted at its 33rd session (Paris, October 2005).

[201] O'Keefe and Prott, *Law and the Cultural Heritage* at pp 539–47 (n 22).

[202] O'Keefe, *Feasibility Study of an International Code of Ethics for Dealers in Cultural Property* (n 40).

[203] Coggins, 'A Licit International Trade in Ancient Art' at pp 70–3 (n 28).

[204] Jonathan Moyes, 'Art dealers fight to save tarnished image', *The Independent*, 7 February 1997.

of stolen and illegally exported cultural objects, including through litigation, is needed. The decade from 1985 to 1995 was a significant one in terms of the readiness of certain source States to sue for the restitution of stolen antiquities and for the success of Turkey following *Turkey v the Met* and the Republic of Cyprus in *Goldberg*. This has been a necessary stage to pass through in forcing private and institutional buyers as well as dealers to reconsider policies towards acquisition and retention of illicit artefacts. However, international litigation for restitution and return of antiquities is not in itself a practical answer in the majority of cases and will only ever be appropriate to only a few, high-profile cases. Not an end in itself, it has been an important catalyst in pushing the argument forward. In seeking to capitalize on this, it is now incumbent on market and source States to consider ways in which a balance can be found between the competing interests in this complex area.

3

Cultural Heritage Located Underwater

Introduction—What is Underwater Cultural Heritage?

The specific focus of this chapter is limited to those underwater archaeological sites and other remains which are situated wholly or partly beneath the sea. In a groundbreaking 1978 Council of Europe report on the underwater cultural heritage ('the Roper Report'), Blackman[1] set out the widest possible definition of the 'underwater cultural heritage' which includes heritage situated in lakes, rivers, and other inland waters as well as that only partially submerged in water (in tidal waters). There are, of course, strong arguments for including *all* sites and elements of the heritage located underwater in a study of the protection of cultural heritage since there are sites which may be in both inland waters and the territorial sea (in a river mouth, for example). Moreover, it is also true that the excavation of a crannog site in a Scottish loch or a harbour works off the North African coast present certain environmental problems common to all sites located underwater which might suggest that it makes sense to treat all underwater sites in one legislative text. However, to take the view that all underwater sites should be treated together since they share the same environmental circumstances is more a scientific judgment than a legal one.

Since this book is primarily concerned with the legal protection of cultural heritage, it is appropriate to treat marine cultural heritage as a separate case from that located in inland waters since the legal context governing it is so specific and since that located in inland waters is essentially covered by the same protective regime as other sites and artefacts found on land. From a purely legal point of view, the regime for inland water sites (all those landward of the baselines of the territorial sea) should be seen as separate from all marine sites—including those in the territorial sea—since only those sites seaward of the territorial sea baselines are affected by admiralty rules such as the laws of salvage and wreck which have such an important effect on the protection of the cultural heritage. For the purposes of this book, the underwater cultural heritage (UCH) in question is that located in the territorial sea and seaward of its boundaries, in order to examine in detail the issues peculiar to maritime areas. The advantages of choosing such a definition is twofold: it provides a clear and objective dividing line; and includes only those

[1] David J Blackman, 'Archaeological aspects', in report for the Parliamentary Assembly of the Council of Europe, *The Underwater Cultural Heritage* (Strasbourg, 1978) Doc 4200 at 29–44.

sites and objects which are situated either wholly or partly on or beneath the seabed and subsoil and this allows one to concentrate more effectively on the special legal issues of protection posed by such objects. These special problems include the laws of salvage and wreck, jurisdictional issues, and the question of title. The range of threats to this heritage includes those from construction activities (harbour dredging, land reclamation, port development) and those conducted in deeper waters (laying pipelines, deep seabed mining, and oil and gas exploration).[2] Marine pollution is also an increasing concern with regard to underwater heritage and fishing, especially trawling, also poses a serious threat. It is of some urgency to address the complex issues surrounding the protection of culturally important remains lying in territorial waters and beyond.

The simple fact of being located underwater is, in itself, a significant characteristic that impacts both on the skills and technology required for locating and recovering this heritage and on the state of preservation of these remains. Unlike sites on land, archaeological and historical remains on the seabed may well have remained undisturbed since their inundation (in the case of sunken harbours, ports, or towns) or sinking (in the case of shipwrecks) which may lead to an unusually high state of preservation. This, in turn, renders such remains peculiarly valuable in terms of the information they contain and has led to ancient shipwrecks being called 'time capsules' by marine archaeologists. However, organic materials such as wood preserved for several hundred or even thousand years underwater are extremely fragile and will be very quickly destroyed if they are not carefully handled and conserved when lifted out of water. Shipwreck sites make up a large proportion of the underwater (marine) cultural heritage and, in addition to their important characteristic of being 'time capsules' that have remained undisturbed and so represent an uncontaminated record of their period, they also can provide invaluable insight into ancient trading patterns and past economic relationships that land archaeological sites may not provide. As a 'cutting edge technology' ancient boats can also provide significant information on the technological development of a particular society. Apart from shipwrecks, there are also sunken cities and other areas inundated by rises in water levels and earthquakes that were previously inhabited areas of land that again represent a much better preserved and intact evidence of the societies that lived there in ancient times. The Bering Strait, that was the land bridge across which nomadic peoples from Siberia crossed to North America in ancient times (and who are now the Native American peoples), is also an important source of archaeological evidence from the prehistoric period and of these ancient migrations.[3] The great wealth of Turkey's underwater archaeological heritage, both on land and under the sea, provides a good example of the potential of this aspect of cultural heritage. In the sea off Turkey, there are archaeological and shipwreck sites ranging from prehistoric times to the Ottoman

[2] Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage', *International and Comparative Law Quarterly*, vol 51 (2002): pp 511–54.

[3] For one of the best introductions to underwater archaeology and its history, refer to: Keith Muckelroy, *Maritime Archaeology* (Cambridge University Press, 1978).

period which are important to our understanding of many of the major cultures of the ancient world. There are many important marine sites lying in Turkish waters which cover a wide spread of archaeological and historical periods and peoples, such as: the Bronze Age; classical Greek; Phoenician; Roman; Byzantine; early Islamic; and Ottoman periods. These can provide an important insight into the ancient world and economy. As Pulak and Rogers have noted:[4]

> Thousands of years of maritime history lie hidden beneath the waves of the Turkish coast. Bronze Age merchantmen, Byzantine *dromons*, and Venetian and Ottoman galleys are among the hundreds of vessel types that plied the waters around Turkey in the past.

As well as the wrecks of ancient trading vessels, warships, and other types of vessel there are other kinds of underwater remains to be found. The remains of the sunken city of Kekova, the ancient harbour works at Çeşme, and the semi-submerged city of Cnidos near Datça (which was celebrated in ancient times for its statue of Aphrodite by the Greek master Praxiteles and, later, for the silver sands shipped there for Cleopatra) are all such sites from the classical period.

In the 1950s, there had been growing interest in the Mediterranean area, in the potential for exploiting the newly developed skills and technology of SCUBA diving to search for and work on archaeological sites. Some of the earliest work on underwater sites of archaeological importance was carried out in France with the pioneering work of Cousteau and the French navy, a major reason for the relatively advanced development of the French legislation concerning marine archaeology. This early work suffered from its infancy as is illustrated by the excavation of a major Roman wreck site at the *Grand Congloué* off the Mediterranean coast of France. As a result of the inadequate plotting, recording, and documenting of this site and its finds during excavation, there is now a major academic debate as to whether there was only one Roman wreck on the site (as originally believed at the time of excavation) or in fact two wrecks, one of which had settled over the site of the other. Unfortunately, given the destructive nature of excavation work which destroys the site in order to extract information from it, and the inadequate recording of the *Grand Congloué* site, it is now impossible to resolve this dispute from the evidence that remains.[5] Such an experience shows that, in the early days of the excavation of marine sites, appropriate archaeological techniques for the excavation and recording of sites underwater had not been developed and even the need to develop them had not been sufficiently appreciated.

It is in this context that one must understand the pioneering nature of the work of George Bass and his team working in Turkey in the early 1960s. Unlike most of those previously excavating marine archaeological sites, Bass was an archaeologist trained and experienced in the field techniques developed over many decades in land archaeology who learnt to dive in order to excavate underwater. Thus he was able to apply the theory and practice of archaeological field methods to the

[4] Cemal M Pulak and E Rogers, '1993-1994 Turkish Shipwreck Surveys', *INA Quarterly*, vol 21, no 4 (1994): p 17.

[5] Jean de Plat Taylor, *Maritime Archaeology* (New York: Crowell, 1965).

underwater site his team were excavating, an approach which played a major role in pioneering the view of marine archaeology as archaeology carried out in a different environment rather than an activity carried out by often highly skilled divers with no formal archaeological training.[6] Techniques have subsequently been developed and improved but such a step was vital in the development of marine archaeology as a discipline within the broader discipline of archaeology.[7] Another excavation—of an early Bronze Age shipwreck at Cap Gelidonya (near Bodrum)[8] begun in 1961 under the direction of Bass—threw up evidence that completely revolutionized theories developed from land archaeology. It was found to have been carrying ingots of Cypriot copper and this has led scholars of Bronze Age trade in this region to reassess fundamentally their understanding of how trade routes operated in the East Mediterranean at that time.[9]

The Challenges in Protecting Marine Cultural Heritage

Threats to the cultural heritage located in marine areas are many and various. They include pollution from vessels and from oil installations that can cause damage to organic materials, accidental damage or the lifting of objects by recreational divers, illicit excavation by amateur 'archaeologists', and construction projects (building marinas, installations, undersea cables, etc). In many cases, these are not necessarily of a different order from those facing land-based cultural heritage and the responses may be similar. However, the marine archaeological heritage faces a specific range of challenges due to its location on the seabed which automatically brings it within the scope of admiralty and other laws specific to the marine environment. Within the territorial sea, the most important of these are the wreck and salvage rules (and related rules concerning finders' rights, abandonment, etc). Seawards of the territorial sea, this picture becomes much more complicated since different rules apply to different maritime zones and, in addition, the rules applied by different States within those zones may differ also depending on which Convention regime is applied.[10] As a result of this, major uncertainties

[6] For more on the discipline, refer to: A Bowens, *Underwater Archaeology: The NAS Guide to Principles and Practice* (UK: Nautical Archaeology Society, 1990).

[7] An early excavation conducted by Bass in Turkey was of a Byzantine shipwreck at Yassiada (near Bodrum) between 1961 and 1964 with the University Museum of Philadelphia. George F Bass, 'A Byzantine Shipwreck: Underwater Excavations at Yassiada, Turkey', *American Journal of Archeology*, vol 66 (1962): p 194.

[8] See, for example, George F Bass, 'The Cape Gelidonya Wreck: A Preliminary Report', *American Journal of Archeology*, vol 65 (1961): pp 267–76.

[9] '[This wreck has] settled a long-standing academic debate that touches on the very collapse of Bronze Age civilisations in the Near East and Aegean' according to George F Bass in 'After the Diving is Over', in *Underwater Archaeology*, edited by Tony L Carrell (Tucson: Arizona Society for Historical Archeology, 1990) at pp 10–12.

[10] It should always be borne in mind when considering this question that some States are Parties to the UN Convention on the Law of the Sea (Montego Bay, 1982) [1833 UNTS 3/[1994] ATS 31/21 ILM 1261 (1982)] (which has specific provision for historic and archaeological remains in the High Seas Area and in the Contiguous Zone) while others are Parties only to the 1958 Geneva

govern some issues which are fundamental to protection: the scope of territorial jurisdiction of the coastal State over archaeological remains and wreck sites on the seabed; the treatment of title to such remains; control over research activities conducted on archaeological remains (which often involve contact with the seabed); and the conduct of archaeological research as a freedom of the high seas. This situation is the strongest argument in favour of a uniform set of rules governing the protection of underwater cultural heritage, in particular that lying in waters beyond the territorial sea area.

The current state of the law of the sea (excluding the 2001 Underwater Heritage Convention of UNESCO) has compounded these difficulties by the existence of the two parallel regimes of the 1958 Geneva Conventions and the 1982 Law of the Sea Convention (LOSC). The failure of the LOSC—intended to codify existing international law of the sea as well as progressively to develop it—to create a clear and consistent regime governing archaeological remains on the seabed in whatever maritime zone further adds to this confusion. The problematic nature of the two articles of the 1982 LOSC that specifically address archaeological and historical remains (Articles 149 and 303) renders them unhelpful for resolving this situation, although they do make clear a general duty to protect UCH in maritime zones beyond coastal State jurisdiction. The LOSC regime of protection is really only of limited effect as far as the outer limits of the contiguous zone and this raised two issues: the idea of creating a form of 'cultural heritage zone' of fixed extent such as 200 miles (co-extensive with the exclusive economic zone or 'EEZ'); and the protection of archaeological remains in international waters. The idea of a fixed zone of protection is increasingly attractive from the point of view of protection and the extent of 200 miles would be the most workable by offering a sufficiently large zone since the 24 miles provided by the legal fiction in Article 303 of the LOSC does nothing to address the vulnerability of sites in deeper waters.

Since archaeological activities seaward of the outer limits of the territorial sea in a 200 mile protection zone involve interference with the seabed, there have long been strong political objections to allowing coastal States to control these activities as a form of 'creeping jurisdiction' of a quasi-territorial nature in such an extensive zone. It should be remembered that the major maritime powers (such as the UK, the US, and the Netherlands) opposed a similar proposal for what became Article 303 of the LOSC on the grounds that it would give coastal States legislative competence over the zone. Here, it is worth noting that employing other jurisdictional principles than the territorial principle, namely those of nationality and flag State jurisdiction, can be extremely effective for the protection of sites in

Conventions on the Law of the Sea which share some common rules with the 1982 regime but do not, for example, make any specific reference to cultural heritage. In addition, the adoption of UNESCO's Underwater Cultural Heritage Convention in 2001 (see more below), has introduced a new level of regulation for those States that are Parties to this treaty. If we wish to add even a further layer of complexity, international salvage rules (such as those set out in the International Maritime Organization's Salvage Convention of 1989) may also have some bearing in the case of historic wrecks.

international waters. The need to find ways to protect wrecks and other remains in international waters on the deep seabed is becoming increasingly acute as the recovery of artefacts from the *Titanic* (discussed below) has shown. There is no doubt that technology is making the location of deep water sites and the recovery of items from such sites increasingly possible. The nature of search and recovery technology which employs remotely operated robotics also means that the identification of sites and the recovery of artefacts are now possible at depths where excavation following archaeological principles would be exceptionally difficult. As we shall see, the article of the LOSC that deals with historic and archaeological remains in the Area (Article 149) is woefully inadequate to address this threat and so it has been necessary to formulate a new approach for protecting archaeological sites in the high seas Area.

An examination of various national legislative systems (accompanied by a more detailed examination of the Turkish system)[11] threw up serious gaps in protection that also exist in the territorial sea. Although primarily an issue for each State to address under its own legislative framework, there is no doubt that there is an increasing sense of a shared duty to protect this heritage: the adoption of UNESCO's 2001 Convention on Underwater Cultural Heritage underlines this sense. This comparative review also pointed to some effective approaches—both legislative and non-legislative—taken by States which could also be of use to other States which face similar conditions. The major problem areas identified include: restricted definitions of what is protected by law; the negative impact of applying salvage rules to historic wrecks; application of reward systems for reporting wrecks which lead to dispersal of the items raised; the limited value of the designation of sites as a tool of protection; and problems related to policing and enforcement. Positive aspects of the national legislation studied include: a clear definition of what is protected that includes remains and sites other than wrecks and, for wrecks, to include all those over a certain age (such as having been over 100 years underwater); the importance of creating a comprehensive inventory of known wrecks and sites, allied with a survey to discover new ones; the prohibition of the possession of any equipment which can be used for diving or salvage within designated zones (where these are operated) and its seizure as a result of breaches of protection regulations; broadening of the zones of protection to include the wider surrounding area/context; separation of ownership from control where the State may appropriate and conserve protected property, even that located on the seabed; the provision of archaeological diving parks where divers may access wrecks within a controlled environment, often established under National Parks legislation; a degree of flexibility in any permit system allowing for strictly controlled 'recreational' diving permits on sites judged not to be of great significance;

[11] Janet Blake, 'A Study of the Protection of Underwater Archaeological Sites and Related Artefacts, with Special Reference to Turkey', PhD Thesis (unpublished) (University of Dundee, 1996) at Ch 3.

the application of a specific law for the underwater archaeological heritage, but one which is not exclusively for wrecks. Although these relate to approaches taken within domestic jurisdictions, they point to (i) the types of national measures that should be encouraged in an international treaty regime and (ii) some approaches that can also be applied directly by such a regime.

An important element of the US system (and the philosophy underpinning the US 1987 Abandoned Shipwrecks Act) is the attempt to reconcile the differing interests of archaeologists, recreational divers, and commercial salvors. Although this has had unfortunate consequences at times as the example of the *Whydah* wreck demonstrates,[12] it remains an important approach to apply when considering new law in order to secure the greatest possible adherence from all groups. The need to control the movement of artefacts and other movables removed from archaeological sites through illegal (or unscientific) excavation is also clear: protection is not simply a question of the protection of the site and artefacts *in situ*, but must also involve the control of illicit excavation and site disturbance by controlling the subsequent movement and disposal of the artefacts recovered. The fact that underwater remains must be brought ashore at some point provides the coastal State with the possibility of exercising control over this. In addition, an exclusion from salvage rules for all wrecks deemed to fall under the definition of 'cultural heritage' is fundamental for the protection of ancient and historic wrecks since it responds to one of the major threats to underwater sites. Allied to this is the need to provide a clear definition of the wrecks thus protected, for example by the use of a time limit (eg 100 years underwater). In addition, it is vital that the notion of abandonment for ancient and historic wrecks be clarified in order to prevent their falling within the terms of traditional salvage rules.

The Different Maritime Zones

Given the different maritime zones[13] and the different legal regimes applying to each, it is impossible to speak of the protection of the underwater cultural heritage in one single formula. This leads to very complex questions regarding the extent and nature of State jurisdiction over submarine antiquities. Before examining the various regimes for underwater archaeology under the 1958 and 1982 Conventions, it is important to understand the extent and nature of the different maritime zones at

[12] The *Whydah* was built in London in 1715 and launched in the following year, carrying goods from London to West Africa to exchange for slaves. It was captured by pirates off Hispaniola in 1717 and was then used for piracy off the Northeast coast of the US. She was wrecked off Cape Cod in the same year and the wreck was discovered in 1984 in just 4.3 m of water and 1.5 m of sand by a professional salvor, Clifford, who raised the ship's bell in 1986. The wreck was then subject to a claim by Massachusetts against Clifford's salvage company, *Commonwealth of Massachusetts v Maritime Underwater Surveys, Inc*, 403 Mass 501 (Mass Supreme Court 1988).

[13] For more on this, see: Robin R Churchill and Vaughan Lowe, *The Law of the Sea*, 2nd edn (Manchester University Press, 1988).

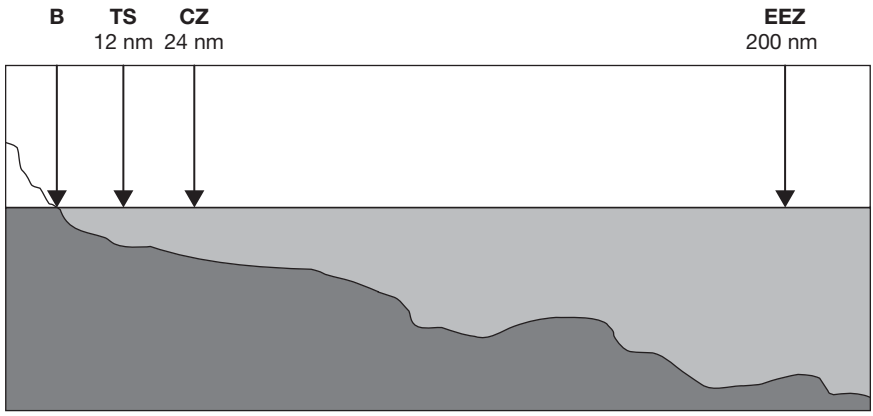

Figure 3.1 The maritime zones according to the 1982 Law of the Sea Convention regime, showing a potential extent of the continental shelf beyond the exclusive economic zone. B=baseline; TS=territorial sea; CZ=contiguous zone; EEZ=exclusive economic zone; nm=nautical mile.

play. Since the zones which the 1958 Geneva Conventions[14] refer to are not exactly the same as those of the LOSC and, as already discussed, there is no uniformity as to which convention regime pertains internationally, it is particularly important to be aware of the various zones of both regimes and how they differ.

First, one must consider the baselines from which most maritime zones are drawn. Those which are not drawn directly from baselines (such as the high seas) are still drawn in relation to zones such as the territorial sea. The extent of the territorial sea, contiguous zone, and the EEZ are measured as the distance seaward of the baseline(s) of the coastal State to which that zone belongs (see Figure 3.1). The determination of the baselines themselves is therefore obviously an important question since the position of the baseline(s) of a State will determine how far seaward its various maritime zones may extend and thus it may assert its jurisdiction and economic interests.[15] It is worth noting three useful criteria for the determination of baselines set out by Churchill and Lowe:[16] they should take geographical factors into consideration; they should be clear and precise such that two different cartographers would reach the same result; and the regime for internal waters should be more appropriate to the waters inside the baselines than the territorial sea regime.

[14] Convention on the Territorial Sea and Contiguous Zone (Geneva, 29 April 1958) [516 UNTS 205]; Convention on the High Seas (Geneva, 29 April 1958) [450 UNTS 11]; and Convention on the Continental Shelf (Geneva, 29 April 1958) [499 UNTS 311].

[15] Baselines must be drawn in accordance with Arts 3 and 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone (henceforth TSC) and Arts 5 to 14 of the 1982 LOSC which have the character of customary rules.

[16] Churchill and Lowe, *The Law of the Sea* (n 13) at p 27.

Inland waters and the territorial sea

These will be treated together since the nature of the protection afforded to sites and objects of cultural heritage located within the territorial sea is closer to that applied to cultural property within a State's land territory and inland waters than to that lying beyond the territorial sea. A State can control and regulate access to cultural heritage sites within its territorial waters as an exercise of its sovereign jurisdiction which extends to the seabed and subsoil, water column, and airspace above the territorial sea.[17] A coastal State's sovereign rights over its territorial sea, archipelagic waters, and ports allow it to control the removal of objects from the seabed or subsoil but not to interfere with traditional high sea freedoms such as innocent passage.[18] Thus, as long as this does not interfere with such freedoms, a State may choose to include the protection of the cultural heritage located in such areas in its general antiquities legislation. Many States, including Turkey, Greece, and Cyprus, follow this approach of a dual-purpose legislation. An alternative approach is taken by the UK and Australia which is to extend protection on a site-by-site basis for specific scheduled sites. It is clear from the wording of the relevant articles[19] cited that the conduct of archaeological excavation activities are precluded from the meaning of the term 'innocent passage' as set out in both the 1958 and 1982 Conventions. What remains an open question is whether related search and survey activities could be carried out by a vessel exercising its rights of innocent passage using survey techniques which do not require the vessel to stop or to interfere with the seabed, such as electronic remote sensing activities. The right of a coastal State to control access to its ports is a further form of control which it can exercise over any marine archaeological excavation since it is a lengthy business which will require access to the facilities of an adjacent port for supplies, repairs, and possibly landing finds from excavation work.

Archipelagic waters and straits used for international navigation

The 1982 LOSC first recognized archipelagic waters as a maritime zone with its own character being neither inland waters nor territorial sea,[20] ie a *sui generis* regime, similar in nature to the territorial sea with the archipelagic State exercising sovereignty over the seabed, subsoil, water column, and superadjacent airspace. The provisions granting flag States innocent passage are the same as for the territorial sea and so, for the reasons set out above, archaeological research cannot be viewed as 'innocent passage' and so falls under the jurisdiction and control of

[17] 1958 Territorial Sea Convention (TSC) Arts 1 and 2; 1982 LOSC Art 2.

[18] TSC Arts 14-20; LOSC Arts 17–28.

[19] Innocent passage does not allow a vessel to hover (as it would need to do over a site being excavated by divers) and Art 18(2) of the LOSC requires innocent passage to be 'continuous and expeditious'; Art 19 lists specific activities including 'the carrying out of research or survey activities' which would render the passage not innocent.

[20] Articles 46–54.

the archipelagic State. Where straits have high seas status then freedom of navigation applies.[21]

Contiguous zone

The coastal State's powers within the contiguous zone[22] do not extend to the seabed/subsoil but are limited to the water column solely for exercising control over infringements of customs, fiscal, immigration, and sanitary laws and laws within its territory and territorial sea. The coastal State is also allowed to punish such infringements. Since, under the provisions of the LOSC, the contiguous zone falls within the EEZ under normal rules of international law, the removal of submarine antiquities from the contiguous zone should be governed by high seas freedoms (under the 1958 Convention rules).

However, the effect of Article 303(2) of the LOSC is to create a special case whereby such artefacts are to be treated as if they were in a State's territorial waters if raised from the seabed.[23] This article attributes a presumption in favour of the coastal State that the removal of 'objects of an archaeological and historical nature' from within the contiguous zone would constitute an infringement of the laws and regulations of Article 33 governing the contiguous zone. Thus a 'legal fiction' is created whereby the removal of such items from the seabed of the contiguous zone without coastal State consent is deemed illegal. This appears to extend the coastal State's *legislative* competence over the contiguous zone for the control of items of historical and archaeological character and is an expansion of the scope of the fiscal and customs regulations, giving a scope of powers over such objects beyond those normally granted in Article 33. A robust interpretation of the effects of this legal fiction created by Article 303(2) is to view it as the establishment of an 'archaeological zone' in the contiguous zone but one which does not transform it into a full jurisdictional zone. Legal commentators are divided on this issue, but lean towards such an interpretation. The coastal State's powers to authorize or refuse the removal of archaeological materials from the contiguous zone could then lead to it imposing certain restrictions and conditions to protect such materials. This might then be seen as the de facto establishment of an archaeological zone within the 24-mile contiguous zone and the effect of Article 303(2) would seem to contradict customary international law by curtailing the freedom of recovery of articles from the seabed beyond the territorial sea.

[21] Articles 37, 38(2), and 39(1)(c) of the LOSC clearly show that the conduct of archaeological surveys cannot qualify as a legitimate exercise of the right of innocent passage. Article 40 adds weight to this by requiring prior authorization by the coastal State for any foreign vessels wishing to carry out any research or survey activities during innocent passage, including hydrographic surveys.

[22] As set out in Art 33 of the LOSC.

[23] The text of Art 303(1) and (2) reads as follows: '1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose. 2. In order to control traffic in such objects, the coastal state may, in applying article 33, *presume that* their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.' [Emphasis added]

Continental shelf

As far as marine archaeological sites and isolated objects on the continental shelf are concerned, the two crucial questions to be asked are:

1. How can one define the resources over which the coastal state has exclusive rights to exploitation and exploration; and can cultural and/or archaeological remains be included in the term 'resources'?
2. Can archaeological research activities be included under the umbrella of the oceanographic and other scientific research on the continental shelf, referred to in Articles 5(1) and 5(8) of the Continental Shelf Convention of 1958 (CSC) with which the coastal State must not interfere?

The answer to the first question is that it is clearly only 'natural resources' covered by the definitions given in both the 1958 and 1982 Conventions that would certainly exclude archaeological materials.[24] Examination of the records of UNCLOS III makes it clear that archaeological remains are not covered by the continental shelf regime and this is further established by the 1956 Commentary of the International Law Commission (ILC)[25] on the draft text for the CSC which explicitly states that the 'sovereign rights' referred to in the CSC (Article 2) does not include rights over archaeological sites:

> It is clearly understood that the rights of the coastal state do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.

Thus any attempts to include the excavation of ancient wrecks for later tourism or for commercial purposes, for example, within the definition of 'exploitation' of the natural resources of the continental shelf would be very difficult to justify. Ancient wrecks and other archaeological materials can be viewed as both cultural and economic resources of the continental shelf but not as 'natural resources' since they are, by definition, man-made. For this reason, they cannot fall within the terms of the CSC; this is true also for the LOSC since its regime of the continental shelf is directly descended from the CSC in terms of the question of the nature of the coastal State's sovereign rights.[26] Hence, the 1956 ILC Commentary cited above applies also to the interpretation of the LOSC provisions.

The case of the *Atocha*[27] is important in this context since the judgment in the case supports the view that jurisdiction under the CSC is confined to the

[24] LOSC Art 77(4); CSC Art 2.

[25] *II ILC Yearbook (1956)* at 298; see also, UN Doc A/CONF.13/L.26 24 March 1958 in *UNCLOS I Off Rec* Vol VI at 51.

[26] This is reinforced by the fact that the wording of Art 77 is identical to that of CSC Art 2 and confirms that archaeological materials would certainly be excluded from the term 'natural resources'.

[27] The case of *Treasure Salvors Inc v The Unidentified, Wrecked and Abandoned Vessel Believed to be the Nuestra Señora de Atocha* relating to the *Atocha*, a Spanish wreck subject to a commercial salvage operation by Mel Fisher off Florida which raised items worth approximately $300 million, at: 408 F Supp 907 (US, 1976); 569 F.2d. 230 (US, 1978); 621 F.2d. 1340 (US, 1980); 640 F.2d. 560 (US, 1981).

natural resources of the seabed and that archaeological finds—in this case a shipwreck—are not included. O'Connell[28] made the intriguing point in 1982 that marine archaeological remains are often encrusted in deposits which themselves might therefore be regarded as 'resources' under the terms of Article 5(8) of the CSC. Would their removal then be an interference with coastal State rights in the continental shelf? He suggests that this could be employed by legislators to control activities related to the archaeological heritage on the continental shelf by forbidding interference with the deposits themselves (such as the coral encrustation) which are a 'natural resource' of the seabed thus denying any interference with the wreck. Of course, this could apply only in certain cases and so would be of limited value, but could still provide a further degree of protection to archaeological materials in the continental shelf area.

Most States, however, will require permission to be granted for any scientific research on the continental shelf (for reasons of economic and military security) and this would include archaeological research. Article 246 of the LOSC sets out the regime for MSR activities in both the exclusive economic zone and continental shelf areas and gives the coastal State the right to withhold consent to the conduct of such activities where, for example, explosives are to be used or artificial installations or other structures are to be constructed. Both of these cases could apply in the case of the survey and excavation of shipwreck and other archaeological sites. Experience from Western Australia in the 1970s gives us examples of the use of explosives on historic wreck sites by treasure-hunters to facilitate access to the wrecks.[29] Some States, however, have sought an extension of coastal State jurisdiction over the continental shelf for purposes of protecting underwater archaeological (and historical) materials. For example, the Commonwealth Historic Shipwrecks Act (Australia) of 1976 which gives the Federal Government jurisdictional control over the Australian continental shelf for the protection of historic and ancient wrecks is the clearest example of this.

Exclusive economic zone (EEZ)

The LOSC provisions governing the exclusive economic zone (EEZ) set out in Part V at Articles 55–75 give the coastal State jurisdiction over: the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment. These provisions would appear to allow a certain degree of coastal State interference with and control of unauthorized excavations being carried out within its EEZ. It is possible that the provisions of Articles 246 and 56(b) relating to marine scientific research (the latter relating specifically to marine scientific research (MSR) in the EEZ) might be utilized in protecting an archaeological site on the seabed or in the subsoil of the EEZ. Article 246 states that coastal States: 'have the right to regulate,

[28] D P O'Connell, *The International Law of the Sea*, vol 1 (Oxford: Clarendon Press, 1982).

[29] Jeremy Green and Graham Henderson, 'Maritime Archaeology and Legislation in Western Australia', *International Journal of Nautical Archaeology*, vol 6 (1977): pp 245–8.

authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf' and this might arguably give the coastal State the possibility of controlling some survey or excavation activity within its EEZ. Such protection is limited, however, as with the continental shelf zone by the fact that MSR under the terms of the LOSC is not intended to include archaeological research and so it can only be applied if other related activities fall within the definition. Thus there is the need to find indirect forms of control of archaeological activities in the EEZ such as over the construction of artificial installations and other structures which might include diving platforms, marker buoys, or other structures necessary to archaeological search, survey, and excavation.

It is worth considering whether coastal State sovereign rights relating to 'other activities for the economic exploitation and exploration of the zone' (Article 56(b)) could include the excavation of a wreck site, for example, for commercial gain. In other words, could this terminology serve to allow the coastal State to prevent the commercial salvage of wrecks of an archaeological and/or historic importance within its EEZ on the basis of their economic value. This provision was designed to protect the rights of other States to engage in economic activities which do not involve 'natural resources', such as the harnessing of energy from wind or wave power, and it is unlikely that salvage excavation of ancient wrecks was considered by the drafting committee. However, it appears possible that commercial salvage of ancient and historic wrecks, could be included amongst those 'other activities' mentioned where there is 'economic exploitation' involved. As far as the EEZ is concerned, Churchill and Lowe[30] argue that the recovery of historic wrecks in this maritime zone (whether by archaeological method or as a commercial operation) is simply not covered by the 1982 LOSC provisions. A noteworthy example reported in the *Independent* newspaper relates to the commercial salvage of a twelfth century Chinese junk located in the Gulf of Thailand by an Australian owned vessel.[31] The Royal Thai Navy seized artefacts including more than 2,000 porcelain pots and jars from the salvors, claiming that their salvage action was illegal since it occurred within Thailand's EEZ.

High Seas

The discovery in 1985 of the wreck of the *Titanic* 500 miles off the Newfoundland coast[32] and subsequent removal of items from the site (following the failure of attempts by the US senate to prevent this by making it a salvage-free international monument) further illustrates the potential vulnerability of wrecks in deep waters. There also exists the exciting possibility of prehistoric sites lying on now-submerged land bridges such as the Bering Straits connecting North

[30] Churchill and Lowe, *The Law of the Sea* (n 13) at p 114.
[31] 'Thailand's Navy Seizes Sunken Treasure Trove', *The Independent*, 10 February 1992.
[32] See: Robert D Ballard, *The Discovery of the Titanic: Exploring the Greatest of All Ships* (London: Hodder and Stoughton, 1987).

America to Asia providing a vital insight into the migration of early peoples to the Americas.[33]

As far as conducting marine archaeological research within the high seas area (beyond the continental shelf) under the 1958 High Seas Convention (HSC) is concerned, it appears that there is nothing to prevent excavation of an archaeological site from being regarded as one of the high seas freedoms. This would have to be undertaken 'with reasonable regard to the interests of other states in their exercise of the freedom of the high seas' and must also be carried out without exercising any rights of sovereignty over the seabed.[34] The reasonableness requirement, given the complexity of excavation work in the high seas zone and the likely need to occupy the area for a lengthy period, potentially allows for control over such activities under the HSC rules. Activities conducted in this area can also be controlled by applying either the relatively weak flag State jurisdiction (the flag State of the recovery vessel involved) or the stronger nationality principle. It is worth noting here that the 2001 Underwater Heritage Convention of UNESCO (see below) applies both of these jurisdictional bases.

The rights of the original flag State to claim jurisdiction over a shipwreck in the deep seabed area is a moot point. First, there is the question as to whether any wreck can still be regarded as a 'ship', a necessary condition for the application of flag State jurisdiction. Since it is unable to navigate or otherwise function as a ship, the conclusion must be that flag State jurisdiction is not applicable in such cases. Furthermore, Strati[35] points out that 'existing public international law does not appear to recognize the priority of the flag State in relation to the removal of shipwrecks'. Recovery operations may therefore be carried out by vessels of any third State as a high seas freedom under the flag State jurisdiction of the recovery vessel. However, the excavation of a wreck with a special historical, cultural, or other importance to a particular State might conceivably be challenged by that State as contrary to its interests on the grounds of its special historical and/or cultural relationship with it. Such claims would have a rather flimsy legal basis, especially since Article 149 of the LOSC—which gives preferential rights to States of origin of archaeological remains in the Area—refers only to the *disposal* of such objects and not to their recovery. Article 149 reads as follows:

> All objects of an archaeological and historical nature found in the Area shall be preserved and 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.

There are several problems with this article which greatly weaken its force. First, it is unclear whether 'archaeological and historical' is intended to be read disjunctively (ie *either* archaeological *or* historical) or conjunctively (ie both taken

[33] D Gibbins, 'Archaeology in Deep Water—a Preliminary View', *International Journal of Nautical Archaeology*, vol 20, no 2 (1991): pp 163–8.

[34] HSC Art 2.

[35] Anastasia Strati, *The Protection of Underwater Cultural Heritage: An Emerging Objective of Contemporary Law of the Sea* (The Hague: Martinus Nijhoff, 1995) at p 222.

together) and the lack of any time limit to define what is 'archaeological' and/or 'historical' adds to the confusion. Furthermore, the word 'object' is not defined. When one considers immovable sites such as sunken cities and archaeologically significant topographical features of the seabed, such as submerged land bridges, which are not obviously covered by this definition, the inadequacy of the definition of what is protected becomes even clearer. Moreover, is the 'benefit' of mankind meant to be an economic one (as one might expect with regard to the common heritage of mankind on the deep seabed) or, as one must assume to be the drafters' intention, a cultural and educational benefit? Does the preservation referred to mean the protection of the artefacts *in situ*, along with their non-disturbance, or post-excavation conservation? Does 'disposal' involve the sale of the items or their donation to a museum and, in either case, will integrated collections be kept together or dispersed? An obvious omission is the lack of any mention of international cooperation over the identification of archaeological (and historical) remains on the seabed of the Area. This renders any protection actions responsive to their accidental discovery in the process of other activities on the seabed (such as mineral exploration and extraction), leaving the archaeological heritage of the Area extremely vulnerable to accidental as well as deliberate destruction.

There is also some confusion over the relative rights of different States of origin. A potentially complicated case would be that of an ancient trading vessel which had stopped at many ports (and so was carrying artefacts from several different countries) and then foundered in the high seas. Would the State of origin of the vessel have title to the wreck itself and the other States title to various pieces of cargo? Or would the State of origin also have preferential rights to the goods on board? Does responsibility for excavation lie with the State of origin of the vessel? If one considers a trading vessel of the early Bronze Age found in the eastern Mediterranean, the origins of which are disputed by scholars—it is believed to be of Greek, Cypriot, or Syrian origin—the question becomes plainly meaningless.[36] This confusion is confounded if we include (as does Article 149) also the rights of 'mankind' as a whole. Strati[37] noted that, previously, the common heritage of mankind (CHM) has been applied to cultural property in terms of preservation and protection where the State acts as a custodian and does not interfere with property rights. She sees the development of the CHM concept in relation to archaeological and historical objects within the LOSC as a radically new approach where a distinct international cultural heritage is established as a new sort of property to be available to all people to enjoy. However, since the phrase 'for the benefit of mankind as a whole' in Article 149 is not intended to carry the weight of the same wording in Article 140 governing the mineral exploitation activities in the Area, too direct a parallel should not be drawn.

[36] In reference to the Cap Gelidonya wreck, Bass wrote: 'Whether or not our ship was Syrian, Cypriot or Helladic, however, is still difficult to say… The pottery finds parallels from the Greek mainland to the coasts of Syria and Palestine, including Cyprus and Tarsus in between', in Bass, 'The Cape Gelidonya Wreck' (n 8) at pp 267–76.

[37] Anastasia Strati, 'A Deep Seabed Cultural Property and the Common Heritage of Mankind', *International Comparative Law Quarterly*, vol 40 (1991): pp 859–94 at p 859.

Salvage Law and Ancient or Historic Wrecks

In 1987, Fenwick gave a stark warning of the immediate and severe threat to ancient and historic wrecks from commercial salvage activities: 'One hundred years after the Californian Goldrush, an underwater goldrush is taking place.'[38] In this article, she drew out the comparison between the way in which proceeds from treasure-hunting on shipwrecks is then used to fund further non-scientific and commercially oriented exploration and excavation activities. Unfortunately, this situation remains fairly much the same today, although the adoption of UNESCO's 2001 Convention is an important step in the international community unequivocally stating that such wrecks should never be subject to commercial salvage operations. However, despite this positive development, salvage law remains a powerful element in the regime governing the treatment of wrecks of a historic and archaeological character.

One of the main reasons—although not the sole one—that ancient and historic shipwrecks are so vulnerable to destruction and deterioration is the often high value of the cargoes that they were carrying, both in monetary and cultural terms. Commercial salvors were netting large profits from historic wrecks (Mel Fisher is estimated to have made around $300 million through the salvage of the *Nuestra Senora de Atocha* off the Florida coast in 1985–6).[39] The *SS Central America* (see below), a US steamer sunk in 1857, was salvaged in 1988 and treasure with an estimated value of $1 billion was recovered, while two of 16 Spanish galleons sunk in 1553 off the Texas coast netted an estimated $1.8 billion when commercially salvaged. The *De Geldermalsen*, a Dutch East Indiaman sunk in the South China Seas while carrying the celebrated Nanking Cargo of over 160,000 pieces of Chinese porcelain and 120 gold ingots, was salvaged in 1985 and its contents sold at auction for over $15 million; one dinner service alone fetched $327,000.[40] Such commercially driven activities are essentially destructive to the heritage in question and the archaeological and/or historic evidence it contains. Moreover, when the disposal of objects raised from these wrecks is undertaken, with the maximization of profit as the main motivation (in part, in view of the enormous cost of launching such expeditions), the integrity of the find itself is threatened, not just that of the wreck and its cargo and other related artefacts. Some commercial salvors (such as Fisher) employ professional archaeologists so as to provide some legitimacy to their operation and as an attempt to gain official sanction for it.[41] However, the requirements for a salvage operation to be fast, if it is to be commercial, are wholly inimical to proper archaeological excavation and

[38] Val Fenwick, 'Editorial', *International Journal of Nautical Archaeology*, vol 16, no 1 (1987): p 1.
[39] N Gibbs, 'The Ocean Gold Rush', *Time Magazine* No 43, 25 October 1993.
[40] Gibbs, 'The Ocean Gold Rush' (n 39).
[41] H M Piper, 'Professional Problem Domains of Consulting Archaeologists: Responsibility without Authority', *International Journal of Nautical Archaeology*, vol 17 (1990): pp 211–14; R J Elia, 'The Ethics of Collaboration: Archaeologists on the Whydah Project', *Historical Archaeology*, vol 26, no 3 (1992): pp 105–17.

the role of archaeologists in such endeavours must be seriously questioned. One case that illustrates the threat posed to ancient and historic wrecks through the inappropriate application of salvage rules, as well as the importance of governments taking responsibility to prevent this, is that of the *Flor de Mar*.[42] This vessel sank off the coast of Sumatra in 1511, loaded with treasures from the Sultanate, including large quantities of gold. An Indonesian commercial salvage company discovered the wreck in 1991 and was granted a government permit to raise objects from it: in the permit no mention was made of plans to carry out an archaeological survey of the wreck or to preserve its remains. The recovered items were to be catalogued by Christies and half of the profits from their sale given to the Indonesian Government.

Salvage rules under admiralty law constitute an old and venerable institution that adequately serves the needs of commercial shipping. However, they operate in contradiction to the requirements of wrecks and objects of a cultural character located underwater. Traditionally, maritime law has rewarded the successful salvage of vessels and cargoes deemed to be 'in peril' at sea, granting salvors the exclusive rights to occupy the wreck during its salvage.[43] The concept of 'peril' is central to the definition of salvage since it is a service rendered to property (and/or life) that is endangered as a result of the vessel being incapacitated or otherwise damaged. In the case of most ancient and historic wrecks, however, the peril is usually long since over and, in fact, they have often reached a situation of equilibrium in their current seabed location that would be disturbed by any salvage operation. However, there are cases where seabed construction activities (laying submarine cables, building installations or artificial harbours, etc) may disturb the wreck and place it again 'in peril'. However, this is not an argument for the application of salvage rules to these wrecks, but rather for including archaeological impact assessment and rescue excavation where necessary to preserve as much of the information of the wreck as possible. Essentially, traditional salvage rules are incompatible with ancient and historic wrecks since they are based on the monetary value of the vessels and their cargo (and the need to preserve the life of recently damaged vessels) and do not take any account of the informational and other values contained in these wrecks.

The case of *Robinson v The Western Australia Museum*[44] (1977) concerning the *Vergulde Draeck*, a seventeenth-century Dutch shipwreck, demonstrated that courts may not always regard the question of peril as a past, and therefore irrelevant, fact for historic wrecks. In 1963, Robinson had located the wreck and raised several valuable items from it: the Museum challenged his right to conduct

[42] Clare Bolderson, 'Sultan's Shipwrecked Treasure Yields a £500 Million Mystery', *The Observer*, 24 March 1991.

[43] H C Black, *Black's Law Dictionary*, 6th edn (West Publishing Company, Minnesota, 1990). The service must be given voluntarily, the outcome should be (at least, in part) successful and the salvor(s) capable of exclusive occupation of the site during salvage operations.

[44] 51 *AJLR* (1977) 806. For more on this, see also: Patrick J O'Keefe, 'Maritime Archaeology and Salvage Laws—Some Arguments Following *Robinson v. The Western Australia Museum*', *International Journal of Nautical Archaeology*, vol 7 (1978): pp 3–7 at p 3.

salvage operations on the wreck and remove objects from it. In giving his opinion, the judge stated that, 'salvage is not limited to property that is actually in distress; it extends to recovery of property in or from a ship that has lain at the bottom of the sea for a long time'.[45] A case with a contrary outcome was that of *Simon v Taylor* (1975) concerning a German U-boat carrying a valuable cargo of mercury that had sunk off Singapore. In this case, the Singapore High Court decided that there was no obvious marine peril since the vessel had remained undisturbed on the seabed for 28 years. As a result, the divers were regarded as being motivated by commercial gain and not by any intention to salve on behalf of the vessel's owners and ruled that they were not entitled to any salvage award. The interpretation of salvage rules in *Robinson* would leave many historic wrecks in danger of commercial salvage operations without any other legislation (national or international) to counter it. Equally, although the *Simon* case had a better outcome from the viewpoint of heritage protection, the lack of consistency of approaches is concerning and suggests the need for clarification of the rules.

In order to conduct salvage operations, the salvor must have possession of the derelict, allowing them exclusive occupation of the wreck during the salvage operations. This allows the salvor to take an action against the property recovered to secure payment for the salvage. This, then, raises the important question as to whether it is possible to 'take possession' of an archaeological site (and when does the location of a historic wreck become an archaeological site?). In the *Robinson* case, the judges disagreed on this matter with Justices Mason and Barwick taking the view that possession was not a problem with an archaeological site (even if the remains were scattered), while Justice Stephen issued a dissenting opinion that, given the scattered nature of the site, Robinson was not in possession of a wreck but rather collecting from the seabed remains that had once been a ship and its contents. Hence, in his view, this did not respond to the requirements of a salvage claim. Another important concept in relation to historic wrecks is that of abandonment of a 'derelict'. The latter term is usually applied to a vessel that has been 'abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it . . . and without intention of returning to it'.[46] Importantly, the mere fact that a vessel is wrecked does not deprive the original owner of title and abandonment must also be proved for this to occur. In such a case, title is vested in the person (or State of the person) who finds and first reduces to possession an abandoned vessel. Providing legal proof of abandonment for a vessel that sunk more than 100 years ago is difficult and, for this reason, it is significant that the 2001 UNESCO Convention provides a clear definition of 'abandonment' for the purposes of that treaty.

The case of the *Lusitania*[47] is relevant to this question of abandonment, having sunk in international waters 12 miles off the Irish coast in 1912. In 1982, 94 items of cargo and personal possessions of the passengers and crew were brought

[45] O'Keefe, 'Maritime Archaeology and Salvage Laws' (n 44) at p 4.
[46] D Steel and F D Rose, *Kennedy's Law of Salvage*, 5th edn (London: Stevens, 1985) at pp 85–6.
[47] *The 'Lusitania'* (1986) 1 Lloyds Reports 132.

to shore in the UK. After lying unclaimed by their owners (or their successors) for one year, the Court then had to determine whether the claimants who had raised the objects could assert a claim of ownership over these objects. The ship itself had become the property of the insurance company on paying out the insured loss to the Cunard Steamship Company. The judge ruled that there was no doubt the ship had been abandoned and that it was therefore derelict and, given the 67-year lapse from sinking to attempting to recover the contents, the owners had abandoned these also. Hence, the title over the content was vested in the claimants and that 'there is no one with a better right to the property than [they]' (at 142). In the *Robinson* case Justice Sheen ruled that the wreck was a derelict when discovered, having been deserted at sea and with no hope of returning to it, but in contrast to the *Lusitania* case, he found that title vested in the successors of the Dutch East India Company, the owners of the vessel at the time it sank since there was no evidence of express abandonment or anything voluntary in the owners' failure to discover the wreck's location (at 821).

In the US case of *Subaqueous Exploration and Archaeology Ltd* (1983),[48] the Court refused to follow a rule developed in the Fifth Circuit that an ancient, abandoned shipwreck constitutes a marine peril for the purposes of a valid salvage claim. This case concerned one of four eighteenth- and early nineteenth-century wrecks lying off the Maryland coast. The wreck was shown not to be in marine peril and *Subaqueous* was unable to show that they had recovered any property from the wreck (also necessary to prove salvage). The case of the *SS Central America* is illustrative of a trend in the US courts towards taking the archaeological or historic significance of a wreck into account when ruling on salvage applications. This wreck was discovered in 1988 by a commercial salvage operation called the Columbus-America Discovery Group having sunk in 1857 around 256 kilometres off the coast of South Carolina at a depth of 2.4 kilometres: conducting salvage operations at such depths is very challenging and requires lots of money and expertise. She had been carrying a substantial cargo of gold, mostly being transported on behalf of California merchants to New York banks, which had been insured. In 1987, Columbus-America initiated proceedings in the US District Court of the Eastern District of Virginia[49] to be named the owner of the *SS Central America* and its cargo and to win an injunction on others from interfering with its attempts at recovery of the gold and other objects from a defined area of the Atlantic.[50] In this case, the District Court held that '[c]ourts may decline to apply the maritime law of finds to shipwrecks of substantial historical or archaeological significance, where a salvor has failed to act in good faith to

[48] *Subaqueous Exploration and Archaeology Ltd v The Unidentified Wrecked and Abandoned Vessel*, 577 F Supp 597 (1984). Case discussed in D R Owen, 'Some Troubles with Treasure: Jurisdiction and Salvage', *Journal of Maritime Law & Commerce*, vol 16, no 2 (1985): pp 139–79.

[49] *Columbus-America Discovery Group v Atlantic Mutual Insurance Company*, 974 F.2d. 450 (1992) 454.

[50] The wreck was actually discovered in 1988 outside the area covered by this injunction but the salvors did not inform the court of this since they did not want anyone to learn of the wreck's true location.

preserve the scientific, historical and, in the limited situations where applicable [in US coastal waters], archaeological provenance of the wreck and artefacts'. In addition, in the Court of Appeals hearing of this case, the degree to which the salvors had tried to protect 'the historical and archaeological value of the wreck and the items salved' was regarded as a salient issue in fixing salvage.[51] This case is also interesting for the District Court's view that, in deep waters, the use of live imaging and remote controlled vehicles was sufficient to have 'effective control' of a wreck site, without any physical presence on the wreck (1989 at 1955). Despite the positive approach taken here, two fundamental problems remain in applying salvage law to such wrecks: first, a court is not well-equipped to judge how far a salvor has fully respected the requirements of archaeological method in recovering a wreck and/or its contents; and, second, the lengthy time-scale and great cost of proper excavation would preclude carrying this out within the context of a salvage operation. In the final analysis, only by establishing a salvage exclusion for ancient and historic wrecks, as provided for under the US Abandoned Shipwreck Act of 1987, can there be sufficient certainty.

The case of the *Geldermalsen* illustrates the limits of maritime law in preventing serious destruction of the archaeological heritage conducted quite legally under salvage rules. The *Geldermalsen* was a Dutch East India Company vessel wrecked in 1752 in the South China Seas. Located in the Indonesian EEZ in 1985, a professional salvor raised its cargo of ceramics and sold them for around $15–16 million through Christies auctioneers in Amsterdam. It is important to note that these items were raised as quickly as possible (to secure them before rival salvors attempted to do so and to keep the costs of salvage down).[52] To do this, methods destructive of archaeological evidence, without proper excavation or the recording of the context of the finds, were employed.[53] Almost nothing was recorded about the vessel nor was any conservation carried out on the objects raised so that wooden and other organic materials that had lain underwater for some time would deteriorate rapidly on exposure to air. In a further violation of good archaeological practice, several items were not recovered at all, including around 32,000 cups and saucers. Notably, Christies was prepared to help in the sale of these items of extremely dubious provenance[54] and, although the Rijks Museum in the Netherlands boycotted the auction, the British Museum and others acquired some of the objects from the Nanking Cargo.[55]

[51] Case of *Columbus-America Discovery Group v unidentified, wrecked and Abandoned Sailing Vessel Believed to be the USS Central America*, 1989 AMC 1955; 1990 AMC 2409; 1992 AMC 2705; US Dist Ct (ED Virginia) 18 November 1993.

[52] Michael Hatcher (with A Thorncraft), *The Nanking Cargo* (London: Hamish Hamilton, 1987).

[53] G L Miller, 'The Second Destruction of the Geldermalsen', *The American Neptune*, vol 47 (1987): p 275.

[54] Miller, 'The Second Destruction of the Geldermalsen' (n 53) at p 278 noted that their action was an 'aggressive search for new sources of saleable antiquities [that] results in the destruction of archaeological sites'.

[55] Today, this would be in direct contradiction to the Code of Professional Ethics of ICOM (para 3.2) as well as the UK Museums' Association's own Code of Ethics.

The discovery of the wreck of the *RMS Titanic* gave rise to a further set of court cases in the US. Although not strictly 'underwater cultural heritage' under the terms of the 2001 Convention since it was not 100 years old when its wreck was located, it is worth discussing here for the issues raised in the courts and as an example of a wreck in international waters. This vessel, thought to be unsinkable, struck an iceberg and sank some 640 kilometres off the Newfoundland coast on her maiden voyage in 1912. Her wreck was found in 1985 at a depth of *c.*4,000 metres by an expedition from Woods Hole Oceanographic Institute of the US and the French Institute for the Research and Exploration of the Sea (IFREMER). Most of the scientists involved in this original expedition did not wish the vessel to be salvaged and wanted it declared a maritime memorial to those who died when she went down.[56] In 1985, the US Government enacted legislation to make the *Titanic* an international monument outside the remit of salvage, to preserve it as a grave site and for the benefit of mankind.[57] The intention was also to use the powers that the coastal State, where any artefacts are landed, has to decide any salvage claims in order to give force to this legislation. During this period, the UK, Canada, France, and the US also attempted to reach an agreement to protect the wreck site for its cultural and historical significance and also as a grave site. Despite these moves, in 1987 Titanic Ventures, a US commercial operation, reached an agreement with IFREMER to raise artefacts from the wreck and recovered 1,800 objects. It then sold its interests in the wreck to RMS Titanic Inc (RMST), which was sued in the US District Court in 1992 for its salvage rights over the wreck and its ownership of the artefacts recovered. Although the vessel was British and not American and was located in international waters, the East Virginia District Court accepted jurisdiction over the case and it decided in favour of RMST in 1994, on the understanding that all artefacts recovered would be exhibited to the public and not sold or otherwise disposed of.[58] Indeed, in 1994, part of the recovered objects were exhibited in the National Maritime Museum in London as the start of a world tour that netted RMST $12 million to cover the costs of the salvage operation.[59] In this way, a major maritime museum in the UK gave legitimacy to the recovery of these artefacts. In 2001, the District Court refused an application by RMST for permission to sell the artefacts to a

[56] For further information on the discovery of the *Titanic*, see: Ballard, *The Discovery of the Titanic* (n 32).

[57] US Congress debate at: HR 3272 99th Cong 1st Sess *Cong Rec* H7408 (1985). This led to the enactment of the RMS Titanic Memorial Act, PL-99-513, 21 October 1986. However, as James A R Nafziger, 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck', *Harvard International Law Journal*, vol 44, no 1 (2003): pp 251–71 notes, the Federal District Court failed to apply the prescriptions of Congress, executive policy, and international law in its decision (the last by asserting a private property right in international waters over a foreign vessel).

[58] *RMS Titanic inc v Wrecked and Abandoned Vessel*, 9 F. Supp.2d. 624 (1998); *RMS Titanic inc v Haver* (1999) *American Maritime Cases* 1330. See also: R J Elia, '*Titanic* in the Courts', *Archaeology* (2001): p 54.

[59] R Williams, 'The Titanic Show Goes on the Road Despite Grave-robbing Row', *The Independent*, 23 March 1994.

specially created non-profit foundation and to various museums in order to continue to pay out dividends to its shareholders.[60]

UNESCO's 2001 Convention on Underwater Cultural Heritage

The need for a dedicated treaty for UCH

First, it is worth considering how far, in view of the pre-existing law of the sea described above, it was necessary for a treaty dedicated to protecting UCH to be developed. In response to this question as to whether such an international Convention is needed, or even desirable, Strati takes the very definite view that: 'Only international Conventions specifically protecting the underwater cultural heritage can offer a more comprehensive regime of protection'; she makes clear elsewhere the need for other protective measures to be taken in tandem.[61] This is seen particularly in contrast to other regional Conventions, such as the 1992 European Archaeology Convention, which provides protection for both land and underwater archaeological sites. She sees attempts to include the UCH in such general Conventions as suffering from an inevitable weakness in failing to address the issues specific to this heritage. It is true that a general Convention cannot deal with questions such as the need for salvage exclusions, the definition of abandonment, the complexity of the different maritime zones and the problem of protection beyond territorial waters (international waters, in particular). Thus far her point is a valid one and there was also a strong argument in favour of UNESCO adopting the ILA draft text as a Convention text since it does deal effectively with these difficulties. However, it is important also to consider the political context within which such a text would be put forward for adoption and the likelihood of it being rejected (or substantially changed) due to difficulties over the jurisdictional extent and the salvage exclusion, for example. One must then consider what the effect of such rejection or changes to the text would have on the protection of the UCH on an international level. Would the process of negotiation itself be sufficiently useful as a means of presenting governments with new and useful approaches to the issue or would a failure (or a text changed in such a way as to lose its character) create a negative precedent which would make any moves on the issue difficult in the future?

One possible approach considered was the preparation of a practical guide on all aspects of protecting UCH at the international level, seeking to balance different interests, to be prepared by the UN Law of the Sea Office similar to other

[60] Since (i) the 'foundation' was too closely linked to RMST's owner and (ii) a voluntary undertaking not to sell the artefacts had been given by RMST when granted the salvage rights.

[61] Strati, 'A Deep Seabed Cultural Property' (n 37) and Strati, *The Protection of Underwater Cultural Heritage* (n 35) in Ch 10.

guides put out by that office.[62] This could, perhaps, have rendered the application of the 1982 LOSC regime more 'user-friendly' towards the UCH; in addition, the 1982 LOSC provisions which encourage State Parties to negotiate could be used to encourage them to enter into ad hoc agreements for protection of UCH. What was attractive about this idea was that it would use a Convention already entered into force (which has already created new law in certain areas, such as the provisions regarding the EEZ and highly migratory species).[63] UCH was one such question that had been addressed in the LOSC text but through provisions not suited for the purpose. However, to provide satisfactory protection for UCH within the LOSC framework would have required a great many additional rules to make the current regime workable for protecting the UCH. Another proposal was for the creation of a new international institution through which potentially conflicting interest groups (such as commercial salvors and archaeologists) could come together and identify both the areas of conflict and existing common ground as a means of conflict resolution. This, however, would be lacking in teeth if it were established outside the framework of an international convention with agreed sanctions for violations of its provisions: A group of commercial salvors, with the weight of traditional salvage rules behind it, might not easily be persuaded to give up the potentially large profits from salvaging a historic wreck with a valuable cargo unless there was a legal basis for excluding that wreck from usual salvage practice.[64] On balance, the argument was in favour of entering the process of negotiating a dedicated treaty for protecting UCH, particularly, in view of the quality of the draft Convention text prepared by the International Law Association (ILA), the innovative nature of some of its proposals.

At the same time, the treaty-making approach should not be viewed in isolation and there are also a number of alternative activities and programmes that might be followed alongside a treaty regime, such as:

- encouraging States to extend and improve their systems of inventory of UCH as an essential tool of protection;
- cooperation between States over the training of professionals as well as other forms of scientific cooperation, exchange of expertise, and information etc;
- State cooperation on the preparation of documentation and standardized databases;

[62] Discussion at a conference held at the National Maritime Museum (London) 3-4 February 1995 in *Summary Report of the National Maritime Museum Conference on the Protection of the Underwater Cultural Heritage* (1995) at p 6.

[63] The adoption of the 1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Seas of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks [UN Doc A/CONF.164/37 (1995); 34 ILM 1542, 1567].

[64] As illustrated above by cases such as the 'Nanking Cargo' being carried by the *De Geldermalsen* commercially salvaged in the South China Seas in 1985 and which raised over $15 million at auction (one dinner service alone fetching $327,000).

- examining the role of amateur divers in underwater archaeology, including existing training schemes run by archaeologists;
- working towards the inclusion of the protection of UCH within the framework of regional agreements on other issues such as economic cooperation, pollution control, environmental protection, etc;
- using the Rules appended to the 2001 UNESCO Convention (see below) as the basis for any attempts at protection on a national, regional, and international level through amendments to national legislation, bilateral agreements, etc;
- government provision of sufficient financing (or provision in kind of equipment, vessels, etc) for conducting the necessary scientific surveying, inventorying, and excavation activities;
- public education to encourage protection of UCH, particularly in coastal areas with mass tourism and States whose nationals are engaged in sports diving as a tourist activity;
- further work to find a *modus vivendi* between commercial salvors and marine archaeologists which can minimize the potential for conflict between the two interest groups;
- consideration of the possibility of including the protection of UCH in an international agreement on salvage;
- encouraging State museums and similar institutions to develop an ethical approach towards the acquisition, preservation, and display of elements of UCH;
- discouraging professional archaeologists from accepting contracts to work with teams engaged in the commercial salvage of historic wrecks;
- educating public officials in the requirements of protection in order to avoid damage to or destruction of UCH during public works programmes, such as port construction and dredging.

From the ILA Draft (1994) to the UNESCO Convention (2001)

Work towards an ILA draft international Convention on the underwater heritage began in 1988 and the final version of the text was adopted by the ILA Buenos Aires Conference in 1994.[65] The initial questions faced by this committee, once it was decided to draft an international Convention on the subject, included: the nature of the definition of the property to be protected and how general or specific it should be; whether the Convention's scope should allow for coastal State control over archaeological remains beyond the territorial sea and, if so, what that zone should be; and should States assume jurisdiction (on the basis of principles of territoriality and nationality) within the agreed zone. Financial considerations

[65] James A R Nafziger (Rapporteur), *International Law Association Cairo Conference (1992)* (Committee on Cultural Heritage Law, International Law Association, 1992) at p 12.

were also important in that the legal framework created should cost governments as little as possible to apply. One area of particular concern to the ILA was the high seas zone with the increasing vulnerability of sites at ever greater depths as a result of technological advances in search and recovery underwater.[66] A minimum form of control possible on the basis of the territorial principle would be that of a State asserting control over material excavated outside its territorial sea but later brought within its territory, and this could be extended to wrecks on the deep seabed. Although the establishment of an international authority (analogous to the International Seabed Authority of Part IX of the LOSC) would probably be the ideal form of control mechanism for cultural property located on the deep seabed, it is not a practicable proposition.[67]

This ILA draft Convention was prepared in the light of two important contextual factors: first, that the draft European Convention on the Protection of the Underwater Cultural Heritage had failed to be adopted in 1985[68] and, second, within the framework of a post-1982 Law of the Sea Convention (LOSC) regime where 'the applicable international law needs elaboration in order itself to provide a significant measure of protection for the underwater cultural heritage'.[69] Another significant factor had been the adoption in 1992 of the European Convention for Archaeological Heritage which, although its increased scope is limited generally to the territorial waters of the States Party, made a very positive contribution to the protection of UCH since it crystallized much new thinking on the protection of the archaeological heritage (in general) and applied this also to the underwater heritage. The ILA draft Convention can therefore be seen in many ways as complementary to this Convention, but with a global rather than regional jurisdictional scope, and reflects several of its fundamental principles and approaches.

In November 1995, a Resolution was presented to the 28th General Conference of UNESCO which, among other matters, dealt with the organization's future activities in the field of the underwater cultural heritage.[70] The text of a draft Convention (prepared by the ILA) was presented to the General Conference as the possible basis for a new international Convention on the subject.[71] Annexed

[66] Examples include the plundering of the wreck of the *Titanic* lying on the outer edge of the Canadian continental shelf and of the *SS Central America* at a depth of *c.*2.4 kilometres, 160 miles off the US coast.

[67] As the extreme difficulty in getting the agreement of the 'major maritime powers' to cooperate with Part XI of the LOSC has demonstrated.

[68] Draft European Convention on the Protection of the Underwater Cultural Heritage (1985), available in a preliminary draft in Council of Europe Doc DIIR/JUR (84) 1; final version published in Council of Europe, 'Final Report' (Strasbourg, 1985) [Doc CAHAQ (85) 5 [restricted]]. It should be noted that the final version differs in parts from the publicly available 1984 version.

[69] Nafziger, *International Law Association Cairo Conference (1992)* (n 65) at p 12.

[70] Draft resolution presented to the General Conference of UNESCO in November 1995, Doc 28 C/29.

[71] James A R Nafziger (Rapporteur), *Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage—Final Report* (Cultural Heritage Law Committee, International Law Association, 1994).

to this draft Convention text was the Charter for the Protection and Management of the Underwater Cultural Heritage prepared by the International Council on Monuments and Sites (ICOMOS)[72] to serve as a set of criteria of good practice to be applied by State Parties to the Convention. The General Conference adopted the draft Resolution and, subsequently, meetings were held between UNESCO and various bodies with an interest in the issue (such as the International Maritime Organization, the International Oceanographic Commission, and the UN Law of the Sea office). These organizations decided to examine the ILA draft Convention along with any other material relevant to a new legal instrument for the protection of the underwater cultural heritage.[73]

UNESCO prepared a feasibility study[74] for the adoption of the ILA draft text as the basis for an international convention which identified certain problem areas for protection and the legal approaches to dealing with them (which are to be found in this text). One fundamental question raised here was whether the adoption of a UNESCO Convention for the protection of the cultural heritage would really be the most useful answer to the urgent need to find new ways of confronting the threats currently facing the preservation of this heritage. A major factor in this decision was the question of the political will of governments to support such an instrument and whether the political problems surrounding the issues of jurisdictional scope and salvage exclusions could be effectively addressed.

The reliance of the ILA draft Convention on the jurisdictional principle of nationality alongside the more traditional territorial jurisdiction for protection and control was a significant innovation for a treaty dealing specifically with UCH. The provisions allowing for States Parties to enforce a salvage exclusion for wrecks that form part of UCH and the application of indirect forms of control (other than by the nationality principle) over excavation activities in international waters also address two major outstanding problems existing in the current protection regime. The possibility for States Parties to assert jurisdictional control over activities relating to UCH within a 'cultural heritage zone' co-extensive with the continental shelf and/or 200-mile limit was seen as crucial in allowing for protection based on traditional territorial grounds to be extended beyond the territorial sea. This 'creeping jurisdiction' was one of the most problematic aspects of the ILA draft that made the negotiation of the new Convention extremely tense.[75] However, it is an important principle given the extreme vulnerability of the wrecks and other materials to be found on the continental shelf seabed to interference by non-scientific salvage. The indirect (non-territorial) forms of control as proposed

[72] International Council on Museums and Sites (ICOMOS), *Draft Charter for the Management and Protection of the Underwater Cultural Heritage*, prepared by an ICOMOS Sub-committee on the underwater cultural heritage, Chairman, C Lund.

[73] Opinion expressed at a meeting of the Sub-committee for the Artistic and Architectural Heritage of the Committee on Culture and Education, Parliamentary Assembly of the Council of Europe in Strasbourg, September 1995. Item 3 (c) of Draft Agenda, AS/CULT/AA (1995) OJ 2.

[74] UNESCO, *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, Executive Board of UNESCO (Paris, 1995), doc. 146 EX/27.

[75] UNESCO, *Feasibility Study for the Drafting of a New Instrument* (n 74) at p 5.

in this draft Convention were also potentially extremely valuable but they served rather to complement a regime based predominantly on territorial principles and would not be sufficient on their own.

History of preparing the treaty text

The Convention on the Protection of the Underwater Cultural Heritage was adopted by UNESCO's 31st General Conference at its Plenary Session on 2 November 2001.[76] Unusually for a modern treaty, it was adopted by a vote rather than by consensus, which illustrates the very contentious nature of a Convention that was seen by some of the maritime 'powers' (UK, US, Japan, Norway, France, and others) as challenging vital economic and military interests they had secured under the 1958 Geneva Conventions and the 1982 LOSC. According to Article 27, the Convention entered into force three months after the twentieth ratification (acceptance, approval, or accession) was secured,[77] the same number as required by the 1972 World Heritage Convention. Securing these ratifications has proved much more difficult than for that treaty or, indeed, for the 2003 and 2005 Conventions on Intangible Heritage and the Diversity of Cultural Expressions, respectively, that followed it in the cultural heritage field.

A draft Convention was duly presented jointly by the UNESCO Secretariat and the UN Division of Ocean Affairs and the Law of the Sea (DOALOS) to the Governmental Experts at their first session in June/July 1998 and adopted as the basis for their negotiations.[78] The negotiation process was not an easy one given that the self-styled 'major maritime powers' (France, Germany, Japan, Netherlands, Norway, Russia, the UK and the US) were determined to see no coastal State control over cultural heritage on the continental shelf since they saw this as a form of 'creeping jurisdiction', ie the first step towards claiming greater jurisdictional powers in that zone.[79] They also argued that, since this had been debated while negotiating Articles 149 and 303 of the 1982 LOSC, it could not be raised again in another forum. However, several States had already taken control over the continental shelf for the purpose of protecting UCH located there, without any such consequences. Moreover, technological advances have made cultural remains on the seabed of the continental shelf and the deep seabed much more

[76] Convention on the Protection of the Underwater Cultural Heritage (UNESCO, Paris, 2 November 2001) [41 ILM 40]. Eighty-seven Member States voted in favour, four against, and there were 15 abstentions. For a detailed analysis, see: Patrick J O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention for the Protection of Underwater Cultural Heritage* (Leicester, UK: Institute of Art Law, 2002).

[77] The Convention entered into force on 2 January 2009 and, by October 2014, had secured 48 States Parties. Information accessed 6 October 2014, <http://www.unesco.org/eri/la/convention.asp?KO=13520&order=alpha>.

[78] At their second meeting in April 1999, three Working Groups were set up to discuss: (1) definitions, scope, and general principles; (2) the Annex (based on the ICOMOS Rules); and (3) jurisdictional issues.

[79] For a detailed description of the negotiations, see: O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention* (n 76) at pp 25–32.

vulnerable to non-scientific exploitation than in 1982. Equally, it is possible to view this approach as filling a gap in the LOSC regime rather than being contrary to its provisions.[80] It should be recognized that a major factor in the major powers' view was their desire to protect security interests and their ability to operate undetected in the continental shelf area.

Another tricky issue concerned the ownership of and the rights related to wrecks of warships and other government vessels located in waters other than the jurisdiction of the State of origin.[81] Protecting the freedom of recreational divers to visit historic and ancient wrecks, even if they were prevented from touching them, was also important to some States such as the US. However, this freedom had to be balanced against the danger of looting by commercially motivated salvors. A further issue of fundamental importance was the scope of the activities which the Convention addressed and the decision was taken (at the second meeting of intergovernmental negotiations in 1999) to limit it to activities 'directed at' UCH and, thus, not affect other activities such as cable-laying.[82] This had the advantage of making the negotiations easier, but could clearly place UCH in greater danger from accidental damage. By the fourth and final intergovernmental meetings, the most controversial outstanding issues that remained were: coastal State control over the continental shelf/EEZ; warships and salvage. The final Draft was adopted (with 49 negotiating States in favour, four against, and eight abstentions) on 8 July 2001.

The 2001 Convention text

The Preamble places the major responsibility for protecting UCH on all States given its character as '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'.[83] This draws out the fact that UCH often reflects trading and other economic and cultural links between countries and even regions of the world over history. Threats to UCH are also set out, including 'unauthorized activities' (which are not specified but would include natural resource exploitation, building of installations, and artificial islands etc), trade in underwater cultural artefacts, advances in technology (for underwater search and retrieval), and incidental impacts from licit activities. The threat that the Convention is most concerned with addressing, however, is

[80] An argument made succinctly by the Italian delegation during negotiations of the UNESCO text. See: G Allotta, *Tutela del Patrimonio Archeologico Subacqueo* (Palermo, Italy: Centro Studi Giulio Pastore, 2001) at p 57.

[81] Such as Spanish vessels wrecked off Central and South America and the Caribbean.

[82] Rather than the broader sense of 'activities affecting'. Patrick J O'Keefe, 'Second Meeting of the Governmental experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage: Paris, UNESCO Headquarters (April 19–24 1999)', *International Journal of Cultural Property*, vol 8 (1999): p 568; Forrest, 'A New International Regime' (n 2).

[83] This approach is mirrored in the Preamble to the 1985 draft European Convention where UCH is characterized as 'an integral part of the common heritage of mankind'.

commercial exploitation and looting where material is recovered with no consideration for the archaeological or historical context.

The need both for public education, including of government officials, judges, and others, is stressed as a means of protection as well as a means of ensuring public access to this heritage. This approach, hidden among the substantive treaty provisions at Article 20, is an essential aspect of any protective regime and deserves much more attention than it has hitherto been accorded. Notably, the international cooperation called for here is not limited to States but includes a wide range of stakeholders such as scientific institutions, professional organizations, archaeologists, and divers, reflecting the range of legitimate interests to be taken into account.[84] The Preamble also states that 'uniform governing criteria' are needed because of the highly specialized nature of underwater archaeological survey, excavation, and protection, as is reflected in the Rules set out in the Annex. These make reference twice to the importance of preservation *in situ* of UCH, but also the need to recover it for 'scientific or protective purposes'. There is also a statement of the need to codify and progressively develop the law in conformity with international rules and practice in cultural heritage law and law of the sea, signalling that this treaty attempts to reconcile these two separate and potentially conflicting fields of law.

In the case of this treaty, the terms under which UCH was to be defined was a particularly complex question and the definition crafted (in Article 1) reflected several years of discussion and the experience of States with more developed legislative protection of this heritage. It is defined as 'all traces of human existence having a cultural, historical or archaeological character' that have been partially or wholly underwater either periodically or continuously for at least 100 years. The types of heritage include: (a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts; (b) vessels, aircraft, other vehicles (or part of), their cargo and contents 'together with their archaeological and natural context'; and (c) prehistoric remains. Here, the emphasis placed not only on the archaeological and historic remains (including wrecks and associated artefacts) themselves but on the 'archaeological and natural context(s)' within which they are located is notable, demonstrating the essential importance of the scientific information they contain. Pipelines, cables, and other installations on the seabed that are still in use are explicitly excluded from the definition, although they would fall within the Convention's remit if left *in situ* after decommissioning. 'Underwater' is a potentially ambiguous word since items on the shoreline or in a reef, for example, may be subject to partial or periodic submersion. Inclusion of the phrase 'cultural, historical or archaeological character' is an unfortunate return to the LOSC text (Articles 149 and 303) and adds little to the definition not already included in the 100-year time limit.[85] The choice of

[84] Reflecting the approach of multi-use guidelines included in the US Abandoned Shipwrecks Act (1987). The principle of cooperation itself is derived from Art 303 of the LOSC, but here has been extended beyond States to this wider range of stakeholders.

[85] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention* (n 76) at pp 42–3.

100 years as the temporal cut-off is rather arbitrary and reflects the practice of much national legislation.[86] The list of specific types of heritage is exemplary only and represents those most likely to be found. The 'objects of prehistoric character' may refer to crannogs, settlements, and related tools and other artefacts and reminds us that some now submerged areas (such as the Bering Strait) were land masses at that time. Vessels and aircraft owned and operated by a State and, at the time of sinking, used 'only for governmental and non-commercial purposes' and which are over 100 years old are also covered (at paragraph 8). Overall, this definition is fairly specific for ease of interpretation by administrators and the courts, a fact that can be particularly important where UCH is concerned.[87]

The main purpose of the Convention is stated as protection of UCH (not, eg, its 'exploitation' or 'recovery')[88] and this clearly shows that its orientation is to keep this heritage safe from intentional or accidental damage and destruction. Since much UCH has reached a state of equilibrium with its underwater surroundings and is better protected *in situ* than raised to the surface (as noted in paragraph 5), this also suggests non-intervention as a primary approach.[89] It may also involve taking steps to prevent changes in the physical context in which UCH is located that can lead to its deterioration, damage, and/or destruction such as pollution from vessels and installations, weapons testing, and resource exploitation activities. The limitations of States' resources and capabilities (including technological) to achieve this are recognized, but this is balanced by a strong imperative to seek international cooperation to this end.[90] Parties are also enjoined to preserve UCH for the sake of humanity (paragraph 3), which places a general duty of protection for all UCH even when it is of no direct interest to the State. The requirement for the long-term conservation of UCH that has been raised from the seabed and to be considered when granting excavation permits,[91] is responsive to the fact that organic materials that have lain underwater for a long time deteriorate rapidly once exposed to air and needs to be stored in a controlled environment.[92]

It is notable that not only is the heritage itself defined for the purposes of this Convention, but also *activities* 'directed at' UCH and 'incidentally affecting' UCH which are defined as (1) activities whose 'primary object' is UCH but that may incidentally cause damage or destruction and (2) activities with a different primary object but that may have the same negative outcome.[93] With regard to

[86] Sweden—Act No 589 of 30 June 1971 states that objects wrecked over 100 years ago and ancient monuments over 100 years old are protected (s 9a); Denmark—Act No 445 of 1973 protects wrecks and other manmade objects which have lain in Danish waters for over 150 years; and Norway—Act No 50 of 9 June 1978 (with amendments of 1 January 1993, in particular Ch IV on Ship Finds) also provides for a similar time limit.

[87] Patrick J O'Keefe, 'The International Law Association: Draft Convention on the Protection of the Underwater Cultural Heritage', in *La Tutela del Partimonio Archeologico Subacqueo*, edited by G Vedovato and L Vlad Borrelli (Italy: Ravello, 1993) at p 44.

[88] General principles and purposes are set out in Art 2.

[89] Rule 1 of the Annex is relevant to this.

[90] Article 2 at paras 4 and 2, respectively.

[91] Paragraph 6.

[92] Muckelroy, *Maritime Archaeology* (n 3).

[93] Article 2, paras 6 and 7. This has parallels in international environmental regulation which tends to focus on the interaction between human activities and environmental damage and/or destruction.

the former, it should be noted that not only can commercial looting of a wreck be extremely damaging of the physical and informational context, but scientific excavation is itself a destructive activity. As for unintentional damage or destruction from other activities, it has been noted that bottom trawl fishing nets can leave scour marks even on the deep seabed.[94] An obligation is then placed on Parties to 'prevent or mitigate any adverse effects that may arise from activities under jurisdiction incidentally affecting [UCH]'[95] which draws the attention of States to the fact that certain activities such as fishing, mining, oil exploration and drilling, weapons testing, etc can disturb or damage UCH. An imperative duty is placed on States Parties to prevent or mitigate the adverse effects of such activities and a balance must therefore be struck between their importance for the economy and security and the protection of UCH. Parties must use 'the best practicable means' to achieve this, namely the most appropriate in view of the physical situation, scientific and technological knowledge, and the potential cost. In certain cases, excavation and recovery may be the only means available to achieve this. This provision recognizes that total prevention may not always be possible and that it may then have to be sufficient to mitigate these effects. However, what is important here is that Parties are required to take some action and cannot simply ignore the negative impacts on UCH from such activities. This obligation extends to the outer limits of a State Party's EEZ or continental shelf, whichever is more extensive.

As has been previously discussed in this chapter, one of the most acute threats to ancient and historic wrecks has been that of commercial salvage, greatly exacerbated by the existence of traditional salvage rules. The 2001 Convention responds directly to this by stating unequivocally that UCH 'shall not be commercially exploited', leaving no room for any type of commercial salvage of vessels that fall within the definition of Article 1.[96] It is unequivocally stated that UCH (as defined in the Convention) 'shall not be subject to the law of salvage or the law of finds' unless: (a) it is authorized by the competent authorities, in full conformity with the Convention (in particular the Annex Rules) and (b) maximum protection of UCH during its recovery is ensured.[97] This brings the international standard into line with practice in many States that already require official permits for any activities on UCH and that they fulfil the requirements of scientific excavation. Although salvage rules are obviously very useful for protecting economic interests with regard to sea-going vessels and cargo they can, as we have seen, be extremely damaging to wrecks and associated materials of a historic or archaeological value. Moreover, most of the wrecks which fall under the terms of

[94] D Gibbins, 'Archaeology in Deep Water—a Preliminary View', *International Journal of Nautical Archaeology*, vol 20, no 2 (1991): pp 163–70 at p 167.

[95] In Art 5.

[96] Article 2, para 7. As Forrest, 'A New International Regime' (n 2) at p 535 notes, 'the creation of an international legal regime that will be applicable to the recovery of UCH, based on its historical importance, rather than the existence of marine peril, will replace the necessity of having to determine whether salvage law is applicable'.

[97] Article 4.

this Convention (normally those underwater for over 100 years) will have reached a state of equilibrium with the environment and so are no longer 'in peril' from the sea as salvage rules require. With regard to the law of finds, the main reason for excluding UCH from its remit is that, in certain jurisdictions such as the US, it treats the finder as the owner of the find and grants them full control over it; again, this is obviously potentially disastrous for UCH whose informational value may be as great as its commercial value. It does, however, raise the problem that a wreck found on the deep seabed and brought ashore has no identified owner unless the State where it comes ashore provides for this. The associated problem of the trade in UCH that has been recovered in this manner is also addressed in this treaty, along with providing specific rules relating to salvage and finds.[98] Although O'Keefe[99] rightly makes the point that scientifically excavated finds can subsequently be exhibited for profit or that archaeologically excavated sites may also be open to for-profit tourist visits, these provisions are clearly intended to be directed at commercial salvage activities where sale of the artefacts is the main objective of their removal.

The interrelated issues of the 'sovereign immunities' of States with regard to certain vessels (such as warships) and of the abandonment of such vessels is also addressed.[100] Some commentators have argued that, once it is on the seabed after sinking, a warship is no longer a 'ship' since it cannot navigate and, hence, affecting the State's rights with regard to that vessel: a vessel in this condition might be argued to be abandoned and title therefore ceded to whoever can salvage her.[101] We are reminded here also of the potential sensitivity of underwater archaeological work (involving, as it does, temporary 'occupation' of the seabed) by the proviso that the rights granted by the Convention should not affect the status of seabed areas in which there were jurisdictional disputes between States.[102] This sensitivity is further recognized by the statement that the Convention should not 'prejudice the rights, jurisdiction and duties of States under international law', including, and in particular, the 1982 LOSC.[103] These include the freedom of navigation, rules relating to laying marine cables and pipelines, exploitation of natural resources, fishing in the high seas and the jurisdictional zones. For example, the right of innocent passage[104] could conflict with the assertion by a Party of the 2001 Convention of its right to prevent entry into its territory of material illegally raised from a historic wreck being carried on a foreign flagged vessel:[105] this should not be interpreted as requiring a Party to prevent the innocent passage of the vessel through its territorial sea since that would be in contravention of its duties under the LOSC.[106] Of course, there may well be future development in the interpretation of the relevant LOSC rules in the light of State practice

[98] Rule 2 of the Annex and Art 4, respectively. [99] *Op cit* n 77 at p 51.
[100] Article 2, para 8.
[101] Strati, *The Protection of Underwater Cultural Heritage* (n 35) at p 221.
[102] Article 2, para 11. [103] Article 3.
[104] Articles 17, 19, and 27 of the 1982 LOSC. [105] Article 14.
[106] General Assembly Resolution A/Res/55/7 (2 May 2001) at para 6 noted that the 2001 Convention should be in 'full conformity with the relevant provisions of the [LOSC] Convention'.

influenced by the 2001 Convention. This may occur, for example, with regard to States exercising control over UCH located beyond their territorial seas in the continental shelf or EEZ areas.

The treaty also provides for the possibility that further, stricter, legal regimes might be established on a bilateral, regional, and other multilateral basis and States Parties are encouraged to enter into such agreements provided that they are in full conformity with the 2001 Convention and do not 'dilute its universal character'.[107] Such additional agreements are, therefore, seen as complementing and strengthening the Convention's regime. It is not uncommon for a multilateral treaty to encourage further agreements (especially on the bilateral, sub-regional, and regional levels) to provide for a stronger protection regime than it can itself provide and to address specific issues that are beyond the remit of a multilateral framework.[108] However, in the case of protection of UCH it is unlikely that States would be ready to undertake any further treaty-making unless this were targeted at much narrower issues such as a specific range of wrecks (eg Spanish Armada vessels wrecked off the UK) or a specific type of threat (eg building artificial installations or marine pollution). A specific complicating factor with regard to ancient and historic shipwrecks is that they may be located in waters far from the country of origin (countries of origin) of the vessel, its cargo, and its crew. Hence, States entering into such additional agreements are encouraged to invite such States 'with a verifiable [cultural, historical, or archaeological] link' to join them.[109] Such a link is the sum total of all possible factors—country of construction of the vessels, nationality of its crew, country (or countries) of origin of its cargo—and this can lead to some very complex relationships and claims. For example, a Bronze Age trading vessel that was built in Greece, traded throughout the eastern Mediterranean and North Africa, whose crew were Phoenicians, and that sank off the coast of modern Turkey.[110] In addition, the position of countries that were Parties to other agreements prior to the 2001 Convention is protected[111] in terms that leave no room for arguing that the rights and duties of the new treaty supersede these older agreements in any way.

The question of the status of UCH in the different maritime zones is, as we have seen, a complex issue and required detailed provisions to address its status in internal waters, archipelagic waters, and the territorial sea (Article 7), in the contiguous zone (Article 8), in the EEZ and continental shelf (Articles 9 and 10), and the deep seabed area (Articles 11 and 12).[112] For the EEZ, continental shelf and deep seabed area, these provisions cover the reporting, notification, and

[107] Article 6.

[108] Just as the 'Bonn' Convention on Migratory Species (1979) encourages the development of bilateral and multilateral agreements for the protection of specific species in Art 4(3) and (4).

[109] Article 6, para 2.

[110] Such as the Cap Gelidonya wreck found off Southwest Turkey, reported in Bass, 'The Cape Gelidonya Wreck' (n 8).

[111] Article 6, para 3. An example of a bilateral agreement is the Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks (1972) 1972 ATS 8.

[112] For more information on the international law rules that govern UCH in these sea areas, please refer to the discussion above.

protection of UCH. The importance given by Member States of UNESCO to the need to protect UCH was demonstrated in their readiness to consider the application of international standards to areas traditionally under their sovereign jurisdiction and, in addition, that the Rules (in the Annex) were generally acceptable as international standards. Since there is a comprehensive description of this treaty available elsewhere,[113] I do not intend to cover the subsequent articles in detail but rather to summarize their main points. First, it should be noted that the interaction between the main text of the treaty and the Rules (annexed to the treaty text) is of fundamental importance: the Rules set out in great detail the standards required for any activities affecting UCH and these must be respected by Parties when permitting such activities. Hence, for example, Parties are required to apply the Rules to 'any activities directed at' UCH in their territorial sea or authorizing such activities in the EEZ and/or continental shelf.[114]

An important effect of Article 7 is to develop a uniform approach among Parties towards regulating activities over UCH in their inland, archipelagic, and territorial waters since there is currently much variation in existing national legislation on, for example, the types of controls used (seizure of finds and equipment, designation of protected wrecks, and control of trade in artefacts raised etc). The complexity of this area of law is well-illustrated by the proviso that provisions governing UCH in the contiguous zone (extending up to 24 nautical miles from the baselines) must not conflict with the articles dealing with UCH in the continental shelf and EEZ zones or with Article 303(2) of the 1982 LOSC (which gives certain powers over UCH in a Party's contiguous zone *if removed from the seabed*). Hence, in order to be in conformity with the LOSC, the regulation of activities directed towards UCH under the 2001 Convention in the contiguous zone must be directed towards those which are likely to result in its recovery. One of the trickiest questions dealt with during the negotiation of the 2001 Convention was the relationship of the coastal State with UCH located on its continental shelf or in its EEZ. These provisions can be seen as developing the general duty to protect UCH set out in Article 303(1) of the LOSC. The rights and duties of a coastal State with regard to the protection of UCH in its EEZ and continental shelf are set out here[115] and Parties are restricted to authorizing activities in that zone that are compatible with the Convention; this may actually prevent them from exercising powers they enjoyed previously under their own national legislation. The coastal State is allowed substantial discretion for the immediate protection of UCH on its EEZ and continental shelf and it has a broad power to prohibit or authorize activities directed at that heritage in order to prevent interference with its sovereign rights or jurisdiction.[116] Essentially, the overall approach of the Convention is to rely upon the nationality and flag State jurisdictional bases rather than any extension of coastal State jurisdiction into zones beyond the contiguous zone.

[113] Craig Forrest, *International Law and the Protection of Cultural Heritage* (London and New York: Routledge, 2011) at Ch 6, pp 287–361.

[114] Articles 7 and 10, respectively. [115] Article 10.

[116] As set out, for example, in Art 77 of the 1982 LOSC.

No right of exclusive jurisdiction is granted to coastal States over UCH in either the continental shelf or exclusive economic zone: the coastal State's power is limited here to acting as the 'coordinating State' for activities related to UCH, alongside other interested States.[117]

The protection regime for UCH in the area attempts to establish regulation in a zone in which, hitherto, the LOSC has only succeeded in doing in a very limited fashion.[118] As for the continental shelf and EEZ, the procedures envisaged here[119] are bureaucratic and their effectiveness will depend greatly on the readiness of Parties to cooperate. Parties can declare an interest in UCH found in the area under Article 11(4), and should be invited by the Director-General of UNESCO to consult on the best approach to protecting it, appointing one State Party (not necessarily from among themselves) to act as the Coordinating State for this. The Coordinating State is required to 'act for the benefit of humanity' in arranging consultations, taking measures, conducting preliminary research and/or issuing authorizations and 'particular regard should be paid to the preferential rights of States of…origin'.[120] The International Seabed Authority[121] should also be consulted as an important safeguard to ensure full coordination with other activities in the Area that may impact on UCH. Any States Parties may take practicable measures to prevent immediate danger to UCH in the area and may place certain prohibitions on their own nationals' or flag vessels' activities in this zone. There is a clear prohibition on a State Party undertaking or authorizing activities directed at State vessels and aircraft in the area without the flag State's consent.[122]

The Convention attempts to address the often complex relationships between States 'of origin' and sunken vessels in articles relating to the different sea areas. For example, with regard to archipelagic waters and the territorial sea Parties should inform the flag State or other States 'with a veritable link' in the case of State vessels and aircraft found in these waters of their discovery.[123] This is aimed at averting the potential for serious disputes in cases where State vessels are wrecked in the waters of another State, where the sovereign immunity of the original State survives and the vessel is not abandoned (ie title is retained).[124] With regard to the EEZ/continental

[117] Forrest, *International Law and the Protection of Cultural Heritage* (n 113) addresses this question at pp 347–50.

[118] Article 149 of the LOSC. [119] Article 12.

[120] This appears again to be an attempt to keep close to the spirit of LOSC Art 149; in practice, it adds little substance to this article.

[121] Established under Part XI of the LOSC to govern mineral extraction and other similar activities in the Area.

[122] Article 10(7). Notably, the flag States concerned do not need to be Parties to the Convention to enjoy this protection of their rights.

[123] Although making reference to State vessels and aircraft in this Convention was highly controversial, but it was decided to include them with their treatment dependent on the sea area in which they were located.

[124] An example of this is that of the *CSS Alabama*, a US Confederate warship sunk in 1864 in French territorial waters off Cherbourg and located by a French navy mine-sweeper in 1984. In 1987 the US State Department wrote to the French Government to claim ownership of the wreck and the right to approve anyone diving on the wreck, contrary to France's view of the matter. This dispute was resolved by an agreement concluded in 1989 for a joint scientific committee to authorize research

shelf zone, a Party other than the coastal State that has 'a veritable link, especially a cultural, historical or archaeological link' to it may declare its interest in being consulted over how to ensure the effective protection of that heritage.[125] Where the coastal State fails to protect such UCH, it is required to consult with any other States that have declared an interest in the UCH[126] and either to act as the Coordinating State or, if it chooses not to, the Party/ies with a stated interest in the UCH shall nominate another State to act as such. Since this consultation procedure could lead to a delay in protecting the UCH, the Coordinating State may take all practicable measures to prevent immediate danger to the heritage. The actions to be taken following consultation are then to be implemented by the Coordinating State but if, for example, a specific technology is needed then another State than one of the other Parties consulting may undertake this.[127] No action taken as a Coordinating State is an assertion of any 'preferential or jurisdictional rights' not already provided for under international law and the 1982 LOSC. With regard to the treatment of State vessels and aircraft, any activity directed at these without the agreement of the flag State and collaboration of the Coordinating State is prohibited. With regard to UCH located in the Area, any State that can demonstrate a 'veritable link'[128] to the UCH found may declare to the UNESCO Director-General its interest in being consulted on the 'effective protection' of this heritage.

The issue of reporting UCH discovered in the different maritime zones is also an important one for its protection since this is the moment at which it becomes particularly vulnerable. Norway, for example, already required both nationals and non-nationals to report incidental discoveries of UCH made during oil and mineral exploration on the continental shelf. A reporting requirement is part of the general duty on Parties 'to protect cultural heritage in the exclusive economic zone and on the continental shelf': States Parties must require their own nationals and flag vessels to report to it any discoveries of UCH and/or intended activities directed towards it within its own EEZ and continental shelf.[129] In the case of UCH located in the EEZ and continental shelf of another Party, nationals and flag vessels should report its discovery to the State Party in whose EEZ or continental shelf it is located; failing that, they should report it to their own State which should transmit it rapidly and effectively to the coastal State. UNESCO is nominated to act as a clearing-house for such information on discoveries of

work on the wreck. For more on the case, see: O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention* (n 76) at pp 76–7.

[125] It is likely, however, that such a link might not be identified until after substantial excavation work and the recovery of items from the site. In addition, a potential problem is that there is no requirement to pass such information to a non-Party State which might leave the UCH unprotected.

[126] Under the terms of Art 9(5).

[127] The Coordinating State is seen as acting *on behalf of the States Parties* and not its own interests in order to avoid difficulties over divergent views regarding the coastal State's powers in its EEZ and continental shelf.

[128] The criteria for demonstrating a 'veritable link' are worded in such a way as to recall the wording of Art 149 of LOSC 'with particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin'.

[129] Article 9.

and planned activities on UCH in the EEZ and continental shelf area, but the reporting system still needs development for it to be effective. Its main weakness is that it can be very difficult to enforce nationality jurisdiction from a great distance while flag State jurisdiction is notoriously poorly applied.[130] With regard to reporting UCH discovered in the deep seabed area lying beyond the limits of national jurisdiction, reference is made to the general duty to protect this heritage set out in Article 149 of the LOSC and Article 2 of this Convention. As a result, a duty is imposed on States Parties to require their nationals or flagged vessels to report any discovery of UCH in the area or any intention to engage in activities directed towards it. Furthermore, Parties to the Convention should inform the Secretary-General of the International Seabed Authority whose role is to 'organize and control activities in the Area'.[131] The situation where a warship or other governmental vessel with sovereign immunity accidentally comes across UCH while engaged in State-controlled operations is also addressed.[132] In cases where disclosure of the find would jeopardize operational secrecy, there is an exclusion from the obligation to report[133] if the vessel is engaged in non-commercial activities and is not engaged in any activities directed towards the UCH. Where there is no operational reason to keep a discovery secret States Parties are required not to withhold such information.

Cooperation among the Parties is implicit in Articles 9, 10, 11, and 12 and this is also explicitly expressed in a clear and practical way as a general duty to cooperate in the 'protection and management' of UCH and, in particular, the investigation, excavation, documentation, conservation, study, and presentation of the heritage.[134] This recognizes that there is a range of expertise and best practice available in different States and that sharing of this is a valuable goal as well as the fact that the UCH located in, recovered from, or seized in the territory of one Party may actually be most closely related to the heritage—and expert techniques—of another State. Sharing information between States Parties is a further essential tool,[135] such as that relating to preventing and controlling illicit excavation, the recovery of UCH (including its discovery and location), and on developments in scientific methodology and technology. However, given the extreme vulnerability of UCH to disturbance and destruction by commercial salvors and others, this information should be kept confidential to the competent authorities as far as possible as long as its disclosure might put the preservation of that heritage at risk. Another form of cooperation encouraged by the Convention is the transfer of UCH-related technology which is important given that few countries have easy access to this highly specialized equipment.[136] However, since much of this technology has been developed for the defence or the oil exploration/exploitation

[130] Especially with the common use of 'flags of convenience' of States such as Liberia that are unlikely to become Parties to the Convention.

[131] Article 156 of the LOSC. This is appropriate since its Regulations for exploration and mining operations require it to be informed of any finds of an archaeological or historical nature.

[132] Article 13. [133] Set out in Arts 9, 10, 11, and 12. [134] Article 19.

[135] Required by Art 19(2). [136] Article 21.

industries, it can be a sensitive matter and so this requirement is qualified by the phrase 'on agreed terms'.

The Convention also seeks to assert control over the international trade (and the subsequent internal dealing) in UCH recovered in a manner contrary to the terms of the Convention and/or illegally exported.[137] Since most illicit excavation and recovery of UCH is undertaken for commercial purposes and that this may often involve movement across borders, this is obviously an important protection mechanism.[138] Although at the discretion of each State, the phrase 'all necessary measures' suggests that this should be more than a minimalist approach.[139] Since the UCH in question does not need to have been illegally exported from the territory of a Party, this applies to *all* illegally exported UCH. Difficulties commonly arise with such controls on international trade, especially in the identification of heritage falling within the terms of the Convention: a Bronze Age Greek trading vessel, for example, would have contained both ceramic utensils for the use of the crew as well as items/cargo acquired during its voyage (objects that could just as easily be discovered on land). In a similar manner, it may prove difficult to refuse entry into their territory of UCH they believe has been recovered in contravention to the Convention (including the Rules of the Annex). The potential for laundering items through bringing them clandestinely to shore and then re-exporting them makes ascertaining the exact provenance of such items very problematic. States Parties are required also to prevent the use of any ports, artificial islands, installations, or similar structures under their jurisdiction for the conduct of activities directed towards the UCH not in conformity with the Convention.[140] This is an important provision since a vessel conducting such activities may be crewed by nationals of a non-Party State and be flagged under a non-Party's jurisdiction: if it is operating far from its home ports, it would require refuelling, food, and other support. Such a prohibition could make the illicit excavation and recovery of UCH very difficult in regions where most coastal States are Parties to the Convention. This is a general duty to prevent such activities and involves both legislative and administrative measures, such as effective dissemination of information to masters of their flag vessels, diving clubs, and known salvors of historic vessels.

The requirement on Parties to impose sanctions for violations of measures taken by them to protect UCH under the terms of the Convention is a further important one given the great commercial value of much of this heritage.[141] Such sanctions are likely to be penal (imprisonment and/or fines) with the addition of

[137] Article 14.

[138] In an analogy to the control of trade in endangered species of animals as a means to their protection in the wild under the Convention on the International Trade in Endangered Species (CITES) Washington, 3 March 1973, entry into force 1 July 1975 [993 UNTS 243].

[139] These measures will also have to be compatible with existing obligations under the UNESCO Convention on illicit import, export, and transfer of ownership of cultural property (1970) and the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (1995), discussed in detail in Chapter 4.

[140] Article 15. [141] Article 18.

certain administrative sanctions, such as the seizure of property. The sanctions should be 'adequate in severity to be effective . . . and to discourage violations' and should 'deprive offenders of the benefit deriving from their illegal activities'. Parties are also required to cooperate to ensure the effective enforcement of sanctions, including through exchange of information on their sanctions and even, in some extreme cases, extradition of an offender. This provision also requires the seizure of UCH recovered in a manner not in conformity with the Convention: seizure is one of the most effective deterrents (in view of the value of the objects in question but also the cost of equipment used in illicit excavation). The question of the rights of an identifiable owner of such UCH is not addressed by the 2001 Convention since it was decided in the negotiations that property issues lay beyond its scope[142] and in cases where the person who illegally recovered the heritage is not its owner, seizure may give rise to a claim for compensation by the owner. Notably, the informational value and potential fragility of recovered UCH is recognized in the need for the seizing State to provide the necessary facilities, experts, and financing to record, protect, and stabilize UCH recovered in this way. This can prove a major and costly task covering a large number of objects and because conservation and stabilization of underwater organic materials is a highly specialized job. Among the actions envisaged are the re-assembly of a dispersed collection (the finds of a shipwreck are regarded, for example, as a single collection) and ensuring public access, exhibition, and education. The interests of any State(s) with a 'verifiable link' should also be taken account of here,[143] for example by giving its experts access to the material for study and, even in some exceptional cases, the division of the material or the transfer of the entire collection to that State. Seizure also serves the public interest by bringing this material into the public domain and the Convention takes as a fundamental position the idea that UCH ultimately belongs to the public who have a right of access to it. Non-intrusive access to UCH *in situ* is therefore encouraged in order to foster public awareness and appreciation of this heritage and its better protection.[144] The public interest aspect of seizure is underlined in paragraph 4 that requires all seized UCH to be disposed of 'for the public benefit' as long as this is in keeping with the needs of conservation and research.

The need to give proper respect to human remains found on a sunken vessel is an important ethical issue and was universally supported, in particular for the remains of those who died in battle.[145] Proper respect for human remains is called for[146] and the sensitive issue of their treatment is addressed in Rule 5, alongside that of 'venerated sites'.[147] Although leaving them *in situ* is the primary approach implied here this could, under certain circumstances, lead to their later

[142] O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention* (n 76) at p 115.

[143] Paragraph 3 requires States Parties to notify the UNESCO Director-General and any other States 'with a verifiable link, especially a cultural, historical or archaeological one' with the UCH of its seizure. The seizing State may, of course, have no connection of this kind with the material it has seized.

[144] Article 18(10). [145] Article 18(9). [146] Article 2(9).

[147] Sites that are 'venerated' may be grave sites (such as the *RMS Titanic* or warships) or those that have a special spiritual or other significance to particular peoples. O'Keefe *op cit* n 96 at p 162

disturbance and so it may sometimes be more appropriate for them to be reburied after examination.[148] Where the remains are an integral part of a site that is to be excavated, it will be impossible to avoid their disturbance but this should be kept to a minimum and they should be treated with due respect.

A contextual issue that is increasingly understood to be a key element in the success of such protective regimes is the need to raise public awareness of the 'value and significance' of this heritage and the importance of its protection.[149] This approach is particularly germane to UCH which is so vulnerable to the depredations of commercial divers and others and for which amateur archaeologists and recreational divers can 'police' the activities of their fellow divers, including commercial salvors. They and the public in general need be educated about the principles underlying the rules of the 2001 Convention and that damage and/or destruction to underwater sites and heritage is not a victimless crime but is the destruction of an irreplaceable context of importance to all of humankind. Ensuring public access to this heritage has the additional advantage of bringing amateur archaeologists within the diving community into an alliance with professional archaeologists rather than perpetuating the hostile relationship that sometimes exists between these two interest groups. Another contextual issue that can greatly weaken the protective regime is a lack of capacity of national bodies to implement the treaty's obligations and the Convention requires the establishment of new competent authorities in States Parties or the reinforcement of existing ones.[150] These bodies should be responsible for establishing, maintaining, and updating an inventory of UCH in their territory (a fundamental tool of protection), the 'effective protection, conservation, presentation and management' of UCH and research into and education about it. Although most States will already have authorities responsible for cultural and/or archaeological heritage, the specific technical aspects of UCH (both scientific and legal) require personnel with special knowledge and skills sets.

The Rules concerning Activities Directed at Underwater Cultural Heritage ('the Rules') that are annexed to the main Convention text form an integral part of the treaty, such that activities in contravention of these are deemed in contravention of the Convention itself.[151] These are divided into 14 Parts, of which Part I (Rules 1–8) sets out the General Principles to be applied. Although the fundamental approach of preservation *in situ* is the 'first option',[152] this does not

gives the example of wreck sites in Australia where Aborigines hunt for fish and which they have incorporated into their 'dreaming', thus giving them a spiritual significance.

[148] As in the case of the Tudor battleship the *Mary Rose*.

[149] Provided for in Art 20. According to Forrest 'A New International Regime' (n 2) at p 550, although this is not given much attention 'it contains arguably the most important tool for the preservation of UCH'.

[150] Article 22.

[151] Based on the *Charter for the Protection and Management of the Underwater Archaeological Heritage*, adopted by ICOMOS in 1994. At the second intergovernmental meeting on the 2001 Convention held in 1999, Canada proposed that the Charter would form a good basis for the principles to guide any authorized activity under the Convention.

[152] Rule 1.

preclude 'activities directed at' this heritage since it will often be impossible to protect it where it lies and such activities should be conducted in a way that is consistent with the protection of that heritage; they should also be designed to make 'a significant contribution to the protection or knowledge of or enhancement of' it.[153] In addition, there must be minimal interference of the UCH during authorized activities and non-destructive techniques and survey methods should be used in preference to the recovery of objects.[154] All of this recognizes that the information contained in an archaeological site is of paramount importance. A further fundamental principle of the Convention is prohibiting the trade, selling, buying, or bartering of UCH 'as commercial goods' and treating the 'commercial exploitation' of UCH as fundamentally incompatible with the requirements of protection and proper management of this heritage.[155] In an attempt to address the controversial issue of professional archaeological consultancy services, these may be used, along with the deposition of any artefacts raised in a museum or other similar institution, as long as this does not prejudice its scientific or cultural interest or the integrity of a collection.

Access is regarded as one of the main elements in the human right to participation in a cultural life as it relates to cultural heritage[156] and the Rules uphold the importance of giving public access to UCH, in a manner compatible with its protection and management.[157] This right of access will need to be balanced with the needs of protection, although visiting a site without any interference directly on it would clearly be acceptable in most cases. The design of projects involving activities directed towards UCH on the EEZ or continental shelf (Article 10) or the deep seabed area (Article 12) and that must be authorized by the 'competent authorities'[158] is dealt with in Part II (Rules 9–13). Notably, 'appropriate peer review' is also required of these projects, which stresses the importance of scientifically valid projects. This section sets out in detail the elements that should be included in a project design[159] and contains requirements similar to those for archaeological excavation permits under many legislative systems.[160] Where

[153] Rule 22 requires that any such activities are under the direction of a qualified underwater archaeologist who will know about the latest techniques, the importance of proper recording, post-excavation conservation, use of non-invasive techniques as much as possible, etc.

[154] Rules 3 and 4. The proper recording of cultural, historical, or archaeological information is required under Rule 6.

[155] Rule 2. The 'irretrievable dispersal' of such heritage is also to be avoided since a shipwreck and its artefacts are viewed as a single ensemble that should normally be kept intact unless there are good reasons for its dispersal.

[156] See CESCR General Comment No 21 (2009) on the right of everyone to take part in cultural life (Art 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21.

[157] Rule 7. [158] As designated under Art 22.

[159] These include: a project statement and objectives; the methodology and techniques; expected funding; timetable; composition of the project team and their qualifications; plans for post-fieldwork analysis; conservation of artefacts and the site; documentation; deposition of archives; and a publication schedule (Rule 10).

[160] For example, the Turkish Law for the Conservation of Cultural and Natural Property (1983, as amended in 1987, 2001, 2004, 2006, 2007, 2008, and 2009) contains several similar provisions in Part IV (Arts 35–50).

unexpected discoveries (such as discovering a second, unknown wreck on the site being investigated) are made or circumstances change, this should be reviewed and amended and, in the case of urgent situations or chance discoveries, temporary stabilization and similar activities may be carried out with authorization but without an agreed project design.[161] The preliminary work that should be undertaken, beginning with an evaluation of the significance of the UCH and the vulnerability of it and its 'surrounding natural environment' to damage as a result of the proposed activities is then addressed in Part III (Rules 14–15). This Part attempts to strike a balance between the essentially destructive nature of archaeological activities and the potential for important finds and information. Where a site has reached a state of equilibrium with its environment, any direct intervention may upset this and lead to a rapid deterioration of the site and so the aim is to ensure that activities are only undertaken where they are absolutely justified and where the preferred approach of *in situ* preservation is not an answer.[162]

Underwater investigation, excavation, and/or retrieval of objects is an extremely costly business and appropriate funding is an absolute requirement to ensure that a project can achieve all its objectives effectively. Part V (Rules 17–19) seeks to ensure that adequate funding is available for all stages of the project (through to project dissemination); to this end, a bond is required and a contingency plan for conservation and documentation must be put in place in case of some interruption in funding. This is a much more far-reaching set of funding requirements than are usually placed on excavation teams by government permits. An adequate timetable for completion of each stage of the project is also required, along with a contingency plan to ensure conservation and documentation of UCH in the event of an interruption or even termination of the project (Part VI, Rules 20–21). The emphasis here on the 'conservation, documentation and curation' of recovered artefacts is important since, once recovered from an underwater site, they can be very fragile and require expert conservation and curation. In order to ensure that a project is properly conducted, all personnel on the project team should have the necessary qualifications and competence and it must be directed by a qualified underwater archaeologist with proven scientific competence.[163] Significantly, divers with experience of underwater excavations but no formal archaeological qualifications are allowed to work on the team as well; their specific expertise may well be needed, especially in deep and difficult waters.[164] Correct site management that protects the site both during and after fieldwork is also vital, including the *in situ* preservation of any UCH that is not recovered (Part VIII, Rules 24–25). This part also requires site stabilization, monitoring, and protection against interference as part of site management. Underwater sites may be very vulnerable to damage

[161] Rules 12 and 13.

[162] Part IV (Rule 16) again reiterates the need for the use of non-intrusive techniques where possible.

[163] Part VII, Rules 22–23. Taken in conjunction with Rule 2, this prevents the 'unholy alliance' that has at times occurred between qualified archaeologists and commercial salvors, the former giving a professional cover to what is an essentially commercial operation.

[164] Rule 23.

or deterioration as a result of interference once discovered and it may be necessary to disguise the site post-excavation to prevent later disturbance. In view of the essentially destructive character of excavation, correct documentation is essential to preserving information of what was found and what was done and must be carried out to 'current professional standards' (Part IX, documentation).[165] The safety of the operation must also be ensured and an environmental policy should ensure that the seabed and marine life are not unduly disturbed.[166]

The requirement for post-excavation reporting is set out in detail[167] and those responsible for the project must ensure that both interim and final reports are made public according to the agreed timetable; this is important since the failure to publish excavation reports is unfortunately extremely common.[168] The ultimate destination and deposition of the finds, including agreements as to how this will be treated, is an issue of some significance: for example, what parts (if any) will be deposited with the State of origin and who owns the copyright of any documentation produced? Project archives (including UCH itself and documentation) should be kept together where possible and for professional and public access to be made possible. This should be done as quickly as possible and with an upper time limit of 10 years, which should prevent the unfortunately common practice of individual researchers claiming copyright to their own materials and refusing access to other researchers. The management of project archives should be done according to international standards, a requirement that suggest the significance of this heritage is as a heritage of humankind as well as one of local significance.[169] In some cases the exigencies of conservation of artefacts may lengthen this time period for bringing the archive together[170] while, in others, practical or political reasons may require the splitting of a collection. Proper public dissemination of the findings of excavations can be seen as a duty with regard to the cultural right to have access to UCH[171] and the element of public education and popular presentation of the findings are also addressed. This not only gives recognition to the importance of the public understanding of the cultural and scientific value of UCH but also to the fact that underwater archaeology is often publicly funded or

[165] It should include, at a minimum, a comprehensive record of the site, the provenance of all UCH moved or recovered, field notes, plans, drawings, sections, photographs, and recordings in other media.

[166] Part X, Rule 28 and Part XI, Rule 29, respectively.

[167] Part XII (Rules 30–31). For more on report writing for underwater excavation, see: Jeremy Green, *Maritime Archaeology: A Technical Handbook* (London: Academic Press, 1990).

[168] The European Convention on the Protection of the Archaeological Heritage (revised) of 1992 requires a summary record of excavation to be published in advance of the later 'comprehensive publication' of scientific studies.

[169] Part XIII, Rules 32–34.

[170] In the case of the Tudor shipwreck the *Mary Rose*, conservation of the timbers required 15 years.

[171] Patrick J O'Keefe, 'Archaeology and human Rights', *Public Archaeology*, vol 1 (2000): pp 181–93 at p 192. See also: Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, on the Right of Access to and Enjoyment of Cultural Heritage', Human Rights Council Seventeenth session Agenda item 3, 21 March 2011 [UN Doc A/HR/C/17/38].

reliant on other funding sources such as tourism, the sale of images, and public subscription.[172] Scientific reports are often inaccessible to the public in terms of their style and content and this information needs to be given 'popular presentation' by professional educators and the media for public consumption.

Conclusion

Protection of UCH and the regulation of activities affecting it is an extremely complex issue due to various factors. First, the physical fact of sites and artefacts being located underwater makes their discovery, recording, and excavation a challenging task that requires the combination of diving skills with archaeological methodology and expertise. Furthermore, the legal environment of the sea adds its own special complexities to this picture. The existence of traditional rules of salvage has made sunken wrecks, even historical and archaeological ones, extremely vulnerable to commercial salvage and exploitation in the past and the law has had to address this fact. The division of the sea into various jurisdictional zones (territorial and archipelagic waters, the contiguous zone, the continental shelf, the EEZ and the deep seabed area) plus the existence of both international customary rules and treaty law regarding the rights and duties of States within these various zones has also proved a complicating factor. States have important economic and security interests with regard to the use of these different maritime zones and have been traditionally reluctant to cede jurisdictional control with regard to them. Also, there is a range of other interest groups—from commercial salvors to the general public, recreational divers, and marine archaeologists—whose interests need to be taken into consideration. The 2001 Convention on UCH has faced a long history in its making and experienced much resistance, but has succeeded in reconciling many of these different legal, political, scientific, and other interests in a regulatory framework that has the potential to provide a much stronger protection to UCH than has hitherto been the case. However, it is bedevilled by the fundamental incompatibility between the archaeological value and the commercial value of UCH: according to Forrest, its provisions 'evince a weak and contradictory attempt to eliminate the economic value of UCH'.[173] He cites, for example, the fact that the Rules allow a role for professional archaeological consulting services which are commercial in their nature. The 2001 Convention has now secured 48 States Parties and entered into force on 2 January 2009. It remains to be seen how far the practice of States Parties (and others) under the influence of this treaty may contribute to the development of future customary or treaty rules in the future.

[172] Part XIV, Rule 35. [173] Forrest, 'A New International Regime' (n 2) at p 534.

4

Cultural Heritage and the Environment

This chapter is not restricted to presenting the 1972 Convention of UNESCO on the World Cultural and Natural Heritage although that instrument is, naturally, a central one in this discussion. It represents the most developed case we have thus far of a treaty that explicitly addresses these two related aspects of heritage together. As such, its adoption in 1972—the same year as the Stockholm Conference on the Human Environment—encapsulated a major paradigm shift in international law-making. Bouchenaki, referring to an increasingly open concept of cultural heritage that we have today, noted that:

> we have become aware over recent decades, since the adoption of the 1972 Convention, that culture and nature cannot be separated in our approach to 'heritage' if we are to render a true account of the diversity of cultural manifestations and expressions, and in particular those in which a close link is expressed between human beings and their natural environment.[1]

It was ground-breaking and was the first, and only, time that an international treaty has addressed the natural and cultural heritage in one text, on the basis of separate drafts prepared by the International Union for Conservation of Nature (IUCN) (for the natural heritage) and ICOMOS (for the cultural heritage).[2] Francioni has written of this Convention that:

> [it] stands out for two very important innovative features. The first is its unprecedented recognition of the close link between culture and nature and in having established a

[1] This more open concept can 'develop new objectives and put forward new meanings as it reflects living culture rather than an ossified image of the past'. Mounir Bouchenaki, 'World Heritage and Cultural Diversity: Challenges for University Education', in *World Heritage for Cultural Diversity* edited by Dieter Offenhäußer, Walther Ch Zimmerli, and Marie-Theres Albert (German Commission for UNESCO, 2010) pp 24–31 at p 25.

[2] In 1968, the IUCN had developed proposals for the protection of the world's natural heritage that were presented to the 1972 United Nations conference on Human Environment in Stockholm [Declaration of the UN Conference on the Human Environment (Stockholm, 1972), adopted at the 21st plenary meeting on 16 June 1972 [UN Doc A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972)]] and, later, became the basis for that aspect of the UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)]. For general background on the Convention's development, see: UNESCO, *Protection of Mankind's Cultural Heritage, Sites and Monuments Paris* (UNESCO, 1970); RL Meyer, 'Travaux préparatoires for the UNESCO World Heritage Convention', *Earth Law Journal*, vol 2 (1976): p 45.

common regime of conservation and safeguarding of the most significant manifestations of what is man-made and what is the most extraordinary work of nature . . .[3]

To bring together these two aspects of heritage was a far-sighted move that has resulted in one of the most successful international treaty regimes ever developed,[4] but it has not, as yet, been followed up in subsequent international treaty making. Also, it should be noted that there is an uneven picture as far as State Practice in implementing this Convention is concerned, with some taking the cultural/natural relationship to a high degree[5] while others have not, as yet, successfully nominated any natural properties to the World Heritage List.[6]

Since this Convention has been well covered in the literature, both from the view point of cultural heritage law[7] and environmental protection,[8] as well as from a more integrated viewpoint also,[9] it is not analysed in detail here although it is, of course, addressed in this chapter. Rather, I wish here to trace the broader relationship both in fact and in law between cultural heritage and the natural environment. It is important to note also that some of the literature concentrates specifically on the 1972 Convention purely as an environmental protection treaty, an aspect that is not at the forefront of this discussion: here, the natural heritage aspects are of relevance insofar as they interact with cultural aspects. However, it is worth noting that where the Convention is acting solely as a nature protection treaty, it is of less direct relevance to this chapter. For Lyster, for example, the 1972 World Heritage Convention is one of the 'Big Four' conservation treaties he described in his book on international wildlife protection law (placed alongside the 1971 Ramsar Convention on Wetlands, the 1973 CITES Convention, and the 1979 Bonn Convention on Migratory Species). Birnie and Boyle and Sands

[3] Francesco Francioni, 'Introduction', in *The 1972 World Heritage Convention—A Commentary* edited by Francesco Francioni (assisted by Federico Lenzerini) (Oxford University Press, 2006) pp 3–7 at p 5.

[4] By 5 August 2014, there were 191 States Parties to this Convention which represents almost the whole of the international community, ratification status available online at: <http://whc.unesco.org/en/statesparties> (accessed 3 December 2012).

[5] The Australian Environment Protection and Biodiversity Conservation Act 1999 ('the EPBC Act'), eg, provides a legal framework for protecting and managing nationally and internationally important flora, fauna, ecological communities, *and heritage places*.

[6] In Iran, as in many countries, the implementing authority for the 1972 World Heritage Convention is the Cultural Heritage Organization (or similar body) and so it tends to focus more on the cultural than the natural heritage.

[7] Eg, in Craig Forrest, *International Law and the Protection of Cultural Heritage* (London and New York: Routledge, 2011) at Ch 5, pp 224–86. Roger O'Keefe addresses the legal status of its obligations in: 'World Cultural Heritage: Obligations to the International Community as a Whole?', *International and Comparative Law Quarterly*, vol 53, no 1 (2004): pp 189–209.

[8] See: Simon Lyster, *International Wildlife Law* (Oxford University Press, 1989; reprinted 2000). Patricia Birnie and Alan E Boyle, *International Law of the Environment* (Oxford University Press, 2002) and Philippe J Sands, *Principles of International Environmental Law* (Cambridge University Press, 2003).

[9] *The 1972 World Heritage Convention—A Commentary* edited by Francesco Francioni (assisted by Federico Lenzerini) (Oxford University Press, 2006) contains chapters on both the cultural heritage and natural heritage aspects of this Convention, as well as on cultural landscapes which bring the two together.

take a similar approach, evaluating the Convention as an environmental protection treaty and on the basis of its provisions relating to natural heritage.

The examination that is presented here will both address the ways in which cultural heritage treaties contribute to environmental protection, as well as the role played by environmental treaties in protecting and/or promoting cultural heritage. The former will consider not only the relationship of the cultural heritage protected under UNESCO's 1972 World Heritage Convention with the natural environment, but also that of the 2001 Underwater Cultural Heritage Convention[10] and the 2003 Intangible Heritage Convention. In the case of the 2003 Convention, it is worth noting that this treaty represented a further paradigm shift in cultural heritage law-making (from the purely tangible to the intangible aspects). It is also one that explicitly recognizes that intangible cultural heritage is shaped and formed in response to the physical environment.[11] As we will see below, the Convention on Biological Diversity adopted in 1992 gives some recognition to the cultural dimension of environmental protection.[12] Moreover, the treaty bodies of various environmental Conventions have sought to integrate cultural factors (such as the role of traditional ecological knowledge of indigenous and local people) into the operation of the treaties through developing new guidelines and directives. For example, Practical Principle 12 of the Addis Ababa Principles notes that, '[t]he needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources'.[13] In a similar manner, the Intangible Heritage Committee of the 2003 Convention has encouraged Parties during the eight years since its entry into force to take account of the role of this heritage in order to ensure environmentally sustainable practices as well as stressing the importance of environmental resources to the continued viability of the heritage.[14]

[10] Article 1 of the Convention, at para 1(a) defines 'Underwater cultural heritage' as including: '(i) sites, structures, buildings, artefacts and human remains, *together with their*…*natural context*' [emphasis added].

[11] See n 2 above.

[12] UN Convention on Biological Diversity (1992) [1760 UNTS 79; 31 ILM 818 (1992)] at Art 8(j) acknowledges the importance of indigenous and local communities' 'knowledge, innovations and practices' related to the environment.

[13] The Conference of the Parties (COP) of the Biodiversity Convention adopted the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (COP 7 of the Convention on Biological Diversity, 2004). Other examples include Resolution VII.8 on Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands, 7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971) held at San José, Costa Rica, 10–18 May 1999. Convention on Wetlands of International Importance, Especially as Waterfowl Habitat (Ramsar) 2 February 1971, in force 21 December 1975 [11 ILM 963 (1972)].

[14] Paragraph 27 of the *Operational Directives* for the implementation of the Convention adopted by the General Assembly of the States Parties to the Convention at its second ordinary session (Paris, 16–19 June 2008) and amended at its third session (Paris, 22–24 June 2010) requires that examination of candidature files for the List of Intangible Cultural Heritage in Need of Urgent Safeguarding should include 'assessment of the risk of its disappearing, due, inter alia, to the lack

Introduction

Cultural heritage and the natural environment are not separate phenomena but are interrelated to a very high degree as is explicitly acknowledged in the Operational Guidelines to the 1972 World Heritage Convention, stating that 'no area is totally pristine and that all natural areas are in a dynamic state and to some extent involve contact with people'.[15] As such, the legal and other approaches taken for their protection have much in common as the shared practice of establishing conservation areas illustrates. The relationship between human societies and their physical environment—the 'environmental media' of air, water, sea, and land[16]—is a complex one that has developed over millennia of mutual impacts and interactions: just as much of the physical environment we enjoy today, except for some extremely rare wilderness areas,[17] has been shaped and moulded by human activities, so human social and cultural practices have often developed largely as a response to the physical environment;[18] our cultural heritage is a clear example of this phenomenon. This fact has been reflected in varying degrees in both environmental protection and cultural heritage law, as this chapter will explore in more detail below. However, the implications of this for future policy- and law-making still need to be further considered. National legal systems may treat certain aspects of the environment as part of the heritage of a specific local community or cultural group or address both cultural heritage and the natural environment in one piece of legislation.[19] In addition, components of the natural environment such as mountain ranges, particular collections of vegetation, or desert landscapes may well serve as symbols of national or ethnic cultural identity.[20] Therefore, we should not regard cultural heritage protection law as a discreet discipline but rather as an integral part of environmental law in general, albeit a somewhat specialized area.

of means for safeguarding and protecting it, or to processes of globalization and social or environmental transformation'.

[15] Paragraph 90 of the *Operational Guidelines* (n 75).

[16] To use the definition of the 'environment' given in the 1990 Environmental Protection Act of the UK.

[17] Wilderness areas are those places that have never been subject to human habitation, agriculture, or other human activities and are, therefore, pristine and untouched environments. Category Ib of the IUCN classification of protected areas includes wilderness areas which are 'unmodified or slightly modified land and/or sea without permanent or significant habitation, which are protected and managed to preserve their natural condition'. See: IUCN, *Guidelines for Protected Areas Management Categories* (Switzerland: Gland, 1994).

[18] As has been explicitly recognized in the definition of intangible cultural heritage provided in Art 2(1) of UNESCO's 2003 Convention for the safeguarding of this heritage: 'This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history'.

[19] As is the case of the Australian law cited at n 5 and, to some degree, of legislation in the UK that protects ancient monuments.

[20] The use of landscape images in the advertising of the Scottish Tourist Board, eg, is a good example of this.

It is also worth noting here that the interrelationship between cultural and natural heritage is not always regarded as a positive one. Examples can be found of cases where traditional cultural practices, often viewed as supporting environmental sustainability, are regarded as contrary to environmental protection principles. For example, there has been a long-standing dispute within the International Whaling Commission over the claims of some States (Norway and Japan, in particular) to whaling as a traditional cultural practice.[21] More recently, this has been played out in the case brought by Australia (later joined by New Zealand) in the International Court of Justice against Japan over the latter's programme of whaling for 'scientific' purposes (making use of the exception allowed under Article 8 of the Whaling Convention of 1946).[22] Although the case itself turned upon whether this taking could constitute 'for scientific purposes' as intended by the Convention, it is founded upon a deeper division between those States that regard whaling as a traditional right (Norway, Japan, and the Faroe Islands, in particular) and those (led by Australia, New Zealand, and the UK) that take a firmly conservationist and, in this case, prohibitionist stance. Another intriguing example is that of Resolution 16.8 from the Conference of the Parties to the CITES Convention (on trade in endangered species) on 'Frequent cross-border non-commercial movements of musical instruments' of which one main purpose is to ensure that 'exemptions provided by the Convention not be used to avoid the necessary measures for the control of international trade in specimens crafted from species listed in the Appendices'. This, then, recognizes that many traditional musical instruments (that might, presumably be protected under UNESCO's 2003 Intangible Heritage Convention) are made from the specimens of species entered on one of the three appendices of CITES as endangered. Indeed, if we look at the Representative List of the 2003 Convention (discussed more below) we can find certain inscribed elements where the traditional practice may raise environmental protection problems. Falconry,[23] for example, can lead to the illegal capture and trafficking in rare species of endangered falcons (which are listed on Appendix I of CITES), as has been seen in the Persian Gulf region.

Despite the closeness of their subject matters, the legal frameworks for protection of cultural heritage and the natural environment (or heritage) have mostly developed independently of each other, despite the clear overlaps that exist. Hence, the 1972 World Heritage Convention remains the sole exception as far as integrating the protection of the cultural and natural heritage into a single international treaty regime. Moreover, both the practice of States Parties to the

[21] Rob van Ginkel, 'Killing Giants of the Sea: Contentious Heritage and the Politics of Culture', *Journal of Mediterranean Studies*, vol 15, no 1 (2005): pp 71–98 addresses the traditional tuna fishery of Favignana (off Sicily) and its ritual of the *mattanza*; the killing of the tuna and the traditional Faroe Islanders' whale drive for the *grindadráp* pilot whale.

[22] This case was decided in April 2014 in favour of the plaintiffs (Australia and New Zealand) on the basis that Japan could not show that its whaling fell within the scientific exception provided for in Art 8. ICJ Case *Whaling in the Antarctic (Australia v Japan; New Zealand Intervening)*, General List No 148, Judgment 31 March 2014.

[23] Inscribed on the Representative List of Intangible Heritage of Humanity in 2010 by 11 Parties and re-inscribed in 2012 with two additional Parties.

Convention[24] and the revisions made over time to the listing criteria contained in the *Operational Guidelines* to the Convention for inscription on the World Heritage List have increasingly sought a closer integration of world cultural and natural heritage. This, then, suggests that the 1972 Convention is an important element in the current and future development of the law in this area.

Norms and Approaches Common to Cultural Heritage and Environmental Law

An examination of these interrelated areas of international law demonstrates that certain underlying principles and approaches are common to both and they result in a similarity in the regulatory measures they adopt. Hence, when we look at the nature of the interrelationship between these areas of law, it is helpful for us to examine more closely the ways in which they operate in these different domains of international law and consider the implications that this interrelationship has for the development of international policy and law in this field. First among these common principles and norms, we can identify the principle of *international cooperation* for the protection of what is regarded as a 'common heritage' or 'common interest' of humankind. This has been the fundamental basis for treaty-making in both the cultural heritage and environmental fields. It should not, however, be confused with the legal characterization of the economic (mineral) resources of common space areas (such as the deep seabed) as a 'common heritage of mankind', even though they may have sprung from a shared source in the negotiations at UNCLOS III over the 1982 Law of the Sea Convention.[25] As applied to the cultural heritage and the environment, this notion is closely linked with the idea that they are both a form of inheritance, held in trust by the present generation, that should be passed on to later generations in at least as good a condition as they were received; this latter idea encourages measures for preservation and conservation. Hence, the notion of *inter-generational equity* also plays an important role as a justification for the legal protection of both.[26] In addition to equity between generations with regard to the natural and cultural heritage, we may also wish to

[24] There were 191 States to the Convention as of 15August 2014. Of 1,007 properties listed in 161 States Parties, 779 are cultural, and only 197 are natural and 31 mixed (cultural-natural) properties. Information accessed 6 October 2014, <http://whc.unesco.org>.

[25] As first expressed in United Nations General Assembly in 1967 entitled: *The Question of the Reservation Exclusively for Peaceful Purposes of the Sea Bed and Ocean Floor, and the Subsoil Thereof, Underlying the High Seas, Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind*, UN Doc A/C.1/P.V 1525 (1967). See also: Christopher Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind', *International and Comparative Law Quarterly*, vol 35 (1986): pp 190–9.

[26] Expressed as early as 1946 in the International Convention for the Regulation of Whaling of 2 December 1946, in force 10 November 1948 [161 UNTS 72] (as amended 19 November 1956 [338 UNTS 336]) in the environmental field and in Preamble to the Convention on the Protection of the World Cultural and Natural Heritage (UNESCO, Paris, 16 November 1972), available online: <http://whc.unesco/org/conventiontext>.

identify the notion of *justice* as another common thread running through these two areas of law: various aspects of justice can apply to the international protection of the natural environment and the cultural heritage, as well as to human rights. A good example of these is a form of procedural justice expressed in terms of participatory approaches to protection and management.[27] In addition, the application of a distributive form of justice to the allocation of a shared resource (such as water) is a common approach in environmental law while a restorative form of justice can be applied both with regard to the clean-up requirement of the 'polluter pays' principle and the return of stolen and/or illegally exported cultural artefacts.

Moving beyond the classic idea of a common heritage of humankind (that is cited in the preambles to many older cultural heritage and environmental treaties), the more recent approach is one in which the protection/safeguarding of this heritage is characterized as a *common concern* or *common interest* of humanity. This expresses the idea that certain elements of the environment (such as the atmosphere and biological diversity) and of the cultural heritage (such as intangible cultural heritage) have such a character that any damage to or loss of them would represent a harm to all of humankind. Hence, the UN Convention on Biological Diversity (1992) characterizes the conservation of biodiversity as 'a common concern of mankind', the UN Framework Convention on Climate Change (FCCC) (1992) notes that 'climate change is a common concern of mankind since the climate is an essential condition that sustains life on earth', and the Convention for the Safeguarding of the Intangible Cultural Heritage (2003) refers to the 'universal will and the common concern to safeguard the intangible cultural heritage of humanity'.[28] This view then gives rise to an obligation on all States to cooperate in order to prevent this harm and it usually forms the basis for developing an international framework for such cooperation.[29] Such an approach also has linkages with the idea of *'third generation'* or *solidarity human rights*,[30] such as the right to a clean and healthy environment and the less well-accepted right to a cultural heritage of mankind. In this model, human rights moves beyond the classic relationship of the citizen vis-à-vis the State, to one that includes also the relationship of one State vis-à-vis other States and even of States (the international community) vis-à-vis the humankind as a whole. They also imply social justice

[27] Good examples of treaties that apply these would be the 2003 Intangible Heritage Convention (as a cultural treaty) and the 1994 Convention against Desertification, available online at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-10&chapter=27&lang=en> (as an environmental treaty).

[28] The UN Convention on Biological Diversity ('CBD') (1992), available online at: <http://www.cbd.int/convention/convention.shtml> (Preamble at para 3); the UN Framework Convention on Climate Change (FCCC) (1992) (Preamble at para 1); and the Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO, 17 October 2003), available online at: <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> (Preamble at para 5).

[29] Such as the international assistance and cooperation framework set out in Arts 19–24 of the 2003 Intangible Heritage Convention or the system for managing plant genetic resources as set out in Arts 15, 16, and 19 of the 1992 CBD.

[30] Carl Wellman, 'Solidarity, the Individual and Human Rights', *Human Rights Quarterly*, vol 22, no 3 (2000): pp 639–57.

(intra-generational equity) and inter-generational equity and the potential for rights held by collectives and not just individuals. Clearly, the proposed solidarity right to a healthy natural environment is relevant here, although we would need to add to it the dimensions of cultural heritage and sustainability to make it complete. The procedural principle of *participation in the decision-making process*[31] and, in certain cases, in the management of the resource in question—be it the tangible or intangible heritage or a naturally occurring environmental resource—is one shared across all three of these areas of law.[32] Indeed, by examining the ways in which this principle operates with regard to cultural heritage or the environment, it is easy to understand the close and intimate connections that exist between the two. Moreover, ensuring that this procedural principle is fully put into practice will inevitably involve a rights-based approach while, as a corollary, participation is also regarded as a key element for a human rights-based approach to development programming.

The concept of *sustainable development* as articulated in the Rio Declaration (1992)[33] and in subsequent UN instruments has been understood to comprise three 'pillars' of sustainability: environmental, economic, and socio-cultural.[34] Obviously, it is the connection between the first and third pillars that is the subject of this chapter: To illustrate this relationship, a direct linkage can often be identified between traditional and local cultures and the sustainability of resource exploitation and environmental stewardship.[35] On the basis of this, we can argue that the intangible cultural heritage (ICH) of local and indigenous communities is a vital element in ensuring sustainable use of environmental resources.[36] In addition, the ecological knowledge and practices of local and indigenous people that are a form of cultural heritage is often the 'missing link' in the environmental protection paradigm: without taking account of this knowledge, inappropriate

[31] Set out in Principle 10 of the Rio Declaration and further elaborated in the 1998 'Aarhus' Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters (Aarhus, 1998) 25 June 1998, in force 30 October 2001 [38 ILM 517].

[32] Eg Art 15 of the 2003 ICH Convention (n 28) that reads, 'Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals' and the UN Convention to Combat Desertification (1994) (n 27) that, at Art 3(a) requires that 'Parties should ensure that decisions on the design and implementation of programmes . . . are taken with the participation of populations and local communities'.

[33] Final Declaration of the UN Conference on the Environment and Development (Rio de Janeiro, 1992).

[34] The UN General Assembly adopted the 2005 World Summit Outcome, GA Res A/60/1, 15 September 2005. In this Resolution environmental protection, economic development, and social development were recognized as the 'three pillars of sustainable development'. More recently, these are understood to include a cultural dimension, either as a 'fourth pillar' or integrated into the third as 'socio-cultural development'.

[35] Principle 22 of the Rio Declaration (n 33), eg, notes that: 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices'.

[36] The 'importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development' is underscored in the Preamble (at para 2) of the 2003 Convention. Hence, it is considered to be a main underlying justification of safeguarding the heritage.

conservation approaches may be applied that result with unforeseen negative impacts on both the environment and the human societies that live in and on it. An example of this danger can be seen in the export prohibitions placed on ivory from Africa under the CITES:[37] these have, at times, led to a damaging and even dangerous imbalance between elephant and human populations.[38] Equally, the strict preservation approach of the Ramsar Wetlands Convention (1971) towards preventing change to the ecological character of wetlands listed on the International List was later understood to have failed to take account of the importance of traditional human activities (such as subsistence fishing or reed-cutting) in the development of and the continued health of wetlands. As a consequence, this preservationist approach was replaced in 1990 under new Guidelines by the 'wise use' approach that is much closer to sustainable conservation.[39]

The idea of *integration* also expresses the intimate, if not inseparable, connection that exists between cultural and natural heritage. 'Heritage' as noted by Boer and Wiffen 'can be cultural or natural, or a combination of both'.[40] To this, we can add an obvious human rights dimension that encourages us to take an integrated approach to human rights, the protection of the environment, and the conservation of cultural heritage. The inherent linkage between these—their integrated character—is demonstrated in international treaties for the protection of human rights and the conservation of the natural and cultural heritage. Certain specific aspects of the environment of special value, for example, are treated as the heritage of particular indigenous or local communities. In this sense, the law relating to protection of cultural heritage is an integral, but specialized, part of the wider discipline of environmental law. On the basis of this view, Boer and Gruber suggest that there is a human right to a sustainable heritage, akin to the already accepted human right to a clean healthy and sustainable environment.[41] Indeed, we can argue that this environmental human right does not go far enough since it does not take sufficient account of the related cultural factors. Such an approach would better recognize the significant contribution that the cultural and natural heritage can make to the long-term survival of humanity.

[37] Convention on the International Trade in Endangered Species (CITES), Washington, 3 March 1973, entry into force 1 July 1975 [993 UNTS 243].

[38] The tensions between elephant conservation and local populations are drawn out in: SM Dansky, 'The CITES "Objective" Listing Criteria: Are They "Objective" Enough to Protect the African Elephant?', *Tulane Law Review*, vol 73 (1999): p 961.

[39] Guidelines for the Implementation of the Wise Use Concept adopted by the 4th COP (Montreux, 1990) in Recommendation C.4.2 (Rev). David Farrier and Linda Tucker, 'Wise Use of Wetlands under The Ramsar Convention: a Challenge for Meaningful Implementation of International Law', *Journal of Environmental Law*, vol 12 (2000): p 21.

[40] Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (Melbourne: Oxford University Press, 2006) at pp 7–8.

[41] See, eg, the right to live in a healthy environment in Art 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador), available at: <http://www.oas.org/juridico/english/sigs/a-52.html>; see further the right to freely dispose of one's natural resources in Art 21 of the African Charter of Human and People's Rights, available at: <http://www.achpr.org/english/_info/charter_en.html>.

This, in turn, leads us to the notion of the *integration of human rights* with safeguarding the cultural and natural heritage. This relationship operates on two levels: (i) we can regard their protection as a fundamental human right per se; and also (ii) the protection of human rights related to culture can in itself contribute to environmental sustainability. The case of the Yanomami indigenous people of Brazil whose ancestral lands were being invaded by gold prospectors is a powerful example of the latter: The activities of these prospectors were damaging the environment of the forest-dwelling Yanomami and had even caused them to be moved off their lands. In 1980, the Inter-American Human Rights Commission ruled that tenure of (hence, control over) their land was an important part of their culture and identity and that Article 27 of the International Covenant on Civil and Political Rights (1966)[42] provided the basis in international law for upholding their right to the preservation of their cultural identity and, hence, protection of those elements necessary to preserve it.[43] This ruling made it clear that environmental protection can extend beyond simply regulating human activities that affect the environment and its resources and the associated management and/or conservation practices to the protection of those human societies whose cultural (environmental) practices and way of life depend on the physical environment. This approach, then, requires respect for the human rights of local and indigenous communities[44] whose ways of life are threatened by economic and resource-related activities that damage their immediate environment.[45] An illustrative case is that of the Penan people of non-peninsular Malaysia and their ongoing fight against large-scale commercial logging in Sarawak: being deprived of their forest habitat, their sustainable livelihood is under threat and their very existence as a community has been placed in jeopardy. In addition to the deforestation, several dam projects are planned which would submerge several Penan villages and their lands.[46] In the absence of the forest habitat and the land on which their villages depend, the Penan community and their way of life will soon disappear altogether.

In sum, the relationship between the heritage-environment-human rights nexus and sustainable development is an important one. Although it goes beyond the remit

[42] This sets out the rights of members of ethnic, religious, and cultural minorities under international law.

[43] Case No 7615 (Brazil), Inter-Am CHR Res No 12/85 (5 March 1985), *Annual Report of the Intra-American Commission on Human Rights, 1984-1985*, OAS Doc OEA/Ser.L/V/II.66. doc 10, rev 1 at 24 (1985). For more on this case, see: S James Anaya, *Indigenous Peoples in International Law*, 2nd edn (Oxford University Press, 2004) at p 261.

[44] Such as the local farmers whose rights are protected in the International Treaty on Plant Genetic Resources for Food and Agriculture (FAO, 2001), online at: <http://www.fao.org/ag/cgrfa/itpgr.htm>.

[45] Numerous examples of this can be found, from the indigenous people of the Amazon Forest facing destruction of their environment through logging to the Ogoni in Nigeria whose environment has been seriously damaged (and their own security placed under threat) by the activities of the international oil company Shell.

[46] Further information can be found on the website of Survival International at: <http://www.survival-international.org/tribes/penan>.

of this book, it is now timely to suggest that the international community needs to develop a legal framework that fully encompasses the three core elements of sustainability: the right to development, the right to a healthy global environment, and the right to the cultural heritage of humankind.[47] Taken together, these would contribute greatly to developing a more truly sustainable approach to protecting both the natural environment and cultural heritage, as well as the related human rights.

An Analysis of the Relevant International Law

In this section, some of the ways in which global environmental and cultural heritage treaties have sought to address the interconnectedness between both these aspects of heritage are examined. We can find these relationships expressed both explicitly and implicitly in the treaty texts themselves as well as through the work of their treaty bodies.

Environmental treaties

Most international environmental protection treaties adopted at or after Rio (1992) have concentrated on the ecological and economic pillars of sustainability and have generally given less attention explicitly to the socio-cultural one. The development of the principle of common but differentiated responsibility[48] as applied in the 1992 Climate Change Convention,[49] for example, reflects an attempt to reconcile the conflicting developmental and environmental interests of developing and developed Parties, respectively. In this sense, it answers directly to the balancing of economic and environmental interests set out in Principles 3 and 4 of the Rio Declaration and that is a central plank of sustainable development.

Despite these observations, international environmental treaties have not wholly ignored the socio-cultural dimension of sustainability as we can see from the following examples. Recognition of the culture-nature relationship in environmental treaties has a relatively lengthy history and the special relationship that traditional indigenous communities enjoy with the environment was recognized as early as 1957 in Article VII of the North Pacific Fur Seal Interim Convention.[50] This agreement allows for an exception for the indigenous people

[47] For a more recent examination of solidarity rights with regard to the environment, see: Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (The Netherlands: Martinus Nijhoff Publishers, 2010).

[48] This principle recognizes the common responsibility of all States to protect the global environment but, at the same time, environmental standards that may be differentiated on various grounds, including special needs and circumstances as well as the aforementioned reasons, see: Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2003) at pp 285–9. Also of relevance is: CD Stone, 'Common but Differentiated Responsibilities in International Law', *American Journal of International Law*, vol 98 (2004): pp 276–95.

[49] Article 4.

[50] Agreement on Measures to Regulate Sealing and Protect Stocks in the Northeast Part of the Atlantic Ocean (1957) [309 UNTS 269].

(named as Indians, Ainos, Aleuts, and Eskimos) 'dwelling on the coast' if using traditional hunting methods to the prohibition on capturing fur seals during their pelagic migration in the open seas and/or their killing. This exception only applies if they hunt from canoes that are 'propelled entirely by oars, paddles or sails' and manned by no more than five persons; such hunting must be carried out 'in the way hitherto practised and without the use of firearms'. In a similar fashion, the 1973 Agreement on Conservation of Polar Bears[51] allows in Article III(1) certain exceptions to the prohibition on hunting and catching polar bears, which include: '(d) Taking by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party'. The acceptance we see here of the rights of local and indigenous people to continue their traditional hunting practices is a recognition that this cultural practice (a form of heritage of the communities concerned) is part of a way of life that contributes to the sustainable stewardship of the environment and its natural resources.

Some more recent environmental treaties have taken this approach further through recognizing explicitly the role that local and indigenous traditional knowledge and practices play in ensuring sustainable management of a fragile environment and its threatened resources. The 1992 UN Convention on Biological Diversity (CBD) acknowledges in Article 8(j) the significant contribution made by local and indigenous knowledge, innovations, and practices to achieving sustainable environmental management and protection and, through this, places an obligation on the Parties to take measures to safeguard these. The 1994 Convention to Combat Desertification (CCD)[52] is also of interest here since it places a strong emphasis on the social and cultural context of environmental protection and on ensuring the participation of local people in decision-making processes related to the environment. Interestingly, it calls for the protection of the economic, social, *and cultural* rights of local populations as part of ensuring the sustainability of the environment and their livelihoods. The 2001 FAO Treaty on Plant Genetic Resources for Food and Agriculture[53] is a further environmental treaty that explicitly protects farmers' and plant breeders' rights (with regard to the ownership and use of plant genetic resources) and, like the 1994 Convention, their procedural right to participate in national decision-making on the conservation and sustainable use of plant genetic resources (Article 9(2)). Although a more indirect recognition of cultural practices, the right of participation implies respect for local cultural customs and forms of social organization which fall largely under the rubric of cultural heritage.

In some cases the cultural dimension of sustainability is afforded protection more through the implementation of environmental obligations by the treaty bodies rather than in the treaty text itself. An example of this process can be found in the operation of the International Whaling Commission (established

[51] Oslo, 15 November 1973, in force May 1976 [13 ILM 13 (1973)]. It entered into force in 1976 with three Parties and, by 1978, all five circumpolar States had become Parties.

[52] UN Convention to Combat Desertification (1994) (n 27).

[53] FAO Convention (2001) (n 44).

under the 1946 Whaling Convention)[54] which recognizes that aboriginal subsistence whaling has a different character from commercial whaling since it aims to: avoid any serious increase in the risks of extinction; ensure continued harvests appropriate to their cultural and nutritional requirements; maintain stocks at highest net recruitment level; and, if they fall below that, to ensure they move towards it. Aboriginal subsistence whaling is currently permitted for Denmark (Greenland, fin and minke whales), the Russian Federation (Siberia, grey and bowhead whales), St Vincent and the Grenadines (Bequia, humpback whales) and the US (Alaska, bowhead and grey whales).[55] Under the operation of the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS), six species of Sahelo-Saharan antelopes are listed in Appendix I and so are subject to the protection that listing provides.[56] These antelopes are regarded both as a keystone species in the maintenance of biodiversity in the Sahelo-Saharan region as well as a being a primary source of exploitable biomass and playing a major role in the culture and livelihood of indigenous peoples of the region. In 1998, an Action Plan for the conservation and restoration of the species and their habitats was drawn up that aims to prevent further loss of the species' populations while also balancing the interests of the indigenous people of the area. The Ramsar Convention (1971) has also established Guidelines for strengthening the participation of local and indigenous communities in the management of wetlands, which were adopted 28 years after the Convention was initially drafted.[57]

The 1992 Convention on Biological Diversity was the first international treaty to address these issues, by intertwining the economic aspects of biological diversity with the cultural aspects of its use and related knowledge by local communities.[58] A more recent FAO international treaty on plant genetic resources[59] also gives a central role to the traditional knowledge of local and indigenous communities for the preservation of biodiversity and sustainability. Although the 2003 Intangible Heritage Convention avoids addressing intellectual property issues directly, they are clearly relevant to the implementation of the Convention and practice related to it will no doubt inform the question of the dualistic cultural and economic character of traditional ecological knowledge (TEK) in the future.[60] However,

[54] Convention for the Regulation of Whaling, Geneva, 24 September 1931 [155 LNTS 351].

[55] Source: <http://www.iwcoffice.org> under 'Conservation and management'.

[56] This species has 14 Range States (Egypt, Libya, Tunisia, Algeria, Morocco, Senegal, Mauritania, Burkina Faso, Mali, Niger, Nigeria, Chad, Sudan, Ethiopia). Convention on the Conservation of Migratory Species of Wild Animals (Bonn) [19 ILM 15 (1980)].

[57] Resolution VII.8 on Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands, 7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971) held at San José, Costa Rica, 10–18 May 1999. The COP of the Biodiversity Convention has adopted similar guidelines as follows: The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (COP 7 of the Convention on Biological Diversity, 2004).

[58] In Art 8(j) of that Treaty.

[59] FAO Convention (2001) (n 44).

[60] A recent evaluation report on the Convention proposed (at paras 246–50 and Recommendation 15) that UNESCO and WIPO work more closely on this issue in the framework of implementing the 2003 Convention. Barbara Torggler and Ekaterina Sediakina-Rivière (Janet Blake as Consultant), *Evaluation of UNESCO's Standard-setting Work of the Culture Sector, Part I—2003*

the problem of treating 'nature' and 'culture' as two separate categories remains since, for indigenous and genetic resources, intellectual property and cultural rights instruments are difficult to apply to many aspects of nature. For indigenous and local communities, this is a false and meaningless distinction. Furthermore, studies on TEK have shown[61] that effective *in situ* preservation of biological diversity—the basic purpose of the 1992 Biodiversity Convention—depends on ensuring control of their land and resources by local communities as well as simply preserving their TEK per se.

Cultural heritage treaties

With respect to the way in which cultural heritage law has acknowledged the importance of the environmental dimension, the 1972 World Heritage Convention and the 2003 Intangible Cultural Heritage Convention are the two treaties of most interest here. However, UNESCO's Underwater Cultural Heritage Convention (2001) is also of relevance in view of the intimate interaction between underwater material culture (shipwrecks, crannogs, etc) and the aquatic environment in which they are found. The European Framework Convention on the Value of Cultural Heritage to Society (Faro, 2005)[62] is also worthy of consideration here since it makes explicit the relationship between cultural heritage and the physical environment.

1972 World Heritage Convention (UNESCO)

The most important convention related to cultural and natural heritage is, undoubtedly, the World Heritage Convention which embraced the idea of a common cultural and natural heritage, recognizing their similarities and equal importance to humankind. The spirit of the World Heritage Convention is expressed in its Preamble: '*Considering* that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole…' This was an important step in recognizing that there exists heritage of outstanding universal value,[63] the conservation of which is important to all humankind and is not simply the sovereign property of the States on whose territory it is located. When world heritage is destroyed, this is a significant loss to all humankind and it should be treated accordingly.[64]

As has been mentioned above, UNESCO's 1972 World Heritage Convention is the result of combining two draft treaty texts, one drafted by ICOMOS for

Convention for the Safeguarding of the Intangible Cultural Heritage, October 2013 [Doc IOS/EVS/PI/129 REV].

[61] Eg, Darrel A Posey, 'Can Cultural Rights Protect Traditional Culture and Biodiversity?', in *Cultural Rights and Wrongs* edited by Halina Niec (Paris: Unesco Publishing, 1998).

[62] Faro, 27/10/2005, [*ETS* No 199]. Art 8, eg, is concerned with 'Environment, heritage and quality of life'.

[63] World Heritage Convention, Arts 1 and 2.

[64] World Heritage Convention, Preamble.

protecting cultural heritage and another, drafted by IUCN, aimed at protecting the natural heritage.[65] It therefore enjoys a dual cultural and natural orientation that takes account of the essentially interrelated character of these two aspects of heritage. Interestingly, this Convention (on which the 2003 Convention was modelled, but with important adaptations) has a form that is reminiscent of some treaties designed to conserve wildlife and their habitat, such as the Ramsar Wetlands Convention (1971) and CITES (1973): This model is based on a main treaty text that sets out general principles and the rights and obligations of States Parties and establishes two or more international lists (appendices or annexes) which require criteria for inscription (of natural and cultural heritage 'properties', species of fauna and flora, habitat types, etc) to be developed by a treaty body such as the World Heritage Committee or the Conference of the Parties. Importantly, these criteria can then be updated as scientific knowledge develops, environmental conditions evolve, and/or the needs of protection change. This structure gives such treaties a necessary inherent flexibility which is a notable feature of both environmental conservation and the 1972 Convention, reflecting both their shared ancestry and their commonalities.[66]

The earliest cultural heritage treaties[67] dealt with purely physical elements of cultural 'property' and as the object of private rights of a mainly economic character. The 1972 World Heritage Convention introduced the concept of 'heritage' by including natural and cultural aspects of heritage within a single Convention—a philosophical breakthrough at the time—and this implicitly included intangible elements as more recent revisions to the Convention's *Operational Guidelines* make clear.[68] The use of the term 'heritage' also had the advantage of allowing for the interest of future generations to be taken into account.[69] Some Member States[70] had expressed the wish during its drafting that intangible heritage be included in the scope of the 1972 Convention. Such an approach would have given recognition in 1972 to the idea of the indivisibility of tangible, intangible, and natural heritage which has only recently been given importance by the international community.[71] However, it is a worldview that has been strongly

[65] For a detailed exposition of this history, see: Francioni, 'Preamble' (n 3). See also: Meyer, 'Travaux préparatoires for the UNESCO World Heritage Convention' (n 2).

[66] Francioni, 'Preamble' (n 3) notes at p 6 that: 'This dynamic character of international law in the areas of natural and cultural heritage…has facilitated the development of interpretative criteria that permit the adaptation of existing law to new realities and risks. I refer especially to the criterion of "evolutive interpretation" that has been used in recent practice, in order to bend the textual meaning or the original intent of the parties to the necessity of reconciling the treaty commitment with new requirements and legitimate objectives of the international community, such as that embodied in the principle of sustainable development.'

[67] Such as: Convention on the Protection of Cultural Property in the Event of Armed Conflict (UNESCO, 14 May 1954 and its additional Protocols); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, Transfer of Ownership of Cultural Property (UNESCO, 14 November 1970).

[68] Eg, the 2000 revision accepted for the first time that 'associated intangible values' may be an important criterion for selecting a cultural site.

[69] Yusuf A Abdulqawi, 'Article 1—Definition of Cultural Heritage', in *The 1972 World Heritage Convention—A Commentary* edited by Francesco Francioni (n 3) pp 23–50.

[70] On an initiative from Bolivia.

[71] Mostly in relation to the development of the 2003 Intangible Heritage Convention of UNESCO.

championed for a long time by indigenous communities who see such divisions as purely arbitrary ones that serve a legislative and operational purpose but do not reflect the true nature of heritage.[72] The relevance of this to the environment is found in the basic precept of ecology that any disturbance of one element in the ecological system will affect all the other elements. This understanding is reflected in the tendency of local and indigenous groups to express their concerns about nature in cultural and spiritual terms.[73] This ought to have implications for legal approaches to protecting the environment as well as safeguarding cultural heritage since they need to take account of these values also.

First, and fundamentally, it is important to understand the relationship of the cultural and natural properties that are the main subjects of this Convention. As has already been suggested, the development of international law has, thus far, created a dichotomy between the cultural and natural heritage that does not reflect reality. The 1972 Convention represented an early, but still the sole, attempt to bridge the gap between these two aspects of heritage. However, simply bringing them together in a single treaty is insufficient in itself and, as the many revisions to the *Operational Guidelines* to the Convention over the last 20 years testify, it can be improved. Significantly for this article, some of the most fundamental revisions have concerned the overlap between cultural and natural heritage and more legal development is clearly needed if we are to achieve a full integration between these two aspects of heritage. Moreover, since cultural and natural heritage share many common elements, it is often both difficult and undesirable to make a strict separation between the two.

This is based on the profound truth that human societies and cultures (including material culture) have been largely moulded by their natural environment while, in a complementary way, the physical environment has also been significantly shaped by human interactions and activities, with the exception of a few wilderness areas. For example, it is now understood that the wetlands that are subject to the 1971 Ramsar Convention are, to a large degree, formed by low-impact human activities (grazing cattle, cutting reeds, traditional irrigation systems, etc) and that these need to continue for the wetland systems to remain healthy. As a result, the Conference of the Parties to this Convention has moved away from a strictly preservationist approach to internationally listed wetland sites to one that allows for environmentally sustainable human activities.[74] It is useful, here, to recall that the definition of 'natural heritage' given in the 1972 Convention (in Article 2) includes: 'natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; … [and] … natural sites or precisely delineated natural areas of outstanding universal value from the point of view of … natural beauty'. In addition, the definition of 'sites' (as one aspect of the cultural

[72] See: Sivia Tora, 'Report on the Pacific Regional Seminar', in P Seitel (ed), *Safeguarding Traditional Cultures: A Global Assessment* (Washington DC: Smithsonian Institution, 2001).

[73] Posey, 'Can Cultural Rights Protect Traditional Culture and Biodiversity?' (n 61).

[74] Farrier and Tucker, 'Wise Use of Wetlands under the Ramsar Convention' (n 39).

heritage as defined in Article 1), also alludes to the relationship between these two aspects of heritage: 'works of man or the combined works of nature and of man and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view'. Hence, the foundations were laid in the main body text for an approach that integrated cultural and natural aspects of heritage, even if they were effectively treated separately in the early implementation of the Convention.

During the period of over 40 years of operation of this treaty by the World Heritage Committee, it is possible to identify some important changes in practice that are in response to the need to integrate the natural and cultural aspects of world heritage. The evolution of the inscription criteria for the World Heritage List over the years[75] and the introduction of new concepts—in particular, those of cultural landscapes and mixed (cultural and natural) properties—bears witness to a response from the World Heritage Committee to this relationship of cultural to natural heritage and the need to ensure sustainability and local community participation in the management of properties. As early as 1962, the UNESCO Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites had provided recognition of cultural landscapes and their combined cultural and natural character.[76] In its Preamble, it noted that:

> On account of their beauty and character, the safeguarding of landscapes . . . is necessary to the life of men for whom they represent a powerful physical, moral and spiritual regenerating influence, while at the same time contributing to the artistic and cultural life of peoples . . .

Cultural landscapes were not, however, included in the *Operational Guidelines* as a category of property for inscription on the World Heritage List until 1992 when the cultural criteria were redrafted.[77] According to Redgwell, this revision was clearly influenced by contemporary developments and in particular by new environmental legal concepts such as the conservation of biological diversity.[78] The criteria for selecting cultural properties for World Heritage described cultural landscapes as, 'illustrative of the evolution of human society and settlement

[75] Until the end of 2004, World Heritage sites were selected on the basis of six cultural (i, ii, iii, iv, v, and vi) and four natural criteria (i, ii, iii, and iv). Following the adoption of the revised Operational Guidelines in 2005, these were merged into one single set of ten criteria, of which i–vi are the original cultural criteria and vii–x represent the previous natural criteria (i–iv). These can be found in English on the website of the World Heritage Convention at: <http://whc.unesco.org/en/guidelines>.

[76] 'For the purpose of this recommendation, the safeguarding of the beauty and character of landscapes and sites is taken to mean the preservation and, where possible, the restoration of the aspect of natural, rural and urban landscapes and sites, whether natural environment or man-made, which have a cultural or aesthetic interest or form typical natural surroundings.'

[77] The newly drafted criteria were based on the work of an expert meeting convened by UNESCO in La Petite Pierre in France in October 1992 with support from both IUCN and ICOMOS. Mechtild Rössler, 'The Implementation of the World Heritage Cultural Landscape Categories', a paper delivered to an expert Meeting of UNESCO on The World Cultural Heritage and Cultural Landscapes in Africa held at Tiwi, Kenya on 9–14 March 1999.

[78] Catherine Redgwell, 'Article 2—Definition of Natural Heritage', in *The 1972 World Heritage Convention—A Commentary* (n 3) pp 63–84.

over time, under the influence of physical constraints and/or opportunities presented by the natural environment and of successive social, economic and cultural forces'.[79] Three categories of cultural landscapes were defined in the 1992 *Guidelines* as: (i) clearly defined landscapes designed and created intentionally by man (eg gardens and parkland landscapes constructed for aesthetic reasons); (ii) organically evolved landscapes which result from an initial social, economic, administrative, and/or religious imperative and have developed their present form *by association with and in response to its natural environment*; and (iii) associative cultural landscapes whose inclusion is justifiable by virtue of the *powerful religious, artistic, or cultural associations of the natural element* rather than material cultural evidence, which may be insignificant or even absent.[80] The wholly mutual relationship between the physical environment and human culture and society is deeply embedded in these criteria.[81] Such landscapes may also have led to the development of sustainable techniques for cultivation and exploitation of the available natural resources that represent a human adaptation to the local ecological conditions. The desert and semi-desert areas in Iran which have given rise to specific water use practices, such as the traditional *qanat* aquifers in Yazd Province, are a good example of this process. As Rössler[82] noted:

> The management of World Heritage cultural landscapes can be a standard-setter for the conservation of the environment as a whole and can establish exemplars of what is required elsewhere. It can help to reinforce the standing of heritage conservation at national and local levels. The conservation of World Heritage cultural landscapes can demonstrate the principles of sustainable land use and of the maintenance of local diversity which should pervade the management of the rural environment as a whole.

[79] *The Operational Guidelines for the Implementation of the World Heritage Convention*, 1998, available at: <http://whc.unesco.org/en/guidelines>.

[80] Examples of cultural landscapes that have been inscribed on the World Heritage List include: Tongariro National Park in New Zealand (inscribed in 1993 on the basis of cultural criterion vi and natural criteria ii and iii), the Rice Terraces of the Philippine Cordilleras in The Philippines (inscribed in 1995 on the basis of criteria iii, iv, and v), the Quadi Quadisha (the Holy Valley), Pyrénées—Mount Perdu in France/Spain (inscribed in 1997 on the basis of cultural criteria iii, iv, and v and natural criteria i and iii), and the Forest of the Cedars of God (Horsh Atz el-Rab) in Lebanon (inscribed in 1998 on the basis of cultural criteria iii and iv).

[81] Although Musitelli criticizes the Convention for perpetuating an artificial dichotomy between cultural and natural heritage, see: Jean Musitelli, 'World Heritage, Between Universalism and Globalization', *International Cultural Journal of Property*, vol 2, no 11 (2002): pp 323–326 at p 329. In 1986, the Bureau of the World Heritage Committee at its Tenth Session, UNESCO Headquarters, Paris, 16–19 June 1986 had noted in Item 5 of the Provisional Agenda: Elaboration of guidelines for the nomination of mixed cultural and natural properties and rural landscapes at para 3.3: 'an inconsistency which existed between the definitions of Articles 1 and 2 of the Convention and the criteria for inscription of cultural and natural properties respectively…while Article 1 (cultural heritage) referred to natural aspects of cultural heritage in two of its definitions, the criteria themselves made no allusion to these aspects [unlike Article 2 which does not mention cultural aspects but criterion iii does allow for these].'

[82] Mechtild Rössler, 'The Implementation of the World Heritage Cultural Landscape Categories', in *The World Heritage Convention and Cultural Landscapes Expert Meeting – Tiwi, Kenya, 9–14 March 1999* (UNESCO, 2000) edited by Mechtild Rössler and Galia Saouma-Forero at pp 7–15 at p 13, available online at: <http://whc.unesco.org/documents/publi_wh_papers_07_en.pdf>.

Marine landscapes are typical examples of cultural landscapes where the interaction between human culture, society, and economic activities with the landscape of the coastline and the sea is strong and where all aspects of life are somehow determined by it. Moreover, the imagination and symbolic life of local people—what can be seen as their intangible heritage—is also heavily influenced by it. These unique landscapes sometimes also forced the local population to develop specific sustainable cultivation techniques and highly specialized skills in order to adapt to the local ecological conditions. This often also resulted in the development of the creation of unique environments such as the World Heritage-listed Rice Terraces of the Philippines Cordilleras.[83]

This integration of cultural and natural heritage in the implementation of the 1972 Convention was taken further by the introduction of the category of mixed cultural-natural heritage in 1998. This followed work by the Expert Group for a Global Strategy whose work led to a revision of five cultural criteria (i, ii, iii, iv, and vi) which led to 'conceptual shifts in the scope and application of the notion of "cultural heritage"…[including] a stronger recognition of the link between cultural and natural heritage'.[84] Interestingly, an Expert Meeting in 1996 felt that references to 'cultural', 'natural', and even 'mixed' heritage undermined the uniqueness of the Convention's recognition of the 'culture-nature continuum' and proposed merging the two sets of criteria (as happened in 2005).[85] In the 1998 revision of the *Operational Guidelines* the interrelated character of these two aspects of heritage and the need for an integrated approach to protection/safeguarding is recognized even more explicitly. According to the *Guidelines*, properties 'shall be considered as "mixed cultural and natural heritage" if they satisfy a part or the whole of the definitions of both cultural and natural heritage laid out in Articles 1 and 2[86] of the *Convention*' (at paragraph 4). Boer makes the pertinent point that many of the 25 mixed properties inscribed by 2007 'recognize[d] the cultural interactions of indigenous peoples and traditional communities with both the physical and non-tangible characteristics of the land'.[87] The later discussion of the

[83] Further information can be accessed at: <http://whc.unesco.org/en/list/722>.

[84] Abdulqawi, 'Article 1—Definition of Cultural Heritage' (n 69) at p 36. Significantly for the later discussion in this chapter, this also allowed for intangible aspects of cultural properties to be taken into account.

[85] Report of the Experts' Meeting on Evaluation of General Principles and Criteria for Nominations of Natural World Heritage Sites (Parc national de la Vanoise, France, 22–24 March 1996), WHC-96/CONF.202/INF.9, Paris, 9 April 1996 at p 4.

[86] Article 1 reads: 'For the purposes of this Convention, the following shall be considered as 'cultural heritage';…sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of Outstanding Universal Value from the historical, aesthetic, ethnological or anthropological points of view.' Article 2 reads: 'For the purposes of this Convention, the following shall be considered as "natural heritage": natural features consisting of physical and biological formations or groups of such formations, which are of Outstanding Universal Value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of Outstanding Universal Value from the point of view of science or conservation; natural sites or precisely delineated natural areas of Outstanding Universal Value from the point of view of science, conservation or natural beauty'.

[87] Ben Boer, 'Article 3—Identification and delineation of World Heritage Properties', in *The 1972 World Heritage Convention—A Commentary* (n 3) pp 84–102.

2003 Intangible Heritage Convention will show that many examples of ICH elements with environmental aspects relate to indigenous peoples and/or traditional communities.

Some examples below of mixed sites inscribed on the World Heritage List[88] that illustrate well the thinking behind merging the notion of cultural and natural properties are as follows. The Ecosystem and Relict Cultural Landscape of Lopé-Okanda in Gabon (inscribed in 2007 on the basis of criteria ii, iv, ix, and x) bears witness to an unusual interface between dense and well-conserved tropical rainforest and relict savannah environments, and demonstrates a great diversity of species, their habitats, and their adaptation to post-glacial climatic changes. It also contains evidence of the successive passages of different peoples including caves and shelters, evidence of iron-working, and a remarkable collection of some 1,800 petroglyphs (rock carvings) and reflects a major migration route of Bantu and other peoples from West Africa along the River Ogooué valley that has shaped the development of the whole of sub-Saharan Africa.

Some older inscriptions are now regarded as mixed sites, including the Tasmanian Wilderness in Australia (originally inscribed in 1982, modified in 2010 and 2012, on the basis of criteria iii, iv, vi, vii, viii, ix, and x) which is located in a region that has been subjected to severe glaciation and, covering an area of over one million hectares, constitutes one of the last expanses of temperate rainforest in the world. Evidence of human occupation of the area for more than 20,000 years is provided by material remains found in limestone caves. The sacred Mount Tai in China (inscribed in 1987 on the basis of criteria i, ii, iii, iv, v, vi, and vii) was the object of an imperial cult for nearly 2,000 years, containing artistic masterpieces in perfect harmony with the natural landscape. The Bandiagara site in Mali (inscribed in 1989 on the basis of only two criteria—v and vii—one of which is cultural and the other natural) is an outstanding landscape of cliffs and sandy plateaux and one of West Africa's most impressive sites. It also contains some fine architectural elements (houses, granaries, altars, sanctuaries, and *Togu Na*, or communal meeting places) and is the location for several age-old social traditions which would now be understood as intangible cultural heritage (masks, feasts, rituals, and ceremonies involving ancestor worship). Another mixed property worth mentioning here for the history of its inscription[89] is the Uluru-Kata Tjuta National Park in Australia (inscribed on the basis of criteria v, vii, viii, and ix). The inscription was extended to that of a mixed site in 1994 because of its importance in the belief system of the local Anangu Aboriginal people who are one of the oldest human societies. The Kakadu National Park (also in Australia) is a mixed site that sits on part of a fly-way network of sites of East Asian/Australian migratory

[88] More detailed information on these and other mixed properties is available online at: <http://whc.unesco.org/en/list>.

[89] Interestingly, this site was previously inscribed on the World Heritage List as an associative cultural landscape in 1994 and later re-inscribed as a mixed cultural/natural site because of its importance to the belief system of the local Anangu Aboriginal people. See: Ben Boer and Stefan Gruber, 'Human Rights and Heritage Conservation Law', in *Proceedings of the Conference on Human Rights and the Environment* edited by Janet Blake (Tehran: Majd Publishing, 2009) pp 90–115.

shorebirds protected under the 1971 Ramsar Convention and 21 species listed under the Bonn Convention for Migratory Species (1979) are also found there.[90]

Discussion of the associated cultural aspects of natural sites and landscapes inevitably leads us to address the dichotomy that has become established between tangible and intangible elements of cultural heritage law. This is, in many ways, a wholly arbitrary distinction that has developed as a result of the fact that cultural heritage law initially concerned itself with material culture—artefacts, art objects, monuments, sites—and that interest in the 'intangible' aspects of heritage only developed later.[91] This inseparability of tangible and intangible aspects of heritage is brought out in the definition of 'indigenous heritage' made by Daes in her 1993 report:

> [It includes] everything that belongs to the distinct identity of a people . . . all those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.

Interestingly, this also makes clear how deeply the cultural and natural heritage is intimately connected in the indigenous worldview.[92] Indeed, if we take the example of indigenous cultural heritage we can see that this is not a particularly useful terminology since many such communities do not themselves recognize this distinction.[93] Moreover, the dividing lines between these two aspects of heritage are becoming increasingly porous as the practice of the World Heritage Committee[94] has shown and as is apparent also in the overlaps that exist between the 1972 and 2003 Conventions of UNESCO.[95] The relationship between tangible and intangible heritage is one of mutuality since the latter often results from an interaction between human societies and tangible elements of heritage or the

[90] Redgwell, 'Article 2—Definition of Natural Heritage' (n 78) at pp 384–5.

[91] Earlier UNESCO treaties were focused on the material, tangible heritage, such as the 1954 'Hague' Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague) 14 May 1954, in force 7 August 1956 [249 UNTS 215] and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO, Paris, 14 November 1970. Available online at: <http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/1970-convention>.

[92] Erica-Irene Daes, *The Protection of the Heritage of Indigenous People* (Geneva/New York: United Nations, 1997).

[93] A point made in Tora, 'Report on the Pacific Regional Seminar' (n 72).

[94] Whereby 'intangible' elements of heritage have been increasingly included in the criteria for selecting properties for the World Heritage List, eg, under cultural criterion v: 'an outstanding example of a traditional human settlement or land-use which is representative of a culture (or cultures), especially when it has become vulnerable under the impact of irreversible change'.

[95] The famous case of the Rice Terraces of the Philippines was inscribed on the World Heritage List in 1995 and the Hudhud Chants Ifugao of the women who work in these rice paddies were inscribed on the Intangible Heritage Representative List in 2008. See: Harriet Deacon and Olwen Beasley, 'Safeguarding Intangible Heritage values under the World Heritage Convention: Auschwitz, Hiroshima and Robben Island', in *Safeguarding Intangible Cultural Heritage—Challenges and Approaches* edited by Janet Blake (UK: Institute of Art and Law, 2007) pp 93–108.

natural environment, while it is the intangible heritage also which gives meaning and significance to them. Together they play a vital role in the construction of the cultural identity of both local and national communities and so also have an important human rights dimension.[96] They can also help us to understand how humans and the environment have mutually acted upon each other over millennia. In view of this, it is necessary to develop fully integrated approaches towards the safeguarding of both tangible and intangible elements of cultural heritage so that it is both consistent and mutually beneficial and reinforcing.[97]

2003 Convention on Intangible Cultural Heritage (UNESCO)

The 2003 Convention for safeguarding intangible cultural heritage is the treaty in which the environmental and human rights dimensions of cultural heritage protection can be most clearly seen. In view of the preceding discussion of the evolution of practice relating to the 1972 Convention, it is important to recognize here that the current division of heritage into tangible and intangible elements in UNESCO treaty-making is, in reality, a technical one that has developed as a result of historical factors. In many ways, there exists a 'grey area' lying between these two treaties where the intangible heritage of the 2003 Convention and the associated intangible values of the 1972 Convention coalesce: this meeting point between the two Conventions is an important one and deserves much more examination and research. It is also, interestingly for this chapter, the place at which both treaties tend to embrace environmental conservation values.

One of the most notable aspects of the 2003 Convention is the central role it gives to the cultural communities and groups (and, in some cases, individuals) associated with ICH[98] which was previously unseen in an international cultural heritage treaty. We can see this as a response to the very specific character of this heritage which is wholly dependent on the ability and willingness of the cultural group and/or community to continue to maintain it. It also, incidentally, reflects the mutual dependency between human societies and their natural environment, a fact recognized in the definition of ICH given in Article 2(1).[99] The Preamble to this Convention also notes the role that this heritage plays in achieving truly

[96] Janet Blake, 'Why Protect the Past? A Human Rights Approach to Cultural Heritage Protection', *Heritage and Society*, vol 4, no 2 (2011): pp 199–238.

[97] *Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage*, adopted by the International Conference on the Safeguarding of Tangible and Intangible Cultural Heritage: Towards an Integrated Approach, 20–23 October 2004 (Nara, Japan) at para 11.

[98] In Arts 11, 12, and 15. The first part of the definition of ICH given in Art 2(1), reads: 'The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—*that communities, groups and, in some cases, individuals recognise as part of their cultural heritage*' (emphasis added).

[99] This reads, in part: 'This intangible cultural heritage, transmitted from generation to generation, *is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history*, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity' (emphasis added).

sustainable development, ie fostering environmentally sustainable practices embedded in the traditional knowledge and know-how of these local communities. There is an important fundamental difference in the philosophy of the 1972 and 2003 treaties that needs to be underlined here: while the definition of the 'world' cultural and natural heritage protected under the 1972 Convention is its 'outstanding' or exceptional value, ICH is celebrated under the 2003 Convention for its 'representative' character.[100] This is a notion that accepts even mundane aspects of heritage as valuable for the degree to which they represent the cultural practices, knowledge, world-view, etc of particular communities. Their inscription on the Representative List, therefore, is illustrative of cultural diversity worldwide since each inscribed element is representative of a type or category of ICH. Coupled with the idea of safeguarding (as opposed to protection) in this Convention, this represents a much stronger human rights related approach also since it celebrates the day-to-day practices of people's lives that are often essential to the continuation of their way of life.[101]

It is also in the interaction between these two Conventions—a question that will become increasingly important for the World Heritage Committee and the Intangible Heritage Committee to examine—that we see a potentially very rich area for further exploration. Clearly, there exists a 'grey area' that lies between them, as we see from properties that can be inscribed on the World Heritage List for their physical aspects but that also have associated intangible elements that merit inclusion on the ICH Representative List.[102] Of interest here is the fact that these frequently relate also to sites that have a significant environmental dimension, whether it be related to land use, water use, or other traditional ecological knowledge and practices. This clearly begs the question as to the wisdom of separating these various aspects of heritage and, importantly, how the practice of both these treaties can be managed to enjoy a positive synergy in such areas rather than redundancy. By examining the contribution both make to environmental sustainability and the importance of human rights of communities in this regard can be a means to find this synergy.

With regard to the 1972 and 2003 Conventions, a further point of relevance to this discussion is the choice of terms, between 'protection' which has generally been the leading term of art in both environmental and cultural heritage law and the newer term, 'safeguarding'. Protection as used traditionally in cultural heritage law is understood to encompass a range of approaches such as preservation, management, and conservation. However, more recent developments in the cultural heritage field (in particular with regard to ICH) have led to the use of the term 'safeguarding' in preference to 'protection'. Choosing safeguarding makes sense, especially in situations where one wishes to emphasize the importance of the

[100] Hence, the main international list is called the Representative List of ICH of Humanity.

[101] Of course, not all Parties have taken this idea on board, and there remains an unfortunate tendency to inscribe elements that are, in some sense, unique or outstanding in order to grandstand their country's heritage.

[102] As with the Rice Terraces of the Philippines and the Hudhud Chants mentioned above.

human context of the heritage in question.[103] It suggests a far broader approach to that of protection, which is essentially measures taken against a series of perceived threats to the fabric and/or viability of the heritage. In the safeguarding paradigm, in contrast, the heritage is not only protected from direct threats to it but this also implies that positive actions that contribute to its continued survival must also be taken.[104] Here, then, safeguarding is seen as a comprehensive notion that not only includes classic protective actions (such as identification, inventorying, conserving, etc) but also providing the conditions—including the social, environmental, and economic ones—within which it can continue to be created, maintained, and transmitted. In this way, safeguarding is a more context-dependent approach that also takes account of the wider human, social, and cultural contexts in which the cultural and natural heritage is situated. Thus, safeguarding is an approach that more clearly encompasses the third (socio-cultural) pillar of the sustainable development paradigm and so is also highly appropriate to the natural heritage.

It is helpful here to give examples of some inscribed elements of ICH in order to illustrate the above arguments. Several of the elements of ICH inscribed in the Representative List are intimately connected with the physical environment and its natural resources and it would be helpful if, in the future, the ICH Committee request that reporting Parties[105] provide information on how safeguarding these elements interacts (both positively and, at times, negatively) with environmental protection measures.[106] For several inscribed elements the physical environment and/or associated cultural space is an essential part of its practice, performance, and continuing viability. For example, the open air folk theatre at Great Land Rock in Dundgobi Province (in Mongolia) that is, at the same time, a protected natural area serves as an archetypal example of such places/spaces. Mibu no Hana Taue (inscribed in 2011) is a Japanese agricultural ritual carried out by the Mibu and Kawahigashi communities in Kitahiroshima Town to ensure an abundant rice harvest by celebrating the rice deity; on the first Sunday of June, after the actual

[103] ICH is a form of heritage whose continued existence depends on the human communities, groups, and individuals that are the repositories for it, practice and/or enact it and transmit it to the next generation; monuments, sites, artefacts, and other physical elements of heritage, in contrast, can exist independently once they have been created.

[104] The measures for safeguarding listed in Art 2(3) of the 2003 Convention are: 'identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage'.

[105] Submitting their reports on implementation measures as required under Art 29 of the Convention and governed by rules in paras 151–159 of the *Operational Directives* for the implementation of the Convention adopted by the General Assembly of the States Parties to the Convention at its second ordinary session (Paris, 16–19 June 2008) and amended at its third session (Paris, 22–24 June 2010).

[106] Information on the elements described here is taken from the UNESCO website at: <http://www.unesco.org/culture/ich/index.php?pg=541> and from reports submitted by 16 States Parties for examination by the ICH Committee at its 7th session held in Paris on 3–7 December 2012. Reports available online at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00485>. See also: Item 6 of the Provisional Agenda, 'Examination of the reports of States Parties on the implementation of the Convention and on the current status of all elements inscribed on the Representative List' [doc ITH-12-7.COM-6-E, 16 October 2012].

rice transplanting has ended, this ritual enacts the stages of planting and transplanting, demonstrating a direct link between the ICH and the environment.[107] Mosi Weaving of cloth from ramie plants in Hansan (Korea) which was inscribed in 2011 is a skill transmitted by middle-aged women (hence reflecting the gender dimension of some environment-related ICH) is a process that involves a number of steps, including harvesting, boiling, and bleaching ramie plants, spinning yarn out of ramie fibre, and weaving it on a traditional loom. The mythical and cosmological structures that make up the traditional knowledge of the Jaguar Shamans of Yuruparí (inscribed in 2011) represent the cultural heritage of many different ethnic groups that live along the Pirá Paraná River in south-eastern Colombia. The Jaguar Shamans follow a calendar of ceremonial rituals, based upon their sacred traditional knowledge that, inter alia, serve to revitalize nature and transmit traditional guidelines for maintaining the health of the land to male children as a part of their passage into adulthood.

The irrigators' tribunals of the Spanish Mediterranean coast (inscribed in 2009) are a very interesting example of how ICH and the environment coincide, being traditional law courts for water management that date back to the ninth to thirteenth centuries, with the two main tribunals—the Council of Wise Men of the Plain of Murcia (jurisdiction over a landowners' assembly of 23,313 members) and the Water Tribunal of the Plain of Valencia (representing a total of 11,691 members from nine communities)—recognized under Spanish law. They provide cohesion among traditional communities and a synergy between occupations (wardens, inspectors, pruners, etc), and contribute to the oral transmission of knowledge about water use and other matter. The cultural space of the Yaaral and the Degal in Mali (inscribed in 2008) encompasses the vast pastoral lands of the Peul people of the inner Niger Delta. The Yaaral and the Degal festivities mark the crossing of the river at the time of the transhumance when, twice a year, herds of cattle cross the arid land of the Sahel and the flood plains of the inner Niger River. Since they bring together representatives of all the ethnic and occupational groups in the Delta—the Peul cattle-breeders, Marka or Nono rice-growers, Bambara millet-growers, and Bozo fishermen—the Yaaral and the Degal festivities continue to renew inter-community pacts and contribute directly to environmental protection. The Hudhud element (mentioned above) that was inscribed in 2008 consists of narrative chants traditionally performed by the Ifugao community whose rice terraces extend over the highlands of the northern island of the Philippine archipelago. Thought to have originated before the seventh century, the Hudhud comprises more than 200 chants recited during the rice sowing season, at harvest time and at funeral wakes and rituals.[108] They recount tales of ancestral heroes, customary law, religious beliefs, and traditional practices

[107] Specific information on the elements is taken from reports submitted by these States Parties for examination by the ICH Committee at its 7th session held in Paris on 3–7 December 2012. Reports accessed at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00460>. See also: Item 6 of the Provisional Agenda (n 106).

[108] Again, it is worth noting that the narrators are mainly elderly women who hold a key position in the community, both as historians and preachers.

and, in this sense, are a means of transmitting important knowledge about rice cultivation and land ownership and usage, among other things.

The Zápara people live in a part of the Amazon jungle straddling Ecuador and Peru in one of the most bio-diverse areas in the world and they are the last representatives of an ethno-linguistic group that included many other populations before the Spanish conquest.[109] They have elaborated an oral culture that is particularly rich as regards their understanding of the natural environment, demonstrated by the rich vocabulary for the flora and fauna and by their medicinal practices and knowledge of the medicinal plants of the forest. This cultural heritage is expressed through their myths, rituals, artistic practices, and language which is the repository of traditional knowledge and of oral tradition and constitutes the memory of the people and the region.

However, the direct or indirect dependency of some ICH elements on the natural environment and its resources also poses problems for their continued viability. For example, climate change, deforestation and desertification either actually or potentially threaten the Yaaral and Degal and the Charter of Manden elements in Mali and the Daemokjang element in Korea.[110] Falconry (a multinational element)[111] is also threatened by lack of availability of falcons and destruction of their habitat. Another interesting problem from the point of view of environmental protection is the difficulty of moving falcons across borders as a result of international regulations to control the trade in endangered species.[112] This last example, therefore, suggests that the interrelationship between cultural heritage safeguarding and environmental protection is an extremely complex one that requires careful and subtle handling for it to have a positive outcome for both. In this case, the traditional practice of falconry which has been sustained over many generations should be regarded as an exception to the CITES export prohibitions for listed species of falcons; however, the impacts of this on falcon populations and, in particular, on the level of illicit commercial trafficking in the birds should be carefully monitored. The cultural space of Yaaral and Degal (Mali) and the Zápara traditions of indigenous people of the Amazon (Peru and Ecuador) also reflect ways of life that are uniquely sustainable and in harmony with the natural environment but face threats from both environmental pressures and the cultural influences of modernization. The continued transmission of the Yaaral and Degal element is threatened by modern lifestyles leading to an exodus of young people from rural areas and the use of time-saving industrially produced products. To these must be added recurrent droughts which impact on the pastureland and disrupt the pastoral calendar. Hence, we can

[109] The Zápara people are in very serious danger of disappearing altogether, their population numbering no more than 300 (200 in Ecuador and 100 in Peru) in 2001, of whom only five, all aged over 70, still speak the Zápara language.

[110] Sources cited at n 105 and n 106.

[111] Nominated by 13 Parties: Austria, Belgium, Czech Republic, France, Hungary, Mongolia, Morocco, Qatar, Republic of Korea, Saudi Arabia, Spain, Syrian Arab Republic, and United Arab Emirates.

[112] Under the CITES Convention (1973).

see in this example that the continued viability of this ICH element is important for preserving the sustainable pastoral lifestyle and associated knowledge while, at the same time, challenges from environmental factors (such as climate change) which require a global response can also threaten this. It is noteworthy that in order to prevent problems over access to the pastureland, the Government of Mali has attempted to balance customary rules with legislation and create well-balanced relationships between the traditional managers of the grazing land, administrative authorities, and municipalities.

Several of these inscribed ICH elements encompass the environmental, cultural, social, and economic dimensions of sustainability and so can be regarded as models for the integrated approach being proposed here. For example, the aforementioned Yaaral and Degal element has a broad and deep socio-cultural significance for its bearers as a space in which their principal cultural forms (knowledge of animals, pastoral routes) and the artistic and artisan creations of the Peul people (poems, myths, legends, music and dance, clothing techniques, etc) are expressed. Another good example of this is the traditional Mexican cuisine (the Michoacán paradigm) element inscribed in 2010 which is a comprehensive cultural model that includes farming, ritual practices, artisanal skills, culinary techniques, and ancestral customs and manners and covers the whole traditional food chain from planting to consumption.

Two Illustrative Cases

Cultural diversity, biological diversity, and environmental sustainability

The intimate connection between cultural and natural heritage is further clarified by a more focused consideration of the relationship between cultural and biological diversity. Cultural diversity regarded as a human rights value and its linkages with both the cultural heritage and the physical environment are striking. This relationship between cultural and biological diversity may be expressed both metaphorically and directly. In its metaphorical sense, Federico Mayor (then UNESCO Director-General) underlined this connection in an address to the 29th General Conference:

> Just as the prolongation of biological diversity is indispensable to the physical health of humanity, so the safeguarding of cultural diversity-linguistic, ideological and artistic—is indispensable to its spiritual health.[113]

The drive towards seeking greater recognition of cultural diversity has also been reflected in the Global Strategy of UNESCO which aimed to work towards a

[113] The Mid-term Budget of UNESCO (Biennium 2002–3) echoes these sentiments: 'As our genetic diversity is vital for our survival, so our cultural diversity is critical for our continued growth and even our peace and well-being.'

more geographically-representative World Heritage List as well as one that is more representative of the diversity of cultural heritages worldwide.[114] It is noteworthy the degree to which the international community has sought to create legal protection for the cultural diversity of local, national, and regional cultures in the face of the homogenizing pressures of an increasingly monolithic, global culture. The Universal Declaration on Cultural Diversity[115] was adopted by UNESCO's General Conference in 2001, responding to the strong emphasis placed by the Executive Board at its 161st Session on the interaction between cultural diversity and both human rights and sustainable development. The Declaration states at Article 1 that 'cultural diversity is as necessary for humankind as biological diversity is for nature'. One could take this further and assert that not only is cultural diversity necessary for humankind (as stated here) but is also, in itself, vital for preserving biological diversity and ensuring environmental sustainability.

In this context, not only must the human rights dimensions of environmental protection and safeguarding cultural heritage be considered but also the human rights that are contingent on these. First, cultural rights are of relevance here and, in particular, the rights related to cultural heritage as guaranteed by the right to participate in a cultural life.[116] In brief, this right ought to ensure that individuals and communities have access to and the ability to enjoy cultural heritages that are meaningful to them, and that their freedom to continuously (re)create cultural heritage and transmit it to future generations should be protected. Within this, different degrees of access and enjoyment may be distinguished, taking into account the diverse interests of individuals and groups according to their relationship with a specific cultural heritage. Here, priority is given to the cultural (bearer) community, followed by the local (non-bearer) community, the wider society, etc.[117] This priority right of access accorded to the community most closely associated with a given element of cultural heritage is also supported in the case of ethnic, linguistic, and religious minority groups under human rights law.[118] This includes the rights of such minorities to use their own languages and to practise and express their cultures and traditions without interference. Minority rights have been used in the American context, for example, to protect environmental resources essential for the continued viability of traditional cultural practices and ways of life.[119] Moreover, the special

[114] In a similar vein, the decision to name the main list under the 2003 Convention the Representative List of Intangible Cultural Heritage of Humanity also demonstrates a desire to acknowledge internationally the *diversity* of this heritage.

[115] Universal Declaration on Cultural Diversity (UNESCO, 2001) at: <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[116] Article 15 of the International Covenant on Civil and Political Rights (ICCPR, 1966). This right and how it applies to cultural heritage is analysed in detail in Chapter 9.

[117] See: Human Rights Council, 'Report of the independent expert in the field of cultural rights, Farida Shaheed', Human Rights Council Seventeenth session Agenda item 3, 21 March 2011 [UN Doc A/HR/C/17/38].

[118] Under Art 27 of the International Covenant on Civil and Political Rights (1966).

[119] As in the Yanomami case cited at (n 43).

rights accorded to indigenous peoples[120] clearly recognize the integrated character of the cultural and natural heritage as well as the human rights dimension to their protection/safeguarding.

The relationship between traditional local knowledge and biodiversity is an intimate one and any loss of biodiversity reduces human cultural diversity that has co-evolved with it. Similarly, when the languages and traditional cultural practices of local populations are lost, a vast repository of traditional knowledge of biodiversity associated with it is also lost. The potential of human societies for adaptation of their lifestyles and practices to the requirements of a changing physical environment and to develop sustainable approaches to resource exploitation depends, in large part, on cultural and linguistic diversity.[121] The cross-fertilization that exists between cultural and biological diversity is reduced as languages and cultures die out, as they are now doing at an increasing rate.[122] A fact highly pertinent to this discussion is that areas with high linguistic diversity often coincide with biodiversity hotspots, as in the examples of Papua New Guinea, the Democratic Republic of Congo, Brazil, Colombia, India, Australia, and Indonesia.[123] For example, knowledge of certain plant species and their medicinal characteristics may only be held in a particular language: if that language dies out, then the traditional botanical knowledge associated with it will also be lost. Recent estimates suggest that as many as 90 per cent of the world's *c.*6,800 languages (of which approximately 4,800 are indigenous) may be lost over the next 50 years.[124] In addition, the ways of living and of relating to the natural environment of traditional knowledge-holders are often essential to the sustainability of particular ecological systems and their associated biological diversity. Traditional agricultural, forestry, and fishing practices and related innovations can ensure the survival of the environmental resource in question, its sustainability as well as that of the people themselves and their way of life.

[120] Now enshrined in the 2007 UN Declaration on the Rights of Indigenous Peoples [UN Doc A/RES/47/1] recognizes in its Preamble that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment' and at Art 25 holds that 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard'.

[121] Half of the world's languages are found in only eight countries which are also high in biodiversity, namely: Papua New Guinea (832); Indonesia (731); Nigeria (515); India (400); Mexico (295); Cameroon (286); Australia (268); and Brazil (234). UNESCO, *Sharing a World of Difference—The Earth's Linguistic, Cultural and Biological Diversity* (Paris: UNESCO, 2003).

[122] The World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO, 1996) noted that, of the *c.*6000 languages spoken today as many as 90 per cent could die out by the next century, see: pp 178–82. Rieks Smeets, 'Language as a Vehicle of the Intangible Cultural Heritage', *MUSEUM International*, vol 221-2, no 56 (2004): pp 156–64.

[123] UNESCO, *Sharing a World of Difference* (n 121).

[124] Smeets, 'Language as a Vehicle of the Intangible Cultural Heritage' (n 122). It is noteworthy that six countries are centres of cultural diversity as well as mega-diversity countries with exceptional numbers of unique plant and animal species. For further on this, generally, see: Posey, 'Can Cultural Rights Protect Traditional Culture and Biodiversity?' (n 61).

For this reason, the erosion of cultural diversity that accompanies the loss of traditional knowledge can lessen environmental sustainability over the longer term. Hence, safeguarding this heritage is not just a cultural question but one that has great implications for maintaining sustainable ecosystems and the biological diversity that depends on them. For ensuring the future sustainability of our planet's ecosystem, we need to ask which societies have proved themselves more adept at responding to the environmental degradation we are facing today and have the technologies and ideas to reverse these trends. It is quite likely that we will find that the societies that are the repositories of traditional ecological knowledge are those whose philosophy and practices are most closely geared towards maintaining biological diversity. It is therefore important to take account of the traditional knowledge, innovations, and practices of these societies and to preserve their rights to continue their customary way of life.

Traditional knowledge that is closely interdependent with the traditional way of life and resources that sustain it is increasingly threatened by globalization and other aspects of economic development. In the global marketplace, value is given to knowledge and resources only when they enter into the market and, moreover, the price paid does not usually reflect the actual environmental and social costs of production. These may be closely related to non-monetary values held by the local traditional knowledge-holders. Such traditional knowledge is a major part of the social capital of often marginalized groups (many of whom are indigenous or cultural minorities) that reflects their social relationships and values as well as their way of life.[125] In view of the lack of fit, as the law currently stands, of the existing intellectual property protection regime for protecting traditional knowledge,[126] the best means currently available to tradition-holders for safeguarding their traditional ecological, biological, and agricultural, knowledge may well be to withhold it unless specific licensing arrangements are made to ensure confidentiality and equitable benefit-sharing.[127] We must therefore seek new means of countering the economic and utilitarian measures traditionally applied in legal

[125] In relation to traditional knowledge, 'culture' is viewed not as a primarily artistic or aesthetic construct but rather as a whole way of life of a given society, including inter alia: techniques and know-how; language; values; rituals and rites; religious and spiritual beliefs; symbols; and gender relations.

[126] There are many works one could cite for this question, including: Michael Brown, *Who Owns Native Culture?* (Harvard University Press, 2004); World Intellectual Property Organization, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, WIPO Publication No 785 (Geneva, nd); and KC Ying, 'Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?', *Journal of Malaysian and Comparative Law*, vol 32, no 1 (2005): p 2, accessed on 9 December 2014 at: <http://www.commonlii.org/my/journals/JMCL/2005/2.html>. See also: Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures—Legal Issues and Practical Options for Museums, Libraries and Archives* (Geneva: World Intellectual Property Organization, 2010) note at p 15 that traditional cultural expressions (TCEs) 'occupy an ambiguous legal status; they may or may not benefit from one or several branches of IP protection. One difficulty in answering these questions is that no clear legislative framework exists to provide guidance over the management, access and use of TCEs'.

[127] Vandana Shiva, 'Ecological Balance in an Era of Globalization', in *Global Ethics and Environment* edited by Nicholas Low (London and New York: Routledge, 2006) pp 47–65.

systems to protect the intangible values of intellectual property so that they may become more suited to the needs of the cultural and spiritual values inherent in biological diversity.

International law has so far formally acknowledged the importance of traditional knowledge in three main areas: the preservation of biological diversity, food security, and sustainable development.[128] In 1992, for example, Agenda 21 of the Rio Declaration[129] called for recognition of the values, traditional knowledge, and resource management practices of indigenous peoples and other local communities (such as farmers), stating in principle 22 that:

> Indigenous peoples and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Such international statements are still very limited and examples of instruments with a contrary outcome also can be found. For example, the UPOV agreement (1991 revised version)[130] effectively prevented exercise of the traditional right and customary practice of saving, exchanging, and using seeds and selling produce in the traditional marketplace. In this context, it is very important that we can draw out more clearly the relationships that exist between preserving cultural diversity through safeguarding cultural heritage and preserving biological diversity and how future sustainability can be better understood and acknowledged in international policy- and law-making. Furthermore, the potential for creating positive interactions between legal instruments in different areas of international law also needs to be further explored. For example, the World Intellectual Property Organization (WIPO) has, since the late 1990s, been exploring ways in which the existing IP regime can be adapted better to suit the needs of indigenous and local communities with regard to their traditional knowledge, traditional cultural expressions, and access to and enjoying the benefits from exploitation of genetic resources.[131] UNESCO's 2003 and 2005 Conventions fill in important gaps in the protection regime afforded by the 1972 World Heritage Convention and have broadened the concept of cultural heritage that underpins it, considerably expanding our understanding as to which cultural goods should be protected.[132] For example, the 2003 Convention safeguards ICH through a deliberately cultural approach and so can be complementary with the more IP rights-based approaches taken in WIPO: it is becoming increasingly clear that there is an urgent need for

[128] Such as the UN Convention on Biological Diversity and the Food and Agriculture Organization 2001 Treaty on Plant Genetic Resources at n 28 and n 44, respectively.

[129] Final Declaration from the UN Conference on the Environment and Development, Rio de Janeiro, 1992.

[130] The Union for the Protection of New Varieties of Plants (UPOV), adopted in 1961 by a few industrialized States and revised in 1972, 1978, and 1991.

[131] For more information on WIPO's programmes in this area, refer to Chapter 6.

[132] Marie-Theres Albert, 'World Heritage and Cultural Diversity: What Do They Have in Common?', in *World Heritage for Cultural Diversity* (n 1) pp 17–22 at p 17.

more cooperation between UNESCO and WIPO in this area and for the experience of UNESCO in safeguarding ICH, ie the cultural aspects of this knowledge, to inform this process.[133]

Climate change and cultural heritage

In recent years, the question of how climate change impacts on cultural heritage and, to some degree, how cultural heritage and its traditional know-how and practices may help to mitigate climate change has become increasingly important. A wide range of effects of climate change on the environment are forecast, such as desertification, rising sea levels, coastal erosion, and loss of animal and plant species. These are expected to result in mass displacement of populations, at worst, which will lead over time to the loss of cultures and languages. Even when local populations remain in their original locality, loss of plant and animal species used for making the tangible objects (musical instruments, costumes, masks, etc) essential for enacting culture and deterioration of the ritual spaces in which this enactment occurs could also have a very damaging impact on local cultural heritages. In addition, the traditional cosmological knowledge that constitutes the fourth domain of intangible cultural heritage in the 2003 Convention may no longer have a relevance to the current conditions.[134] Since such cosmological knowledge of the seasons, the weather, the climate, and local plants and animals is an essential basis for the lives of the peoples that hold it, its obsolescence in the face of climate change could have devastating impacts on these communities' ability to sustain their livelihoods. It is also worth noting that the actions undertaken by governments to address impacts of climate change may also have a devastating impact on traditional sustainable lifestyles and its associated knowledge: Quiritano gives the example of the introduction of new technologies in Bangladesh to deal with the reduction in rice yields that may, over time, result in the loss of traditional farming knowledge and techniques.[135]

Here, again, we see the environment, cultural heritage, and human rights coming together, not only since protection of a clean and healthy environment in itself is increasingly accepted as a human right but also since the negative impacts of climate change on the inhabitants of environmentally fragile areas can be widespread and affect a range of their human rights. Since this book is concerned with the protection of cultural heritage, the human right of most relevance here is the

[133] See the recent evaluation report on the 2003 Convention, Torggler and Sediakina-Rivière, *Evaluation of UNESCO's Standard-setting Work of the Culture Sector* (n 60) at paras 246–50 and Recommendation 15.

[134] Article 2(2) of the Convention sets out the five main domains of ICH. An example of such cosmological knowledge is that of the previously mentioned Jaguar Shamans of Yuruparí (inscribed in 2011) living along the Pirá Paraná River in south-eastern Colombia.

[135] Ottavio Quiritano, 'A Human Rights-based Approach to Climate Change. Insights for the Regulation of Intangible Cultural Heritage', in *International Law for Common Goods—Normative Perspectives on Human Rights, Cultural Rights and Nature* edited by Federico Lenzerini and Ana Filipa Vrdoljak (Hart Publishing, 2014).

right to participate in cultural life set out in Article 15(1) of the International Covenant on Civil and Political Rights (1966) which is the primary general right related to access to and enjoyment of cultural heritage. A 2009 study by the UN Committee for Economic, Social and Cultural Rights (ECOSOC) found that climate change is likely to have an impact on a wide range of human rights, including those related to culture and heritage. It is therefore appropriate to question to what extent can States be held responsible for violations of human rights caused by greenhouse gas emissions and, as a consequence, be required to adopt measures to reduce damage caused to cultural heritage by such emissions?[136] Some cases heard by the Inter-American Commission on Human Rights (IACHR) over the last 20 years or so have upheld the approach that environmental damage and degradation that harms the traditional culture and lifestyle of communities may be regarded as a violation of their cultural rights.[137] The question that arises as a result is whether it is possible to prove a sufficiently direct link with climate change impacts and consequent loss of environmental quality to assert that climate change has caused damage to the cultural rights of indigenous and local communities. The Inuit in northern America attempted to prove such a link with regard to the effect of rising temperatures on the Arctic and, consequently, on their traditional subsistence harvesting and related culture.[138] They made a complaint to the IACHR against the US, source of 15 percent of the world's greenhouse gases, for its failure to curb these: the IACHR decided against the Inuit on the grounds that it was difficult to prove a direct link between US greenhouse gas emissions and the environmental deterioration of the Arctic region.

Much of the discussion on the subject of the impacts of climate change on cultural heritage has been directed towards heritage protected under the 1972 Convention.[139] For example, the World Heritage Committee commissioned a report on predicting and managing the impacts of climate change on world heritage,[140] in which seven climate indicators (atmospheric water change, temperature change, sea-level rise, wind, desertification, joint action of climate and pollution, and climatic and biological effects) were examined with regard to the level of risk they posed for climate change and what physical, social, and cultural

[136] Quiritano, 'A Human Rights-based Approach to Climate Change' (n 135).

[137] Such as the case of the Yanomami indigenous tribe, Case No 7615 (Brazil) of the IACHR (n 43).

[138] This case is discussed in more detail in Quiritano, 'A Human Rights-based Approach to Climate Change' (n 135) at pp 384–6.

[139] See, eg: WGC Burns, 'Belt and Suspenders? The World Heritage Convention's Role in Confronting Climate Change', *Review of European, Comparative and International Environmental Law*, vol 18, no 2 (2009): pp 148–63; E Thorson, 'The World Heritage Convention and Climate Change: The Case for Climate-Change Mitigation', in *Adjudicating Climate Change* edited by WGC Burns and HM Osofski (New York, 2009); and A Huggins, 'Protecting World Heritage Sites from the Adverse Impacts of Climate Change: Obligations for States Parties to the World Heritage Convention', *Australian International Law Journal*, vol 14 (2007): pp 121–36.

[140] Augustin Colette, *Climate Change and World Heritage: Report on Predicting and Managing the Impacts of Climate Change on World Heritage and Strategy to Assist State Parties to Implement Appropriate Management Responses* (Paris: UNESCO World Heritage Centre, 2007).

impacts they might have on cultural heritage.[141] The impacts on heritage that are forecast here—the majority of which are physical—include damage from faulty water drainage systems, biological attack of organic materials, internal damage to brick, stone, or ceramics from freezing, inappropriate adaptation of structures, population migration and disruption of communities, erosive damage, changes in the cultural heritage values of cultural heritage sites, loss/reduction of native species for repair/maintenance of buildings, and changes in livelihood of traditional settlements. This report takes the position that conserving world heritage is predominantly concerned with managing change and that, in the case of likely anthropogenic climate change, this will require a three-pronged approach: preventive actions (monitoring, reporting, and mitigating impacts at a range of societal levels); corrective actions (adaptation strategies at global, regional, and local levels); and knowledge-sharing (best practices, research, capacity-building networks, etc).[142]

A significant point made by Kim is that there are few statistics available that specifically document the extent of the vulnerabilities of cultural heritage to climate change-related impacts.[143] In view of the fundamental importance of building good baseline information for monitoring changes, this is clearly an area requiring much greater consideration; however, the insufficiency of the social and cultural indicators in the aforementioned report for the World Heritage Committee would suggest that this whole question needs to be specifically addressed within UNESCO with a holistic approach that encompasses both tangible and intangible aspects of heritage fully. The UN FCCC itself recognizes the important role that traditional knowledge can play in climate change adaptation. However, aspects of heritage that have a less obvious utilitarian value for reducing greenhouse gas emissions within the framework of the UN FCCC and its Kyoto Protocol tend to be ignored. Neither the Clean Development Mechanism for projects by developed States in developing countries nor the National Adaptation Programme of Action to address urgent adaptation needs of developing countries[144] has as yet had any activities that specifically address safeguarding ICH or cultural heritage in general.[145] Relevant aspects of heritage may include more 'cultural' expressions of communities, such as dance, oral history, traditional story-telling, etc. One of the most severe impacts of climate change is likely to be the erosion, destruction, and even disappearance of places and their natural resources with the resulting

[141] Presented in a detailed table in Colette, *Climate Change and World Heritage* (n 140) at pp 10–11.

[142] Colette, *Climate Change and World Heritage* (n 140) at pp 10–11.

[143] Hee-Eun Kim, 'Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage', *International Journal of Cultural Property*, vol 18 (2011): pp 259–90 at p 263. Kim cites in this regard UNESCO Institute for Statistics, *Measuring the Diversity of Cultural Expressions* (2009), accessible at: <http://www.uis.unesco.org/ev.php?ID=7061_201&2=DO_TOPIC>.

[144] The CDM was developed within the framework of the Kyoto Protocol and the NAPA is under Art 4(9) of the UN FCCC.

[145] Kim, 'Changing Climate, Changing Culture' (n 143) at p 268.

displacement of people.[146] For some Small Island Developing States (SIDS) such as Tuvalu and Kiribati, this poses a threat to their national identity as a whole. Even in less dramatic cases, the loss of environmental quality and key resources may, in itself, make the continued enactment and practice of their ICH impossible for local communities who remain.[147]

Commentators on the 1972 Convention take the view that Article 4, which places on Parties a general duty to protect world cultural and natural heritage, imposes an obligation to adopt climate change mitigation measures beyond those set out in the UN FCCC and Kyoto Protocol.[148] Thus far, the World Heritage Committee's main response to the threats posed by climate change to world heritage sites is the Strategy to Assist States Parties to Implement Appropriate Management Responses. This, according to Huggins, is too weak in its approach to mitigation and does not sufficiently respond to the level of obligation imposed by the 1972 Convention which, she argues, includes a duty on States Parties to commit to 'deep cuts' in greenhouse gas emissions.[149] Burns has explored moves by both governments and non-governmental actors to use petitions before the World Heritage Committee as a tool for action on climate change. In these petitions, they request the up-listing of sites that are threatened by climate change from the World Heritage List to the List of World Heritage in Danger.[150] Although not containing any positive obligation on Parties to protect these sites better through mitigation measures, such actions can put a strong moral and political pressure on them to do so. There is, of course, no clear way of separating tangible from intangible aspects of heritage in considering this question, as the aforementioned list of potential impacts suggests; without doubt, any loss of physical sites, structures and spaces due to climate change will inevitably have important impacts on local communities and their intangible heritage (which may rely upon these places and the environmental resources found within them).[151]

[146] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Synthesis Report (2007)*, edited by RK Pauchuri and A Reisinger (Geneva: IPCC, 2007). The International Organization for Migration (IOM), UNHCR, and others produced a report on *Climate Change, Migration and Displacement: Impacts, Vulnerability, and Adaptation Options* that was submitted to the 5th session of the Ad-Hoc Working Group on Long-term Cooperative Action under the UNFCCC, 29 March–8 April 2001 (IOM, 6 February 2009) in which they proposed a new treaty responding to the specific needs of climate change refugees.

[147] In the case of the Indonesian ICH element Angklung, eg, safeguarding approaches include teaching the local community in Bandung how to preserve the bamboo that is essential for the practice of this art.

[148] Quiritano, 'A Human Rights-based Approach to Climate Change' (n 135). Article 4 reads: 'Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.' For more on this, see: Huggins, 'Protecting World Heritage Sites from the Adverse Impacts of Climate Change' (n 139).

[149] Huggins, 'Protecting World Heritage Sites from the Adverse Impacts of Climate Change' (n 139).

[150] Burns, 'Belt and Suspenders? The World Heritage Convention's Role in Confronting Climate Change' (n 139).

[151] Susan McIntyre-Tamwoy, 'The Impact of Global Climate Change and Cultural Heritage: Grasping the Issues and Defining the Problem', *Historic Environment*, vol 21 (2008): p 8.

It would also appear, however, that insufficient attention has been paid until recently to the latter and so more should be given to how climate change affects or may affect ICH. The point at issue, then, is whether a similar obligation to safeguard ICH from the impacts of climate change can be asserted. Safeguarding under the 2003 Convention is a broad notion encompassing a variety of actions and measures,[152] including ensuring its viability. In view of the impacts that climate change is likely to have on its viability, it seems reasonable to assume a similar obligation to take additional mitigating measures arising out of the 2003 Convention. In addition, the 2003 Convention also requires Parties to integrate safeguarding ICH into planning programmes, foster scientific, technical, and artistic studies, as well as research methodologies for the 'effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger' and adopt appropriate legal, technical, administrative, and financial measures to ensure, inter alia, its continued transmission.[153] These, again, can be read as imposing a general obligation in the face of climate change to take specific mitigation measures in order to safeguard ICH and its future transmission.

Conclusion

From the above discussion, it is clear that the cultural heritage and the natural environment are extremely closely interconnected and that this fact has not been sufficiently well reflected in either the drafting or the implementation of treaties in these two fields of international law (despite the best efforts of the treaty bodies). Moreover, this relationship is one that is likely to become increasingly significant and the legal implications of this will have to be much better worked out in the future with regard to climate change and other global threats to both the environment and to the heritage and ways of life of communities around the world. It is important for this interrelationship to be better reflected in international policy- and law-making in the future if the overriding policy objective of creating a sustainable approach to environmental protection is to be achieved. Moreover, both of these aspects of international law have important human rights dimensions that have, at present, been only tangentially recognized. It is therefore vital also that the human rights related to protection of the cultural heritage and natural environment be more explicitly expressed in the drafting and application of future international law instruments. This endeavour may well be best responded to through further development of the field of solidarity human rights, taking into account the need to integrate these various elements and to answer to the requirements for sustainability as presented at Rio in 1992.

[152] Article 2(3) reads: '"Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.'

[153] Article 13.

5

Cultural Heritage

Intangible Aspects

> To be human is to have an oral tradition. It is the stories, the tales, the poetry, the songs, the languages that give meaning to experience and provide continuity across the generations. We should encourage that continuity, or the voices of the past may be silenced and future generations may be deprived of their cultural inheritance. These expressions form the base and matrix of valuable cultural and social dynamics, serving as vital links in our fragile and perishable social and cultural practices through the potential they offer for exchange and transmission.
>
> (Kochoiro Matsuura, then Director-General of UNESCO, 2008)

Introduction

One of the principles underlying UNESCO's activities since 1949 has been the preservation of cultural diversity while setting international standards.[1] Its international Convention and Recommendation texts have been designed to achieve this both through international cooperation and encouraging the development of national legislation and cultural policies. Formal international recognition of the 'intangible heritage' as an element to be preserved is one the most significant recent developments of international cultural heritage[2] alongside the closely related area of cultural rights as human rights.[3] Identifying its character has been a challenge and has required, inter alia, understanding the significance of the skill of the producer, the transmission of information (eg how a carpet is woven by hand) and the social, cultural, and intellectual context of its creation is central

[1] Lyndel V Prott, 'International Standards for Cultural Heritage', in UNESCO *World Culture Report* (Paris: UNESCO Publishing, 1998) pp. 222–36 at p 222.

[2] See, eg: Lyndel V Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', *Recueil des Cours*, vol V (1989): pp 224–317 at pp 224–5.

[3] Eg, the Fribourg Declaration on Cultural Rights (2007) states at Art 3 (identity and cultural heritage) that: 'Everyone, alone or in community with others, has the right: (a) To choose and to have one's cultural identity respected, in the variety of its different means of expression… (b) To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage'.

to this definition. It follows from this that the human (social and economic) context of the production of intangible heritage needs safeguarding as much as the tangible product and must always be considered in evaluating existing or future protective measures.

This acknowledgement of the importance of traditional cultural expressions as an element of the cultural heritage requiring international safeguarding has coincided with the enormous impact of economic and cultural globalization on our societies and on this heritage itself. These effects have mostly been perceived as a threat to the continued existence and practice of intangible cultural heritage (ICH) in its traditional forms,[4] although the potential of the new technologies that have driven cultural globalization to aid in its preservation and dissemination have also been recognized.[5]

Identifying 'Intangible Cultural Heritage'

Since the 1980s, there has been a growing awareness of the need to employ a broader and more 'anthropological' notion of cultural heritage in the international protection and programmes related to that heritage.[6] Such an extended notion is one that encompasses the intangibles (such as language, oral traditions, and local know-how) associated with, and sometimes independent of, material culture. However, in reality, the need to ensure the proper safeguarding of ICH has been an important issue for the large majority of countries around the globe and their citizens long before the 2003 Convention was adopted.[7] For some countries, oral and traditional forms of culture represent not only the majority of their cultural heritage but also serve as a vital social and cultural resource. They may, for example, be the basis for the provision of alternative medical services or serve as a repository of agricultural and other knowledge necessary to subsistence livelihoods. The 'problem'

[4] The *Guidelines* for the UNESCO programme the 'Living Human Treasures' (1993) states in relation to the intangible cultural heritage that: 'Unfortunately a number of its manifestations . . . have already disappeared or are in danger of doing so. The main reason is that local intangible cultural heritage is rapidly being replaced by a standardized international culture, fostered not only by socio-economic "modernization" but also by the tremendous progress of information and transport techniques.'

[5] Isabelle Vinson, 'Heritage and Cyberculture', in UNESCO *World Culture Report* (n 3) pp 237–45 at p 243 notes that '[t]he broad and integrating anthropological conception of the heritage which has emerged in recent decades should be accentuated by the properties of networks . . . which favour the integration of related fields such as performing arts, crafts, oral traditions, into the cultural heritage'. She gives as an example a site on Canadian Schoolnet where contemporary Inuit artworks are placed in the context of the myths, legends, and traditional way of life of Arctic Inuits.

[6] The Mexico City Declaration on Cultural Policies (World Conference on Cultural Policies, 1982) noted in its fourth preambular para that, 'in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.'

[7] During the negotiation of the UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)], Bolivia had proposed that its subject matter should include tangible and intangible cultural heritage as well as natural heritage.

of ICH, therefore, was predominantly the lack of formal international recognition of this reality and the dominance of a cultural heritage protection paradigm that prioritized monumental 'European' cultural forms over local and indigenous ones and that, when it did address traditional culture, it did so from a heavily researcher-oriented viewpoint.[8] In addition, as noted by Forrest, 'the beginnings of a normative regime can be found in the very creation of UNESCO' but it was, for many years, overtaken by the apparently more pressing need to address the tangible aspects of heritage.[9] It did, however, form a part of these protection regimes for 'tangible' heritage, most strongly in the 1972 World Heritage Convention but also with regard to objects of a sacred or ritual character protected by UNESCO's 1970 Convention and even the notion of a 'verifiable link' of countries with the underwater cultural heritage protected under the 2001 Convention can include intangible aspects. At the same time, there may be a way in which intangible aspects of heritage 'go beyond' the monumental and material elements traditionally protected by international (and most national) heritage law.[10] Deacon and Beazley[11] make clear both the intimate connection between tangible and intangible heritage in the following statement:

> Intangible heritage is probably best described as a kind of significance or value, indicating non-material aspects of heritage that are significant, rather than a separate kind of 'non-material' heritage. Examples include performing arts, rituals, stories, knowledge systems, know-how and oral traditions, as well as social and spiritual associations, symbolic meanings and memories associated with objects and places. Tangible heritage forms all gain meaning through intangible practice, use and interpretation: 'the tangible can only be interpreted through the intangible'. Intangible values can, however, exist without a material locus of that value.

Here, they make clear the importance of intangible to tangible heritage but, equally, the independent existence of the latter. Their emphasis on the 'significance' or 'value' represented by intangible heritage rather than its 'non-material' character is also interesting. This echoes the view held by many indigenous peoples that to make such a separation between 'tangible' and 'intangible' aspects of heritage is an artificial and arbitrary distinction.[12] As Deacon and Beazley

[8] A criticism levelled at UNESCO's Recommendation for the Safeguarding of Traditional Culture and Folklore (Paris, 1989), accessed on 10 November 2014 at <http://unesdoc.unesco.org/images/0013/001323/132327m.pdf>. See: Janet Blake, 'Safeguarding Traditional Culture and Folklore—Existing International Law and Future Developments', in *Safeguarding Traditional Cultures: A Global Assessment* edited by Peter Seitel (Washington DC: Smithsonian Institution, 2001) pp 149–58.

[9] Craig Forrest, *International Law and the Protection of Cultural Heritage* (London and New York: Routledge, 2010) at p 363.

[10] Laurajane Smith, *The Uses of Heritage* (Routledge, 2006) p 61 makes the point that, in many ways ICH goes beyond those 'traditional' categories based on monumental and material aspects (the tangible heritage) and is therefore a broader and more encompassing category.

[11] Harriet Deacon and Olwen Beazley, 'Safeguarding Intangible Heritage Values under the World Heritage Convention: Auschwitz, Hiroshima and Robben Island', in *Safeguarding Intangible Cultural Heritage—Challenges and Approaches* edited by Janet Blake (UK: Institute of Art and Law, 2007) pp 93–108.

[12] See, eg, Sivia Tora, 'A Pacific Perspective', in *Safeguarding Traditional Cultures: A Global Assessment* edited by Peter Seitel (Washington DC: Smithsonian Institution, 2001) pp 221–4 at

explain, the distinction between tangible and intangible forms of heritage often lies in the way in which significance of heritage is defined. In this way, the practice of intangible heritage can have tangible results or representations (eg poetry, baskets woven using traditional techniques, or audio-visual recordings of stories), but it is often the continued practice and meaningfulness of the heritage within a group that is significant, rather than specific tangible products. Some objects are thus less important than the intangible cultural practices that produced them. For example, if people doing a certain ritual have traditionally dressed in red, protecting the heritage value of this practice does not necessarily involve mothballing the specific red clothes that have been worn during the ritual, but ensuring the continuation of the ritual, including the redness of clothing to be worn in the future, for example through access to dyes or knowledge of processes of dyeing.[13]

Over the last three decades, UNESCO has been working on developing an operational definition of 'intangible cultural heritage', encompassing such elements as social customs and beliefs, ceremonies and rituals, musical traditions, theatre, oral traditions, cosmogonies, skills, and know-how.[14] More recently, a specific definition has been crafted for the purposes of the 2003 Convention for the Safeguarding of Intangible Cultural Heritage whereby a general definition is given and the five main domains of ICH are then set out.[15] What is interesting is that the definition provided in this Convention avoids any list of elements of ICH (although this was considered at the intergovernmental stage of negotiation) and it was decided that listing the domains of ICH would be more appropriate. This is, in part, since ICH is so broad in its scope that there is the danger of limiting the Convention's subject matter by even a non-exhaustive list. However, for the purposes of this book and in order to clarify further what we mean by intangible cultural heritage, it is helpful to suggest some examples of what may be included in 'intangible cultural heritage'. For example, it can include: oral traditions, cuisine, clothing, ways of living, musical and other performances (but not their fixation, ie recordings), artistic and other forms of know-how, traditional knowledge and practices, rituals, social practices and value. Another interesting notion related to ICH (but not explicitly mentioned in the 2003 Convention) is that of 'cultural spaces' which were a clear category of the programme for proclaiming Masterpieces of Oral and Intangible Heritage by UNESCO (1998–2003)[16] that immediately preceded the 2003 Convention. These are understood to be physical

p 221: 'In the Pacific, the distinction between tangible and intangible cultural heritage is not made. They are considered to be a unified cultural heritage.'

[13] Deacon and Beazley, 'Safeguarding Intangible Heritage Values' (n 11) at p 106.

[14] Noriko Aikawa-Faure, 'From the Proclamation of Masterpieces to the *Convention for the Safeguarding of Intangible Cultural Heritage*', in *Intangible Heritage* edited by Laurajane Smith and Natsuko Agakawa (Routledge, 2009).

[15] In Art 2(1) and (2), respectively, as discussed in more detail below. For more on terminology related to ICH, see: Wim van Zanten, 'Constructing New Terminology for Intangible Cultural Heritage', *Museum International*, vol 221-2 (2004): pp 36–45.

[16] UNESCO's 'Masterpieces of Oral and Intangible Heritage of Humanity' programme launched in 1997.

and/or temporal 'spaces' where ICH is enacted to be performed and that are often essential to the continuing maintenance and transmission of that heritage. For more discussion on the definition given in the 2003 Convention, please see below.

The wider context

The extension of the notion of the cultural heritage protected on the international level to include 'intangibles' during the process of elaborating the 2003 Convention[17] ran in parallel with growing understanding of the relationship between culture and development. For example, the World Commission on Culture and Development noted in its 1995 report[18] that the notion of culture must be broadened considerably to promote pluralism and social cohesion if it is to be a basis for development. Thus, safeguarding ICH was one way in which UNESCO could fulfil the mandate set out by the World Commission in view of the role that the intangible values inherent in cultural heritage have to play in development.

However, the roots of this thinking go back at least 20 years previously to the revolution in development thinking that occurred in the 1970s in reaction to the top-down, purely economic vision of development then favoured by the Bretton Woods institutions and the international community generally. Indeed, it can be said that the contribution that intangible heritage can make to social and economic development in such societies has been an important factor in strengthening the international safeguarding of this heritage. Up until the 1970s, development had generally been conceived as a purely economic phenomenon with GDP growth as the main, if not the sole, indicator of success; culture was often viewed as a break in development, particularly the 'traditional cultures' of the poorer countries. During the 1970s, Africa and Latin America experienced an intellectual shift towards 'endogenous development' in which local and ethnic cultures (and languages) began to be accorded greater value than previously in the development model and traditional ways of life were emphasized.[19] The Declaration of the World Conference on Cultural Policies[20] adopted in 1982 for the first time in an international document articulated a view of 'culture' as a broad notion encompassing ways of life, social organization, and value/belief systems as well as material culture; it also, importantly, linked this with the idea of cultural identity. By the late 1980s and early to mid-1990s, further important new

[17] Dawson Munjeri, 'Tangible and Intangible Heritage: From Difference to Convergence', *Museum International*, vol 221-2 (2004): pp 12–20.

[18] World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO Publishing, 1996).

[19] Lourdes Arizpe, 'The Cultural Politics of Intangible Cultural Heritage', ch 1 in *Safeguarding Intangible Cultural Heritage—Challenges and Approaches* edited by Janet Blake (UK: Institute of Art and Law, 2007).

[20] The World Conference on Cultural Policies (MONDIACULT, 1982) defined 'culture' as: 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs'.

thinking occurred in international development theory with the introduction, for example, of the sustainable development[21] and human development[22] approaches and the publication of the Report of the World Commission on Culture and Development (1995).[23]

Increasingly, during this process, the value of local and indigenous cultures and their heritage within the wider society and as a resource for its overall development became better understood.[24] The adoption of the 'Rio' Declaration of the UN Conference on Environment and Development in 1992 marked a watershed in this progress. Here, the notion of sustainable development first received universal international endorsement, with its 'third pillar' understood to constitute socio-cultural factors, a central role given to participatory approaches to development and formal recognition of the value and importance of indigenous and local communities.[25] The Stockholm Action Plan adopted by UNESCO in 1998[26] drew out the linkage between the requirement for sustainability of development and cultural heritage, taking forward the groundwork done two years previous by the World Commission on Culture and Development. It formally recognized as its first principle that sustainable development and the flourishing of culture are interdependent and its first stated objective was to make cultural policy a key component of development strategy such that cultural policies become a major element in *endogenous and sustainable* development. Its third objective makes direct reference to the need to strengthen policies and practice for safeguarding and enhancing cultural heritage. This includes the requirement (at 3) to update our understanding of heritage to include all natural and cultural elements as well as both tangible and intangible ones, which are inherited or newly created. The text acknowledges here the constitutive role played by heritage in identity-formation of social groups and their commitment to its intergenerational transmission. This desire to integrate cultural heritage into development planning as a means to achieve sustainable development underpins the whole ICH project.

Every one of these development approaches also contains strong human rights aspects emphasizing, as they do, the importance of developing human capacities (supported by rights) and addressing the requirements for social justice. At the same time as these evolutions in development thinking were taking place and, in

[21] First formally articulated in: World Commission on Environment and Development *Our Common Future* (New York: Oxford University Press, 1987) (known as the 'Brundtland Report'). One of three 'pillars' of sustainable development is understood to be socio-cultural.

[22] Developed by Amartya Sen, this approach was adopted by UNDP for its Human Development Reports series from 1990. See also, more generally: UNESCO, *Change in Continuity—Concepts and Tools for a Cultural Approach to Development* (Paris: UNESCO, 2000).

[23] World Commission on Culture and Development, *Our Creative Diversity* (n 18).

[24] UNESCO, *The Third Medium-Term Plan* (1990–95) (25C/4) at para 215 noted, eg: In 1990, UNESCO recognized the cultural heritage as a living culture of the people the safeguarding of which 'should be regarded as one of the major assets of a multidimensional type of development.'

[25] The UN Convention on Biological Diversity (1992) [1760 UNTS 79; 31 ILM 818 (1992)] adopted at Rio at the same time also gave a prominent position to 'local and indigenous knowledge, practices and innovations' in ensuring environmental sustainability (at Art 8(j)).

[26] Action Plan on Cultural Policies for Development (UNESCO, Stockholm, 2 April 1998), accessed online on 31 October 2014 at: <unesdoc.unesco.org/images/0011/001139/113935eo.pdf>.

particular, its social and cultural dimensions were becoming better recognized, cultural rights—the 'Cinderella' of the human rights family—began to receive belated attention both in UNESCO[27] and ECOSOC (in which there was strong involvement by the Indigenous People's Forum) where work was begun in 1993 towards a draft Declaration on indigenous rights.[28] UNESCO's work in the area of cultural rights was initiated in the last quarter of the 1990s and led to the adoption of the 2001 Universal Declaration on Cultural Diversity which was a foundational text for the future elaboration of the 2003 Convention. Another significant text in the area of cultural rights was the Fribourg Declaration on Cultural Rights adopted in 2007, a further output of the aforementioned UNESCO programme although developed by a group based around the Institute of Human Rights at Fribourg University. It stresses that 'respect for diversity and cultural rights is a crucial factor in the legitimacy and consistency of sustainable development based upon the indivisibility of human rights'.[29] This understanding of the importance of respecting cultural rights and diversity as a basis upon which truly sustainable development policies can be built runs through the 2003 Convention also. In the Final Communiqué[30] issued by the Third Round Table of Ministers of Culture held by UNESCO in Istanbul in September 2002, the important role that intangible cultural heritage can play in fostering truly sustainable development was emphasized:

> Laying the foundations of true sustainable development requires the emergence of an integrated vision of development based on the enhancement of values and practices involved in the intangible cultural heritage. Alike (*sic*) cultural diversity, which stems from it, intangible cultural heritage is a guarantee for sustainable development and peace.

One of the ways, then, in which governments can ensure that their development policies are sustainable and fulfil the objectives of the Rio Declaration (1992) is by safeguarding intangible cultural heritage and employing those elements of traditional knowledge, practices, and innovations that contribute to achieving sustainability.

Traditional cultural expressions, traditional knowledge, and indigenous heritage

Other important and closely intertwined contextual issues relate to the potential use of intellectual property (IP) rules for the protection of traditional cultural expressions and knowledge and the relationship between indigenous heritage and

[27] The publication of *Cultural Rights and Wrongs* edited by Halina Niec (Paris: UNESCO, 2001) was part of the attempt to understand the scope and content of cultural rights better.

[28] It took until 2007 for the UN General Assembly finally to adopt its Declaration on this subject. The Fribourg Declaration on Cultural Rights (2007) notes in its Preamble: 'respect for diversity and cultural rights is a crucial factor in the legitimacy and consistency of sustainable development based upon the indivisibility of human rights'.

[29] Fribourg Declaration on Cultural Rights (n 3), preambular para 6.

[30] *Intangible Cultural Heritage—a Mirror of Cultural Diversity*, the 'Istanbul Declaration' of the Third Round Table of Ministers of Culture Istanbul, 16–17 September 2002.

ICH. With regard to the former, UNESCO and WIPO had been working since the 1970s to develop a joint approach to protecting traditional cultures and their expressions through intellectual property law (and related *sui generis* rules) but, by the mid-1980s, there was a divergence whereby UNESCO began to explore a broader 'cultural' approach that went beyond the IP one. WIPO's work since 2000 on traditional cultural expressions and folklore[31] can be seen as the continuation of this endeavour: the Intergovernmental Committee has been consulting with WIPO Member States for nearly 15 years over the development of an international standard-setting instrument deigned to protect the IP rights of local and indigenous communities over, inter alia, their traditional cultural practices, expressions, and knowledge, which mostly comprise ICH as it is defined by the 2003 Convention. It is possible that such a standard-setting instrument will be drafted in the not so distant future. Although this question of extending IP protection to traditional cultural expressions and traditional knowledge (TK) is addressed in detail in Chapter 8, it is important to note here that it has become increasingly clear in the operation of the 2003 Convention that this is an issue of great importance to many Parties, some of which concentrate much of their safeguarding activities on IP approaches to protect TK.[32] However, there is a degree of inconsistency of approach and it is not yet fully understood by the States Parties if and/or how the Convention addresses the question of IP rights. For example, some Parties wrongly assume that inscription of an element on the Representative List of Intangible Heritage of Humanity (RL) or the List of Intangible Heritage in Need of Urgent Safeguarding (USL) automatically provides it with protection under international IP rules. This needs to be given greater attention by the ICH Committee established by the Convention (see below) and it was recommended in a recent internal evaluation of the 2003 Convention[33] that UNESCO experts work more closely with WIPO in the process of developing the new IP standard-setting instrument so that the regimes of the 2003 Convention and the future WIPO treaty will be compatible with each other.

Both traditional knowledge and indigenous heritage are aspects of ICH since they are orally transmitted and do not have any physical expression as such. They overlap to a high degree although not all traditional knowledge is indigenous and, significantly for the 2003 Convention regime, indigenous peoples are also repositories of much of the world's cultural diversity.[34] For these reasons, it was

[31] WIPO's Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore established in 2000. The *Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore—Policy Objectives and Core Principles* (2005) [Doc WIPO/GRTKF/IC/9/4] are an important outcome of its work.

[32] Eg, a Zafimaniry label has been registered in the Madagascar Intellectual Property Office (OMAPI) which is used by the Zafimaniry Association on all woodcraft products by Zafimaniry artisans in order to protect their interests and involve them more directly in safeguarding. Information taken from Madagascar's Periodic Report submitted in the 2013 reporting cycle.

[33] Barbara Torggler and Ekaterina Sediakina-Rivière, *Evaluation of UNESCO's Standard-setting Work of the Culture Sector: Part I—2003 Convention for the Safeguarding of the Intangible Cultural Heritage* with Janet Blake as consultant (Paris: UNESCO, 2013).

[34] According to Darrel A Posey, 'Can Cultural Rights Protect Traditional Cultural Knowledge and Diversity?', in *Cultural Rights and Wrongs* (Paris and Leicester: UNESCO Publishing and

very important for UNESCO to be able to identify: (a) the character of both traditional knowledge and indigenous heritage; (b) their relationship to the broader notion of ICH; and (c) how they are already subject to international regulation and protection. Part of the challenge has therefore been to establish the complex relationships that exist between these elements and the ways in which they interrelate. Daes[35] defines indigenous cultural heritage in such a way that she makes clear the broad scope of the concept[36] which also signals the range of international instruments that are of relevance to its protection, from UNESCO's 1972 World Heritage Convention to the 1992 UN Convention on Biological Diversity. A number of other international instruments have a direct relevance to the protection of indigenous cultural heritage. These include ILO Convention no 169 on indigenous and tribal peoples (1989)[37] and the UN Declaration on the Rights of Indigenous Peoples (2007).[38] The great difficulties associated with negotiating these two instruments suggest that dealing with indigenous heritage as a discrete category of ICH within the new Convention would have raised similar difficulties for UNESCO: it took 14 years, from an initial draft in 1993 until 2007, for the aforementioned UN Declaration to be adopted. For this reason, it was generally accepted by the delegates at the intergovernmental meeting for negotiating the 2003 Convention that it would be easier to address the protection of indigenous cultural heritage as one—albeit extremely significant—element within the broader notion of ICH rather than as a separate category in itself.[39] However, this was and remains a controversial decision, with some Member States (such as Vanuatu) dissenting, and was regarded by some commentators as yet another example of the international community failing to live up to its promises to indigenous peoples.[40]

Institute of Art and Law, 1998) at p 44, nine countries account for 60 per cent of all languages and 4,000–5,000 of the 6,000 languages of the world are indigenous 'strongly [implying] that indigenous peoples constitute most of the world's cultural diversity'.

[35] Erica-Irene Daes, *Protection of the Heritage of Indigenous Peoples* (UN, New York and Geneva: OHCHR, 1997) at para 25.

[36] ' "Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.'

[37] Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989) at Arts 2, 5, 8, 22, 23, 28, and 31.

[38] Declaration on the Rights of Indigenous Peoples (UN, 2007) [GA Res 61/295, UN Doc A/RES/47/1 (2007)].

[39] Indigenous heritage is implicit in the definition given in Art 2(1) as well as the domains set out in Art 2(2), but is not explicitly referred to anywhere in the Convention. The sole reference is in the Preamble that recalls the important role played by 'communities, in particular indigenous Communities', in different stages of safeguarding ICH (at para 7).

[40] Paul Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage', *Macquarie J of Int and Comp Law*, vol 1, no 1 (2004): pp 111–34.

UNESCO's Normative and Operational Activities from 1970 to 1999

Normative activities

UNESCO has been involved in both normative and operational activities in relation to intangible cultural heritage since the 1970s, both independently and in conjunction with the World Intellectual Property Organization (WIPO). However, most of UNESCO's standard-setting activities in the field of cultural heritage have hitherto concentrated on the 'tangible' elements of this heritage as is illustrated by all the Conventions adopted by UNESCO before 2003.[41] Interestingly, it had been proposed that intangible cultural heritage be included within the framework of UNESCO's 1972 Convention at the time of its development; but this idea was dropped before reaching the final version of the text.[42] As a result, intangible cultural heritage has remained for a long time on the sidelines of UNESCO's normative activities although, by its very nature, it has been implicitly but indirectly relevant to the application of the 1972 Convention. UNESCO has been involved with WIPO since the 1950s for the protection of copyright and their joint activities led in 1976 to the adoption of the Tunis Model Law extending copyright protection to folklore.[43] The two organizations continued to cooperate in this field, leading to the adoption in 1982 of the UNESCO/WIPO Model Provisions[44] giving States a model law for the application of intellectual property rules to the protection of 'expressions of folklore'. UNESCO and WIPO took this work forward in the early 1980s by elaborating a draft treaty[45] on the subject, but it was never formally adopted by either organization.

At the same time as this work relating to the protection of folklore through intellectual property rights, UNESCO also examined the protection of folklore from a broader cultural perspective. This led to the adoption of the 1989

[41] Convention for the Protection of Cultural Heritage in the Event of Armed Conflict ('Hague Convention') (The Hague, 14 May 1954, with a Protocol adopted in 1954 and two Additional Protocols adopted in 1999); Convention on the Means of Prohibiting and preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (Paris, 19 November 1970); Convention for the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972); and the Convention for the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001). The development of the 2003 Convention is described in greater detail in Janet Blake, *Commentary on the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage* (UK: Institute of Art and Law, 2006).

[42] In 1973, Bolivia proposed to the Director-General of UNESCO that a Protocol dealing with the protection of folklore should be added to the Universal Copyright Convention.

[43] UNESCO/WIPO Universal Copyright Convention (1952) 6 UST 2731, 25 UNTS 1341 (as revised 1971). Article 6 of the Tunis Model Law on Copyright for Developing Countries (UNESCO, 1976) provides for the protection of national folklore, accessed on 12 December 2014 at: <http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[44] Model provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (UNESCO/WIPO, 1982) accessed on 12 December 2014 at: <http://www.wipo.int/wipolex/en/text.jsp?file_id=186459>.

[45] Draft Treaty for the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (UNESCO/WIPO, 1984).

Recommendation on the Safeguarding of Traditional Culture and Folklore that remained the sole international instrument safeguarding intangible cultural heritage from the cultural perspective until the adoption of the ICH Convention in 2003. The Recommendation encourages international cooperation for safeguarding traditional culture and folklore and sets out measures to be taken on the national level for the identification, conservation, preservation, dissemination, and protection of ICH. The last action listed is the sole reference to IP-based protection signalling that a much broader-based and more holistic interdisciplinary approach is being taken in this text than a purely IP-based one. It might also be understood from this that the mention of 'protection' as one of the measures constituting 'safeguarding' as defined by the 2003 Convention is an indirect reference to IP protection approaches. The adoption of UNESCO's Recommendation on the Safeguarding of Traditional Culture and Folklore in 1989 was a major step forward in providing formal recognition of intangible heritage and the need to safeguard it, representing the culmination of many years' work. It also represented a significant conceptual development in that it was the first time that non-material aspects of cultural heritage were explicitly the subject matter of an international instrument. Until the adoption of the International Convention on Safeguarding the Intangible Cultural Heritage (2003), the 1989 Recommendation remained the sole UNESCO instrument dealing directly with this aspect of cultural heritage. However, the Recommendation was later criticized as suffering from several weaknesses. Chief among these were too heavy a bias towards the interests of researchers and experts over the tradition-holders themselves and the choice of the terminology of 'folklore' for the subject matter which was seen by many cultural communities as demeaning. Furthermore, the application of this Recommendation by Member States, however, has been disappointing, probably in view of its 'soft law' character and the lack of incentives for States to implement its provisions.[46]

During 1998–9, UNESCO convened eight regional seminars that culminated in an international conference held in Washington in June 1999 to reassess the implementation of the 1989 Recommendation after ten years of operation.[47] This was deemed necessary in view of the major geopolitical developments that had occurred during that decade, particularly the economic and cultural impacts of globalization. At this conference, the importance of the 1989 Recommendation was recognized, although weaknesses in its definition, scope, and general approaches to safeguarding were also identified. The Washington conference recommended that UNESCO study the feasibility of adopting a new normative instrument for safeguarding traditional culture and folklore. The conference

[46] Janet Blake, *Developing a New Standard-setting Instrument for Safeguarding Intangible Cultural Heritage—Elements for Consideration* (Paris: UNESCO, 2001).

[47] International conference on *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Co-operation*, jointly held by UNESCO and the Smithsonian Institution, Washington DC, 30 June–2 July 1999. Proceedings published in *Safeguarding Traditional Cultures: A Global Assessment* edited by Peter Seitel (Washington DC: Smithsonian Institution, 2001).

concluded that any new (or revised) instrument would need to address the scope of such an instrument, the definition to be used, and various terminological questions. There was a strong feeling that 'folklore' was an infelicitous term and that a more inclusive definition was required encompassing not only artistic products but also the knowledge and values enabling their production.[48] Adoption of the 2003 Convention marks the culmination of a gradual recognition of the significance of that heritage in its own right. This recognition is largely based on a greater understanding of its role as a mainspring of cultural diversity and as a guarantee of truly sustainable development.[49] A further impetus for this normative work has been the great acceleration in loss of intangible cultural heritage as a result of the combined effects of globalization and acculturation amongst other threats to its continued existence.

Operational activities

On the operational side, UNESCO launched the Living Human Treasures programme in 1993. Under this programme, Member States were invited to submit to UNESCO a list of Living Human Treasures in their country, ie people who were repositories of important ICH and who transmitted it to future generations.[50] These would then be inscribed on a World List. The main objective of this programme was to give recognition to the individuals who are the living exponents of traditional culture and, hence, living repositories of ICH. An important criterion in identifying these individuals was their ability to transmit their skills, techniques, and knowledge to apprentices and thus ensure the transmission of their ICH to future generations. By focusing on the bearers of traditional cultural knowledge, this programme recognized that the existence of the ICH in question depends, among other things, upon the economic and social well-being of the tradition-holders and their way of life. Hence, the skills and know-how of the practitioners of ICH was for the first time given international recognition—an important element, as we shall see, in the approach taken by the 2003 Convention.

Another programme entitled 'Masterpieces of Oral and Intangible Heritage of Humanity' was launched in 1997 with the aim of raising awareness of the

[48] *Safeguarding Traditional Cultures* edited by Peter Seitel (n 47).

[49] Both mentioned in the Preamble to the Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO, 17 November 2003) [2368 UNTS 3]. Also, the Final Communiqué issued by the Third Round Table of Ministers of Culture held by UNESCO in Istanbul in September 2002 (n 30) noted that: 'Laying the foundations of true sustainable development requires the emergence of an integrated vision of development based on the enhancement of values and practices involved in the intangible cultural heritage. Alike (*sic*) cultural diversity, which stems from it, intangible cultural heritage is a guarantee for sustainable development and peace.'

[50] The purpose of this programme was explained as follows: 'One of the most effective ways of safeguarding intangible cultural heritage is to conserve it by collecting, recording and archiving. Even more effective would be to ensure the bearers of that heritage continue to acquire further knowledge and skills and transmit them to future generations'. See: *Guidelines—Living Human Treasures* (UNESCO, 16 September 1998).

importance of ICH among Member States and people at large. Such 'masterpieces' were to be identified on the following criteria as:

> Cultural spaces or forms of cultural expression of outstanding value in that they represent either a strong concentration of the intangible cultural heritage of outstanding value or a popular and traditional cultural expression of outstanding value from a historical, artistic, ethnological, anthropological, linguistic or literary point of view.[51]

A 'cultural space' is a place which brings together a concentration of both popular and traditional cultural activities as well as representing a time in which a cultural event regularly takes place (eg seasonally, annually, or according to the movement of the sun or moon). This cultural space—in both its physical and temporal dimensions—owes its existence to the cultural expressions and manifestations that traditionally take place there over time. Equally, and in a mutual relationship, such cultural spaces play a central role in the continuing enactment, creation, maintenance, and transmission of oral and intangible cultural heritage.

In late 2001, the Proclamation Jury established detailed selection criteria for the proclamation of 'Masterpieces of Oral and Intangible Heritage of Humanity'. Examples of the 'Masterpieces' inscribed by UNESCO include: Jmaa el-Fnaa Square in Marrakesh (Morocco) where story-tellers, musicians, dancers, snake-charmers, glass- and fire-eaters, performing animals, etc gather and perform; Boysun Cultural Space in Uzbekistan where several traditional rituals take place; the Oruru Carnival in Bolivia in which pre-Colombian indigenous dancing is performed in the procession; traditional puppet theatres of Sicily (Italy) and Japan and their associated craft skills; and Vedic chanting from India.[52] This, therefore, served as a useful indication of the type of ICH that different Member States might wish to inscribe on an international list (of the type established by the ICH Convention). In this way, the significance of the Masterpieces Programme as a precursor to the ICH Convention is clear. A survey conducted in countries where Masterpieces have been proclaimed under this programme supports this view. The proclamation process significantly raised awareness of the idea of 'intangible heritage' and reinforced government-level appreciation of the importance of establishing adequate protection for this type of heritage. For example, it has led to the elaboration of coherent national policies for developing administrative and legislative programmes necessary for safeguarding ICH.[53]

[51] Annex to letter from the Director-General to Member States, 26 April 2000 [UNESCO doc CL/3553].

[52] The International Jury for the Proclamation by UNESCO of Masterpieces of Oral and Intangible Heritage of Humanity, Extraordinary Meeting, Elche (Spain), 21–23 September 2001. The Final Report of this meeting can be found in Doc RIO/ITH/2002/INF/6.

[53] UNESCO, *Impacts of the First Proclamation of the Nineteen Masterpieces Proclaimed Oral and Intangible Heritage of Humanity* (Paris: UNESCO, January 2002).

Developing a Convention for Safeguarding ICH

The type of instrument to be developed

When UNESCO initially began to consider seriously the possibility of developing a new standard-setting instrument in the field of ICH, it was by no means clear what form this instrument should take or even which legal approach (eg IP-based or cultural) would be most appropriate.[54] For example, the Istanbul Declaration (2002) which gave qualified support for the development of an international Convention demonstrated some reservations felt by the Ministers concerning the definition of ICH to be used for a Convention and, by implication, of the scope of such an instrument.[55] There was also concern over the need to avoid duplicating work already being undertaken in other international organizations as well as rights and obligations existing under other international treaties. Another paragraph in the Istanbul Declaration suggests that any future instrument should take an approach reflecting the 'dynamic link between the tangible and intangible heritage and their close interaction'. There was, however, a general acknowledgement that existing cultural heritage and intellectual property instruments were inadequate to the task of safeguarding ICH and that a new standard-setting instrument of UNESCO would represent a major step in plugging this gap in protection. It is also felt that this could provide the means for developing internationally agreed standards of protection as well as the necessary dynamic for international cooperation in this important area. Furthermore, it could contribute to the development of national safeguarding measures and raise local, national, and international awareness of the importance of this heritage.

Various options regarding the type of instrument that UNESCO might develop for safeguarding ICH were examined during the phase of conducting a preliminary study into the question.[56] Initially, the possibilities of (a) drafting an Additional Protocol to the 1972 Convention or (b) revising the 1972 text were considered and discounted by that study since it would prove as difficult to achieve as drafting a new Convention and less useful. The development of a new Recommendation to 'plug the gaps' of the 1989 Recommendation could only have been seriously considered if it were felt that a new Convention should not be developed. Experience of the 1989 Recommendation suggests that this is an ineffective means of creating State practice in comparison with a Convention placing binding obligations on Parties. Three remaining options concerning the nature of

[54] Blake, *Developing a New Standard-setting Instrument* (n 46). See also: Noriko Aikawa-Faure, 'An Historical Overview of the Preparation of the International Convention for the Safeguarding of Intangible Cultural Heritage', *Museum International*, vol 221-2 (2004): pp 137–49.

[55] Final Communiqué issued by the Third Round Table of Ministers of Culture (n 30) at para 7(viii) reads: 'an appropriate international Convention, which should be developed in close co-operation with relevant international organisations and take into full account the complexity of defining intangible cultural heritage, could be a positive step towards pursuing our goal'.

[56] Blake, *Developing a New Standard-setting Instrument* (n 46) at pp 31–2.

the Convention to be developed and the type of obligations that it should impose on States Parties were then examined.

The first option would involve the drafting of a Convention based on *sui generis* approaches to protection inspired by intellectual property rules and addressing the specific needs of intangible heritage.[57] However, it was felt that this type of Convention was unlikely to prove sufficient to the needs of ICH and its holders since intellectual property approaches (and hence a *sui generis* system developed from IP rules) are too limited in their aims and generally inappropriate to this heritage.[58] Furthermore, such a Convention would, in all likelihood, have faced fierce resistance from those Member States that oppose any adaptation of the traditional intellectual property system, rendering its negotiation extremely lengthy and difficult. Moreover, WIPO was regarded as the appropriate intergovernmental body to deal with such questions given its IP-related mandate.[59]

A second possibility would be a Convention employing a mixture of general cultural heritage approaches to protection with the addition of some *sui generis* measures where particular gaps in protection have been identified. Such an approach would aim to provide for a broad-based protection of ICH. It would, therefore, present a complex problem in terms of identifying and defining the subject of protection, the scope of application and the nature of the obligations to be placed on Parties. It would also require the identification of a wholly new and untried approach to safeguarding and the development of new mechanisms and systems of protection and control. Furthermore, any *sui generis* approaches included would present similar difficulties and thus would need to be chosen carefully to avoid creating strong opposition to the text as a whole.

The third choice of instrument was for a Convention based broadly on the principles and mechanisms of the 1972 Convention and adapted to the needs of intangible cultural heritage and the communities that create and maintain it. Of the three possible models for the new Convention text presented here, a Convention loosely based on the 1972 Convention was regarded as the most useful and the most likely to be acceptable to Member States. Furthermore, to draft a Convention that took a different approach from the 1972 Convention would have involved exploring a new way of safeguarding ICH, new mechanisms for intervention, and new systems of protection and control. This would have been extremely costly in terms of time and resources without any guarantee of success at the end of it. Moreover, it is a not

[57] These include: the recognition of traditional collective forms of ownership (through contractual or other arrangements); the requirement of proof of prior informed consent of holders of TK for the granting of patents; protection to be granted in perpetuity and time-limited; protection of the moral rights of tradition-holders; and prohibition of the unauthorized registration of sacred and/or culturally significant symbols and words as trademarks.

[58] For further on this, see Blake, *Developing a New Standard-setting Instrument* (n 46) at pp 13–31.

[59] For more on IP rules and ICH, see: Wend Wendland, 'Intangible Heritage as Intellectual Property: Challenges and Future Prospects', *Museum International*, vol 221-2 (2004): pp 97–112.

unusual practice to use a pre-existing treaty on a related subject as the model on which to base a new Convention.[60]

Both the Executive Board and General Conference agreed that, given the similarity of the procedural approaches required to regulate the two areas of heritage, the 1972 Convention model should be followed. The attractions identified in the 1972 Convention model can be summarized as follows. First, it has proved to be one of UNESCO's most successful Conventions in the cultural heritage field with 191 Parties and 1007 world heritage properties (of which 779 are cultural properties) located in 161 States worldwide and has unquestionably raised government and popular awareness of the importance of this heritage. Second, the duty placed on Parties to ensure the national protection of cultural and natural heritage[61] is also important for ICH since it often lacks sufficient national measures for safeguarding. Third, an important principle in the 1972 Convention relates to the establishment of a system of international cooperation and assistance to support States Parties in their efforts to conserve and identify protected heritage. Fourth, the financial measures through the World Heritage Fund are regarded by many as the key to the success of the 1972 Convention and, by analogy, to the future success of the new ICH Convention.[62] It could be used, for example, to help in the identification of ICH and to build the capacity of local communities for safeguarding their ICH. Fifth, the existence of a permanent Secretariat dedicated to overseeing this Convention, although not stipulated in the text itself.[63] This is a further development that would provide a greater profile to the operation of the Convention. Finally, the establishment of an Intergovernmental Committee for the Convention was a major innovation of the 1972 Convention that the ICH Convention has also followed (albeit with some adaptation).

The substantial advantages of the 1972 model meant that it was followed for preparing the Preliminary Draft Convention,[64] although with major adaptations to suit the needs of ICH. Some of the main respects in which the new instrument needed to be clearly distinguished from the 1972 Convention were: the definition and terminology used had to be specific to ICH as would its field of application; criteria for safeguarding would also need to reflect the special character and needs of ICH; and the notion of universality would either have to be removed or rethought in terms of ICH. The commitment to involving the communities,

[60] Mohammad Bedjaoui, 'The Convention for the Safeguarding of Intangible Cultural Heritage: the Legal Framework and Universally Accepted Principles', *Museum International*, vol 221-2 (2004): pp 150–4 at p 152.

[61] Under Art 4 of the 1972 WHC.

[62] Many statements to this effect were made during the intergovernmental meeting of experts for the 2003 Convention. Lack of financial (and other) resources to carry out the necessary tasks of identification, conservation, and preservation of intangible heritage were frequently cited by Member States as a major obstacle to implementing the 1989 Recommendation.

[63] The World Heritage Centre was established in 1992, 20 years after the adoption of the Convention.

[64] Prepared by a Restricted Drafting Group that met twice during 2002; the author was Rapporteur of this Drafting Group that was chaired by HE Mohammad Bedjaoui, ex-President of the International Court of Justice.

groups, and individuals directly concerned with creating, maintaining, and transmitting ICH was also an innovation in this area.

The choice of the 1972 model has not been without controversy, however. Many delegates to the intergovernmental meeting for negotiating the draft ICH Convention were worried that establishing an international list of ICH could lead to the creation of a hierarchy of ICH or to the 'fossilization' of this heritage. Despite these misgivings, the advantages in terms of raising local, national, and international awareness of this heritage (and avoiding some of the more intractable difficulties regarding the scope of the Convention) were seen to outweigh those other concerns. Another potential problem associated with the 1972 Convention is the possibility of overlap between the two Conventions. Indeed, when the 1972 Convention was being considered originally it was thought that ICH should be included within its scope (alongside the cultural and natural heritage); however, this idea was dropped before the final version of the text. In other words, the intimate connection between these three aspects of heritage was recognized at that time. This fact has become clearer over the last 30 years with various revisions of the Operational Guidelines that accompany the 1972 Convention text and include the criteria for inscribing cultural and natural properties on the World Heritage List.[65] The myriad possibilities for overlap between the two Conventions is well illustrated by the example of the Rice Terraces of the Philippine Cordilleras: the Terraces themselves were inscribed on the World Heritage List in 1995 and the 'Hudhud Chants of the Ifugao'—songs of women as they plant the rice—were separately recognized as Masterpieces of the Intangible Heritage of the World in 2001.[66] In this way, both the tangible and intangible values of the rice terraces have been identified and recognized by UNESCO, but under separate Conventions.

Once the type of instrument was chosen, one of the most challenging aspects of this work proved to be drafting a definition of ICH that was both sufficiently inclusive and workable. In order to achieve this, it was necessary to identify the priority areas for safeguarding and to try to eliminate potential conflicts of interest. The work of other intergovernmental organizations relating to ICH, in particular traditional (often local and indigenous) knowledge also had to be taken into account and potential overlaps avoided. For example, WIPO had been active in relation to traditional knowledge, genetic resources and folklore since the 1980s.[67] The UN Environment Programme (UNEP) had been working on preserving the knowledge, practices, and innovations of local and indigenous people within the framework of Article 8(j) of the 1992 Convention on Biological Diversity[68] and

[65] In particular, revisions of the Operational Guidelines adopted in 1992, 1998, and 2000.

[66] These have now been subsumed into the Representative List of Intangible Heritage under a 'transitional clause' in Art 31 of the 2003 Convention.

[67] WIPO conducted nine fact-finding missions (1998–9) in order to try to identify the IP needs and expectations of holders of traditional knowledge and other new beneficiaries. Further to this, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established at the WIPO General Assembly in August 2000.

[68] This reads: 'Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles

the related issues of access and equitable benefit-sharing and, in 2001, the Food and Agriculture Organization (FAO) adopted a treaty[69] that explicitly recognizes the role of local and indigenous farmers and their traditional knowledge in preserving and developing such resources. A further relevant international treaty is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the 1994 Uruguay Round of the GATT Agreement of the World Trade Organization (WTO) aimed at harmonizing IP rights as they apply to trade.[70] Although not directly concerned with ICH, certain aspects of TRIPS may be seen as potentially favourable to the protection of traditional knowledge.[71] Hence, there is both the operational work of other intergovernmental organizations as well as existing rights and obligations flowing from international treaties that needed to be taken account of. In order to avoid damaging overlaps with other intergovernmental bodies and, in particular, with other treaty texts, it was therefore extremely important that the domain(s) in which UNESCO sought to regulate this question should be made very clear and, thus, the intended scope of the proposed instrument. As a result, it was decided to follow a 'cultural' approach to protection and leave the further development of IP protection for 'traditional cultural expressions' to WIPO.

Process of drafting the 2003 Convention

The decision to proceed with the work of drafting an international standard-setting instrument for the safeguarding of ICH was taken by UNESCO's General Conference at its 30th session in 2001.[72] A Restricted Drafting Group (RDG) then met twice in 2002 to prepare a preliminary draft Convention for safeguarding ICH. Another expert meeting aimed at clarifying the terminology related to the future Convention text was also held at this time,[73] signalling that the task of regulating ICH internationally was a very challenging one in view of the lack of useful precedents. Once a preliminary draft Convention text was ready, the

relevant for the conservation and sustained use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge'.

[69] The International Agreement on Plant Genetic Resources for Food and Agriculture (2001).

[70] Agreement on Trade-related Aspects of Intellectual Property Rights, Annex 1C to the GATT Agreement of the World Trade Organization (1994).

[71] These include measures to be taken to protect public health and nutrition and to promote the public interest in sectors of vital importance to socio-economic and technical development that could be used to protect traditional medical knowledge as well as a range of other traditional forms of knowledge and innovation: Art 8(a) and (b).

[72] In 30C/Res.25 at para 2(a) (ii), the General Conference of UNESCO invited the Director-General to study 'the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore'. The Preliminary Study by Blake, *Developing a New Standard-setting Instrument* (n 46) was the outcome of this.

[73] International Meeting of Experts for the Preparation of Glossary of Intangible Cultural Heritage, Paris, 10–12 June 2002. See also: *Glossary—Intangible Cultural Heritage* edited by Wim van Zanten (n 15).

intergovernmental stage of negotiating the Convention was initiated in late 2002 and continued up to June 2003.[74]

The main lines of discussion during the intergovernmental sessions focused on (a) general approaches to and principles of safeguarding and (b) the mechanics of safeguarding. Some important issues that were debated in relation to these questions were: the importance of defining the term 'safeguarding' clearly and distinguishing it from 'protection'; the need to raise awareness ('visibility') of ICH at all levels; the importance of the notion of 'revitalization' of ICH (as opposed to reviving of already 'dead' traditions); the trans-frontier character of much ICH; the complex relationship between tangible and intangible elements of cultural heritage; and the importance of respect for human rights in this domain. National inventories were seen as fundamental to the safeguarding process as was an effective system of international cooperation and assistance to support countries with fewer resources to fulfil their obligations under the Convention. Controversial issues included whether to make explicit reference to indigenous peoples or just to regard their cultural heritage as falling within the broader subject of ICH and whether to include an explicit reference to languages in the Convention. Although the establishment of an international listing mechanism was felt by most delegations to be necessary, there were reservations over the need to avoid 'fossilizing' ICH and the problem of who should identify ICH for inclusion in these lists, ie only States Parties or other actors as well?[75]

2003 Convention for Safeguarding Intangible Cultural Heritage

The 2003 Convention on the Safeguarding of the Intangible Cultural Heritage was adopted by the General Conference of UNESCO on 17 October 2003 and entered into force on 20 April 2006.[76] Once there were 50 Parties to the Convention, the number of States Members of the Intangible Cultural Heritage Committee (established under Article 5) that oversees the implementation of the Convention has risen from 18 to 24. There are now 161 Parties to the Convention, well-distributed among the six regional groupings of UNESCO. This is a very high number to have been secured within seven years of the adoption of the treaty and demonstrates the international community's acceptance of its aims.[77]

[74] Meeting in September 2002, February–March 2003, and June 2003.

[75] Ultimately the pre-eminent role of the States Parties in identifying and safeguarding ICH was reserved. This is in line with the strict reservation of State sovereignty in other cultural heritage Conventions.

[76] The 30th ratification required by Art 34 for the Convention to enter into force (within three months) was received from Romania on 20 January 2006.

[77] As of April 2010. Information available at: <http://www.unesco.org/culture>.

A brief description of the treaty text

As has already been noted, the overall model for this Convention was the 1972 World Heritage Convention and so the basic institutions and mechanisms are similar to that Convention. However, these were adapted to the very different needs and character of ICH and so have some significant variations from that model. The structure of the Convention text is as follows. Part I sets out the purposes of the Convention, the definitions of terms (in particular, 'intangible cultural heritage' and 'safeguarding') and its relationship with other international instruments (Articles 1 to 3). Part II (Articles 4 to 10) is concerned with the organs of the Convention, namely a General Assembly of the States Parties as its sovereign body and an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage to ensure overall the implementation of the Convention. Part III (Articles 11 to 15) is devoted to measures to be taken at national level to ensure the safeguarding of ICH, especially that which is not inscribed on a List.

Part IV (Articles 15 to 18) deals with safeguarding ICH at the international level and establishes two international lists—the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding—on which ICH will be inscribed according to criteria to be developed by the ICH Committee. Provisions relating to international cooperation and assistance are set out in Part V (Articles 19 to 24), in recognition of the fact that the safeguarding of ICH is a matter that requires international solidarity that goes beyond just the actions of individual States within their own jurisdictions. An Intangible Heritage Fund is established to support Parties in their safeguarding activities and the overall implementation of the Convention and the modalities of the Fund are set out in Part VI (Articles 25 to 28). A reporting system is provided for under Part VII (Articles 29 to 30) and Part VIII (Article 31) comprises a transitional clause allowing for proclaimed 'Masterpieces'[78] to be incorporated into the Representative List before the entry into force of the Convention. The final clauses are set out in Part IX (Articles 32 to 38).

The Preamble, of course, includes some insights into the international community's objectives in drafting this Convention. For example, the importance of the human rights aspect of safeguarding ICH is made clear by placing reference to these instruments in paragraph 2. Moreover, a linkage is made in paragraph 3 between safeguarding ICH, sustainable development, and creative diversity. The special role played by indigenous communities in relation to ICH is also noted here (paragraph 7), although this is the sole such reference in the whole Convention; sadly, the central role played by women is not mentioned at all.[79] The

[78] The 90 masterpieces of ICH proclaimed under the programme of 'Masterpieces of the Oral and Intangible Heritage of Humanity' in 2001, 2003, and 2005. See: *Masterpieces of the Oral and Intangible Heritage of Humanity. Proclamations 2001, 2003 and 2005*, Intangible Heritage Section, UNESCO Culture Sector, Paris, June 2006.

[79] In contrast with several treaties and other instruments dealing with different aspects of sustainable development, especially environmental protection.

threats to ICH mentioned in paragraph 5 cite the obvious ones such as 'deterioration, disappearance and destruction' but also others, such as 'globalization and social transformation . . . the phenomenon of intolerance' that are peculiar to ICH. Given that most of these threats relate to social issues, the direct linkage between safeguarding ICH and protecting the rights of the human custodians of that heritage and their ways of life is made clear. It is important that the justification for international cooperation for safeguarding ICH is presented in paragraph 6 as 'the universal will and the common concern [of the international community]' and that its character as 'the intangible cultural heritage of humanity' is placed second to this: This has the effect of shifting the emphasis from the notion of a common heritage of mankind that dominates the World Heritage Convention towards a universal interest in its safeguarding and in safeguarding the strong local interest in ICH reflected in paragraph 7.

The purposes of the Convention given in Article 1 are: (a) to safeguard ICH; (b) to ensure respect for ICH; (c) to raise awareness at local, national, and international levels of the importance of ICH and thus to ensure a mutual appreciation of it; and (d) to provide for international cooperation and assistance. It has been argued that this last purpose is superfluous given that it essentially expressed the principle of international cooperation on which such treaty systems are commonly based. However, it can also be said also that it serves to underline the central place played by Part V of the Convention (on international cooperation and assistance) which many drafters felt was essential to the Convention's overall success given that much ICH is found in countries with limited human, financial, and technical resources to safeguard it and this reflects the general duty to protect this heritage worldwide.

The question of crafting a definition of ICH for the purposes of this text and of defining the scope of the instrument proved to be one of the most challenging aspects of negotiating the 2003 Convention.[80] This is because it was a very new area for international regulation and the definition chosen would be central to the nature and scope of obligations to be placed on States Parties. According to Article 2(1):

> The 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given 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.

[80] In Art 2(1) and (2).

The proviso that 'consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments' is worth noting. This limitation on what could be included in ICH for the 2003 Convention is an important one since there are several traditional cultural practices that clearly contravene international human rights standards, such as female infanticide, ritual rape, forced marriage, tribal scarring, and female genital mutilation. However, it has caused some difficulties for the preparation of criteria for inscription of ICH on the international lists of that Convention since much ICH is gender-specific and it is not always easy to determine whether this constitutes a discrimination of one sex or the other.[81] The domains in which ICH is found are listed in Article 2(2) as:

> The 'intangible cultural heritage', as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.

From this (non-exhaustive) list, it is obvious just how broad a spectrum is covered by the domains of ICH[82] and how unwieldy, and potentially limiting, it would be to include a list of examples of ICH. It is worth mentioning here two interesting points concerning these domains of ICH. First, part (a) refers to 'oral traditions and expressions, including language as a vehicle of the intangible cultural heritage' but it avoids direct reference to language per se as a domain of ICH. In this way, it is possible to inscribe on the International (Representative) List established by the 2003 Convention items of ICH in which language is a major and central element.

For example, some requests for international assistance under Article 19 of the Convention have had a strong language component and give an interesting insight into how this Convention may be used for the purpose of protecting endangered languages.[83] The Brazilian proposal, for example, had a direct focus on the ICH to be transmitted, namely the myths and traditional games of three Amazonian indigenous peoples. This is seen as falling directly within an overall strategy of language preservation and revitalization. Hence, although the Convention avoids including languages per se as subjects of protection as ICH in view of the extreme sensitivity of issues surrounding minority languages and language rights, it can help indirectly in their safeguarding. A further potential domain of ICH would

[81] See: Janet Blake and Nasserali Azimi, 'Women and Gender in Intangible Cultural Heritage' and Toshiyuku Kono and Julia Cornett, 'An Analysis of the 2003 Convention and the Requirement of Compatibility with Human Rights', in *Safeguarding Intangible Cultural Heritage—Challenges and Approaches* edited by Janet Blake (UK: Institute of Art and Law, 2007) at pp 143–74 and 175–99, respectively.

[82] Italy and Belgium had wished to add traditional cuisine to this list and other possible domains can be added too.

[83] Such as for *Language Documentation in Three Indigenous Communities* (Brazil) and *Safeguarding the Yukagir Language and Oral Traditions through Capacity-building for Communal Education in Places of their Compact Settlement in the Republic of Sakha (Yakutia)* (Russian Federation).

obviously be religion and spirituality but this, again, was rejected by the Member States as too sensitive an issue. As a result, established religion has no mention here but some spiritual beliefs concerning nature (such as shamanistic beliefs) could be included in part (c).

Paragraph 3 of Article 2 defines 'safeguarding' for the purposes of the Convention as follows:

> 'Safeguarding' means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

To include a definition of such a term is an interesting approach (and a new one for cultural heritage instruments) which signals the central importance of this notion of safeguarding to the whole Convention. By providing a clear definition of the term here, it allows for a much simpler drafting of later articles dealing with national and international safeguarding activities, policies, and programmes. Safeguarding is seen here as a comprehensive notion that not only includes classic 'protection' actions—such as identification and inventorying—but also includes providing the conditions within which ICH can continue to be created, maintained, and transmitted. This, in turn, implies the continued capability of the cultural communities themselves to do this, ie it is the community as the vital context for the existence of ICH that is placed at the centre of this Convention rather than the heritage itself. In this way, the safeguarding of ICH is a more context-dependent approach that takes account of the wider human, social, and cultural contexts in which the enactment of ICH occurs. The measures (to be taken by governments) to achieve this include ensuring that the economic, social, and cultural rights of the communities (groups and individuals) that allow them to create, maintain, and transmit ICH.[84]

One of the tricky questions facing the drafters of this treaty was to identify how it would relate to other international treaties dealing with aspects of this heritage, in particular those in the intellectual property domain. The Convention attempts to resolve the danger of an overlap by making clear that nothing in this Convention should alter the status or diminish the level of protection of the 1972 Convention. Nor should it affect the rights and obligations of Parties deriving from any instrument to which they are Parties in the field of intellectual property rights or the use of biological and ecological resources.[85] The relationship of the 2003 Convention with other treaties (including, now, the 2005 Convention on

[84] For a critical appraisal of 'safeguarding' under the Convention, see: Richard Kurin, 'Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal', *Museum International*, vol 221-2 (2004): pp 66–77.

[85] Article 3. Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013) notes at p 37 that '[t]he system created by the 2003 Convention was meant to be, from the very beginning, complementary to other regimes that could be created by other specialized agencies. The commitment to complementarity is true particularly regarding IP protection, which was, and still is, being developed by WIPO'.

Diversity of Cultural Expressions) is one that is not wholly resolved and needs further consideration by the treaty organs. Two such treaty bodies are established under the Convention: a General Assembly of States Parties as the sovereign body of the Convention and the Intangible Heritage Committee which undertakes most of the work of overseeing the Convention's implementation.[86] There was wide-ranging debate during the intergovernmental negotiations on the functions of the Committee, and its main functions were identified.[87] Importantly, the participation at meetings of the Committee by public and private bodies and private individuals with proven competence in the field of ICH as well as the accreditation of NGOs with recognized competence in this field are all provided for.[88] It was stressed, however, that any such participation should be on an ad hoc basis. This is an area in which the experts preparing the draft Convention text wished to go much further than the representatives of Member States who negotiated the final text of the Convention, demonstrating the high degree of sovereignty that they wished to reserve.[89] More recent developments in the Operational Directives to the Convention (discussed below) have brought implementation closer to the drafters' intentions in this area.

Under the Convention, two world Lists of ICH are to be established—a Representative List of Intangible Heritage of Humanity and a List of Intangible Cultural Heritage in Need of Urgent Safeguarding.[90] Here, again, we see the insistence of reserving State sovereignty in the requirement that requests for inscription on either List should be made solely at the request 'of the States Parties concerned' and not to allow requests directly to the Committee from non-State actors. The exception to this being cases of extreme urgency when an item of ICH may be inscribed by the Committee itself on the basis of objective criteria in consultation with the State Party concerned.

As part of the initial set of Operational Directives for the Convention adopted by the General Assembly at its Second session in 2008,[91] criteria for inscription on the RL and on the USL were adopted. These criteria share some common

[86] The General Assembly of States Parties and the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage ('the Committee') were established under Arts 4 and 5, respectively.

[87] The Committee's main functions (as set out in Art 7) are: promoting the objectives of the Convention and encouraging its implementation; providing a guiding role for the establishment of best practices in the field of safeguarding ICH; preparing Operational Directives to aid States Parties in the implementation of the Convention; preparing and submitting to the General Assembly a plan for using the resources of the Fund; establishing criteria for the inscription of ICH on the Lists; inscribing ICH on the basis of these criteria at the request of States Parties; and examining requests by States Parties for international assistance.

[88] Articles 8(a) and 9(1).

[89] Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights' (n 40).

[90] Articles 16(2) and 17(2) respectively.

[91] The General Assembly adopted some draft operational directives at its second Session held in UNESCO Headquarters in June 2008. UNESCO Doc 1.EXT.COM 6. These are found in paras 1 and 2 of the current version of the Operational Directives: *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, Adopted by the General Assembly of the States Parties to the Convention at its second ordinary session (Paris, 16–19 June 2008), amended at its third session (Paris, 22–24 June 2010).

elements, namely that the element should satisfy the definition of ICH given in the Convention, it has been included in a national ICH inventory as defined in Articles 11 and 12, and the widest possible participation of the community, group, and, if applicable, individuals concerned has been secured for the nomination, with their free, prior, and informed consent. If properly handled, this last criterion would serve to reduce the degree of State sovereign power in this nomination process, however it is very difficult actually to determine how far such consent is freely given and in a fully informed manner and, in addition, that those who expressed their consent were representative of the community concerned. This is an area that will require much more consideration and where the current periodic reporting framework fails, in a large number of cases, to secure sufficiently informative and/or reliable responses from reporting Parties. Other inscription criteria for the RL include that the inscription: will contribute to the visibility and awareness of the significance of the ICH; will encourage dialogue; and reflects cultural diversity worldwide and testifies to human creativity. Additional criteria for inscription on the USL include that its viability is at risk despite the efforts of the various concerned stakeholders and actors and that it is facing grave threats as a result of which it cannot be expected to survive without immediate safeguarding.

With regard to the RL criteria, it is interesting that no specific criterion requiring compatibility with international human rights standards has been included, although it may be argued that the requirement (from both Lists) that inscribed elements must conform to the Convention's definition of ICH could be seen to cover this requirement.[92] In both cases, again, inscribed elements must be already inventoried by the nominating Party(ies) and this underlines the importance accorded in the Convention to inventorying ICH as an essential prerequisite for effective safeguarding. Safeguarding measures (as defined by the Convention) must also be in place designed to protect and promote both RL and USL inscribed elements; in the case of the USL, there is the additional requirement that they enable the community, group, or, if applicable, individuals concerned to continue the practice and transmission of the element. A significant conceptual departure here from the 1972 Convention (and even the Masterpieces programme) has been the removal of any reference to the notion of 'outstanding' or 'exceptional' value as a listing criterion. This is aimed at avoiding the creation of a hierarchy of ICH through the listing process—it is the *representative* nature of the ICH listed and its cultural significance that should be celebrated and safeguarded by this Convention. In the case of the USL, the requirement for the elaboration of safeguarding measures that allow for the continued practice and transmission of the ICH is a central one: this, in particular, is subject to monitoring through the reporting system established for USL-inscribed elements. Although community participation is encouraged in these criteria, nominations may be made only by

[92] Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage (Tokyo, Japan, 13–15 March 2006). This meeting prepared an initial set of RL criteria that included an explicit human rights 'threshold' criterion that was not adopted by the ICH Committee.

Parties on whose territory the element is located and cannot come from communities, groups, individuals, or third States. However, the Committee may list ICH that it considers to be in extremely urgent need of immediate safeguarding without the consent of the State Party concerned, although consultation with that State is required.[93] Moreover, unlike the case of the 1972 Convention, elements do not need to be inscribed first on the RL before they can be inscribed on the USL.

The establishment of a Fund to provide a stable financial arrangement for implementing the Convention lies at the heart of the Convention since it requires a clear commitment from the international community towards safeguarding ICH as well as a show of solidarity by Member States. Provisions have been included in the Convention relating to the establishment of a Fund, the character of the Fund, the resources it could draw upon, and the level of States Parties' contributions.[94] The compulsory contributions by States Parties should be made on the basis of a uniform percentage applicable to all Parties levied at least every two years by the General Assembly. In no case should they exceed 1 per cent of the State Party's contribution to the regular budget of UNESCO. Details of the implementation of these provisions were also elaborated by the Committee at the Chengdu meeting of the ICH Committee in 2007.[95]

Another central feature of the Convention is the system for international cooperation and assistance for safeguarding ICH which is overseen by the Committee. The main purposes for which international assistance may be granted are: for safeguarding heritage inscribed on the USL, for the preparation of national inventories and in support of programmes, projects, and activities for safeguarding ICH on national, sub-regional, and regional levels.[96] Requests for international assistance may only be made by a State Party for ICH 'present in its territory' since the territorial link was viewed as the only one that the Convention could take account of.[97] This prevents another State, for example, that has cultural claims on the ICH in question from making such requests. However, provision is also made for joint requests by two or more States Parties in recognition of the fact that much ICH is trans-frontier in character and will therefore often have more than one State Party with a territorial interest in its safeguarding.[98]

Naturally, these provisions relating to the international safeguarding of ICH and to the international cooperation and assistance available to meet this must be counterbalanced by some regime for safeguarding on the national level. It is a fundamental principle of the listing system that any ICH which is not inscribed on one of the international lists should benefit from a raised awareness of its significance and need for safeguarding by the State Party in whose territory it is located. Consequently, the provisions for national safeguarding[99] should

[93] Article 17(3). Craig Forrest, *International Law and the Protection of Cultural Heritage* (n 9) at p 380.

[94] Part VI (Arts 25–28).

[95] An extraordinary meeting of the Committee was held on 23–27 May 2007 at which several significant decisions governing the Convention's implementation were taken. UNESCO Doc ITH/07/1.EXT.COM/CONF.202/Decisions.

[96] Article 20. [97] Article 23(1). [98] Article 23(3). [99] Part III, Arts 11–15.

be regarded as the heart of the safeguarding framework established under the Convention and a general obligation is placed on Parties to 'take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory'.[100] Generally, national safeguarding involves measures aimed at ensuring the continuing viability of ICH. These include such measures as the identification, documentation, research, preservation, protection, promotion, enhancement, revitalization, and transmission (especially through non-formal means) of ICH.[101] In this, emphasis is placed on 'the participation of communities, groups and relevant non-governmental organizations'[102] in these safeguarding activities. Indeed, the final provision in this section explicitly enjoins Parties to ensure 'the widest possible participation of communities, groups and, in some cases, individuals that create, maintain and transmit such heritage, and to involve them actively in its management'.[103] This is a significant development in cultural heritage instruments whereby not only the need of cultural communities for but also entitlement to be directly involved in the safeguarding process is explicitly recognized.[104] The use of inventories as a central tool for identification and subsequent safeguarding is given importance and the requirement is placed on Parties to draw up one or more inventories of their ICH and to update these regularly.[105] Parties should also adopt a policy that promotes the function of ICH in society[106] and integrates it into planning programmes, designating one or more competent bodies for safeguarding ICH. Further measures set out relate to education and training, transmission of ICH, capacity-building for management of ICH, providing access to ICH while respecting customary practices and for establishing institutions for documenting ICH.[107]

Part VII (Articles 29 and 30) establishes a reporting system whereby Parties report to the Committee on the legislative, regulatory, and other measures taken for the implementation of the Convention. A Transitional Clause is included in Part VIII (Article 31) that provides for the items proclaimed under the 'Masterpieces of Oral and Intangible Heritage of Humanity' programme to be incorporated into the Representative List of the Intangible Heritage of Humanity before the entry into force of the Convention. Hence, the RL inherited all of the Masterpieces of Oral and Intangible Heritage that had been proclaimed up until 2005,[108] which gave it an initial basis of 90 elements. It should be borne in mind, however, that these items had proclaimed under a different definition of 'oral and intangible heritage' and using a very different set of criteria from those of the 2003 Convention and so do not necessarily correspond to the understanding of ICH in

[100] Article 11(a). [101] As set out in Art 2(3) definition of 'safeguarding'.
[102] Article 11(b). [103] Article 15.
[104] Interestingly, revisions to the Operational Guidelines to the 1972 Convention since 1998 have also increasingly recognized the role of local communities in management and protection of inscribed properties.
[105] Article 12(1).
[106] A similar provision is contained in Art 5(a) of the 1972 Convention.
[107] Articles 13 and 14.
[108] There had been three proclamation rounds previous to that in 2001, 2003, and 2005.

that Convention or its core values; in addition, some are located in the territory of Member States that are not Parties to the Convention. The Final Clauses are set out in Part IX (Articles 32 to 40) and deal, inter alia, with the following: ratification, acceptance, and approval; accession; entry into force; federal or non-unitary constitutional systems; denunciation; and amendments. These are mostly standard provisions.

The first meeting of the General Assembly of the States Parties, the sovereign body of the Convention established under Article 4, was held in June 2006, and its main business was the election of the first 18 States Members to the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage ('the Committee') from the 30 States that were Parties by 20 January 2006.[109] Article 6(1) requires that the membership of the Committee should reflect 'equitable geographical distribution', which was to be achieved by choosing two States initially from each of the six regional groupings of UNESCO[110] with the remaining six to be chosen after these on a similar basis. Another of the Committee's tasks was to determine the uniform percentage of States Parties' contributions to the Intangible Cultural Heritage Fund. The first session of the Committee was held in Algiers from 18–19 November 2006 and its main task was to produce an initial draft set of Operational Directives for the Convention as required by Article 7(e).[111] This was, of course, a crucial task since it had a strong influence on the initial orientation of the Convention in its first years of operation. The Operational Directives can, of course, be updated at a future date once more experience of operating the Convention has been gained, but this would not be expected to happen for a few years.

The Operational Directives that have been adopted thus far,[112] deal with such issues as: the incorporation of items proclaimed 'Masterpieces of the Oral and Intangible Heritage of Humanity' in the RL; criteria for inscription for and the submission and evaluation of nominations to the USL and the RL; selection criteria for programmes, projects, and activities to be selected as best practices; eligibility and selection criteria for international assistance requests; submission of multi-national files; guidelines for resourcing and use of the Intangible Cultural Heritage Fund; the participation of communities, groups, and, where applicable, individuals, as well as experts, centres of expertise and research institutes, and non-governmental organizations in the implementation of the Convention; raising awareness about ICH; use of the emblem of the Convention; reporting by

[109] Algeria, Mauritius, Japan, Gabon, Panama, China, Central African Republic, Latvia, Lithuania, Belarus, Syria, Republic of Korea, Seychelles, United Arab Emirates, Mali, Mongolia, Croatia, Egypt, Oman, Dominica, India, Vietnam, Peru, Pakistan, Bhutan, Nigeria, Iceland, Mexico, Senegal, and Romania.

[110] These are: Arab States, African States, Asia-Pacific Region, Latin America and the Caribbean, Western Europe, and Central and Eastern Europe.

[111] ITH/06/1.COM/CONF.204/Decisions. There have now been nine sessions of the ICH Committee and the 10th will take place in Windhoek (Namibia) in November 2015.

[112] *Operational Directives* (n 91).

States Parties to the ICH Committee on the implementation of the Convention and on the status of elements inscribed on the USL. Some of the issues addressed by the Committee in these Operational Directives have proven to be very sensitive and complex and a few of the most challenging of these have included: how 'representativeness' in the RL can be achieved; whether to apply a human rights-related criterion to selection of elements for listing and, if so, how this should be done; how the terms 'community', 'group', and 'individual' should be understood for the purposes of the Convention, and how the involvement of communities and groups in the process of identifying, inventorying, and safeguarding ICH (as required by Articles 12 and 15, in particular)[113] can be ensured by Parties; the role of non-governmental experts in implementation, especially in advising the ICH Committee and the evaluation of nomination files; and the accreditation of NGOs to advise the Committee and the selection of Advisory Organizations by the General Assembly.

The operation of the international lists

The USL was established at the fourth session of the ICH Committee held in Abu Dhabi in 2009 and it includes elements whose viability is endangered, despite the efforts of the community or group concerned.[114] Among the 38 elements thus far inscribed are: traditional felt carpet-making (Kyrgyzstan); calligraphy (Mongolia); earthenware pottery skills (Botswana); traditional textile techniques and know-how for building wooden bridges (China); indigenous sacred forest traditions and practices (from Kenya); a collective fishing rite (from Mali); an indigenous ritual for the maintenance of social and cosmic order (Brazil); a cultural space (from Latvia); and a traditional epic (from Mongolia). The ICH Committee has been considering Periodic Reports from Parties on the effectiveness of the safeguarding strategies undertaken for elements inscribed on the USL: the primary purpose of inscription is to ensure effective safeguarding with the eventual aim of being able to move the element from the USL to the RL.[115] Over all, it can be stated that the USL is serving its purpose of focusing Parties on

[113] Article 15 reads: 'Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management'.

[114] By inscribing an element on this List, the State undertakes to implement specific safeguards and may be eligible to receive financial assistance from a Fund set up for this purpose.

[115] Parties are normally expected to submit four-yearly reports on the status of an element on the USL to the Committee, although the Committee may request more frequent reports. Examples of such reports include the *Annual report of Belarus on the results of the measures taken to ensure the safeguarding of the 'Rite of Kalyady Tsars (Christmas Tsars)' inscribed on the Urgent Safeguarding List in 2009* (UNESCO Doc ITH/11/6.COM/CONF.206/11) and the *Report of Brazil on the status of 'Yaokwa, the Enawene Nawe people's ritual for the maintenance of social and cosmic order' inscribed in 2011 on the Urgent Safeguarding List* (UNESCO Doc ITH/13/8.COM/6.b), both accessed at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00460>.

developing and implementing safeguarding Action Plans for these endangered elements. Although their success has been mixed thus far, some elements have been rescued from the brink of disappearance and one or two may now be ready to be up-listed to the RL.[116]

The RL has, to some degree, achieved its objective of celebrating the world-wide diversity of ICH in the great variety of elements now inscribed on it. To name but a few, the 314 inscribed elements include: the tango (from Argentina and Uruguay); the skills and know-how of building and navigating the *lenj* boats (Iran); knowledge and practices of mathematical calculation through the abacus (from China); religious processions (from several Parties, including Colombia, Belgium, and Croatia); silk craftwork and lace-making (from China and Cyprus); a traditional indigenous dance (from Japan); the seven-yearly re-roofing ceremony of a sacred house (from Mali); indigenous places of memory and living traditions (from Mexico); a whistled language (from the Canary Islands, Spain); shadow puppet theatre (from Turkey and Indonesia); socio-cultural spaces (in Hungary and Estonia); a shamanistic rite (from Viet Nam); irrigators' tribunals (in Spain); seasonal gatherings/festivals of pastoralists (in Morocco and Mali); and the traditional cultural practices and associated ecological knowledge of Amazonian indigenous peoples (Ecuador and Peru). However, the RL and its underlying notion has been the subject of criticism from its conception.[117] It is true that for many Parties the RL has predominantly an opportunity to showcase their 'outstanding' ICH elements: This demonstrates a lack of understanding of the fundamental conception underlying the RL, namely that it should reflect the diversity of (sometimes mundane) ICH elements around the world. It is to be hoped that, over time, this view will change and Parties will understand better the different philosophy underlying this List from that of the World Heritage List of the 1972 Convention. Another aspect of the RL listing that has presented a challenge to the Committee and to UNESCO has been the tendency in some regions (in particular southeast and western Asia) to engage in a form of competitive inscription whereby one Party has inscribed in its name an ICH shared with a regional Party or Parties. This is extremely unfortunate in view of the fact that the 2003 Convention explicitly recognizes the transfrontier character of much ICH and encourages multi-national inscriptions thereof.[118] This represents a significant departure and is an unusual example of international

[116] The 'Mongol Biyelgee (Mongolian Traditional Folk Dance)' element was almost extinct at the time of inscription on the USL in 2009 and measures taken since then seem to have succeeded in preventing its disappearance. Although safeguarding measures taken for the 'Traditions and practices associated to the Kayas in the sacred forests of the Mijikenda' element since it was inscribed in 2009 have been relatively successful, the decision was not taken by the Committee to up-list it at its 9th session in Paris in November 2014.

[117] Several Member States expressed concern during the treaty negotiations that it would just become a 'hit-parade' of ICH and not fulfil its intended role as a *representative* list. See: Janet Blake, *Commentary on the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage* (n 41) at p 79.

[118] *Operational Directives* (n 91) at paras 13–16.

law accepting the reality that cultures cross international borders and cannot be confined within one country.[119] This is also in keeping with the general approach of recognizing that the interests of cultural communities and their heritage may challenge purely 'statist' concerns. Since the question of how States should treat the heritage and languages of migrants and diasporae remains a sensitive one,[120] the operation of the 2003 Convention has the potential to inform and even contribute to the development of international law in this area.

Despite the aforementioned difficulty, the possibility of making multinational nominations to the RL has been enthusiastically received by Parties and there are now 19 such inscriptions, ranging from falconry that is now inscribed in the name of 13 Parties from different geographical regions to that of cultural practices and expressions linked to the Balafon of the Senufo communities of Mali and Burkina Faso.[121] It is also worth noting that, in some cases, Parties to multinational inscriptions do not have any other inscribed elements, suggesting that this has provided for them an important opportunity to have their heritage recognized and to develop capacity and experience in this area.[122] Multinational inscriptions often foster sub-regional and international cooperation for their safeguarding: Latvia, Estonia, and Lithuania now enjoy close sub-regional cooperation over the Song and Dance festival and its related ICH while the Governments of Peru and Ecuador cooperate for the identification of oral heritage and traditions of the Zápara people and to improve understanding of and the safeguarding of this fragile ICH of the Amazon, its bearers, and related environment. The main elements found in such cooperative frameworks are: exchange of information and experience on ICH safeguarding; sharing documentation on a shared element; collaboration over developing inventorying methodologies; hosting joint seminars and workshops; and co-hosting festivals.[123] Clearly, since different regions (and sub-regions) often have common social, cultural, economic, and environmental characteristics as well as shared ICH elements, it makes much practical sense for encouraging such regional cooperation frameworks, and multinational inscriptions have, thus far, proved to be one of the most effective

[119] The Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979) [19 ILM 15 (1980)] is another rare example of such an approach.

[120] The question of diasporae and their cultural heritage is discussed in more detail in Chapter 9.

[121] In order to encourage multinational nominations to the RL and to try to avoid further problems over a Party inscribing in its name an element that another Party regards as its own, and that such nominations represent an important mechanism for promoting international cooperation, Committee Decision 7.COM 14 establishes an online resource through which States Parties can announce their intentions to nominate elements and other States Parties may learn of opportunities for cooperation in elaborating multinational nominations. See also: UNESCO Doc ITH/12/7.COM/14.

[122] Pakistan, eg, is one of the nominating Parties of the Nowrouz element and is now working with regional countries for inclusion in the list of countries nominating Falconry for the RL.

[123] The creation of a network of professionals, communities, and centres of expertise for the Mvett, a common ICH of the Fang community, between four States of the Central African sub-region (Gabon, Cameroon, Congo, and Equatorial Guinea) is an interesting initiative. Another regional network is the International Institute for the Study of Nomadic Civilizations (Kazakhstan, Kyrgyzstan, Mongolia, and Turkey).

means of securing this.[124] Some examples can also be found of bilateral and multilateral cooperation between Parties not of the same region: For example, such cooperation exists over shared African and Brazilian heritage.

The most disappointing aspect of listing under the 2003 Convention thus far has been in the Register of Best Practices (BPR) which was introduced at the request of Member States during the final negotiations on the treaty: this was very much a response by those States that felt that the model of an RL and USL would fail to achieve what they wished from an international listing system. Its main purpose is to give recognition to best safeguarding practices in order to disseminate these and encourage other Parties to apply similar approaches. This, if it is successful, would surely make a great contribution to the effectiveness of the Convention. Unfortunately, thus far, Parties have been too heavily focused on having their ICH inscribed on the RL and have not submitted a sufficient number of nominations for the BPR. It is hoped that this will improve in the future once (a) Parties have satisfied their initial enthusiasm for RL inscriptions and (b) more practice has developed on the ground that deserves such recognition.[125] Thus far, the following Best Practices have been internationally recognized between 2009 and 2014: the centre for traditional culture—school museum of Pusol pedagogic project (Spain); school-level education and training in Indonesian Batik in collaboration with the Batik Museum in Pekalongan (Indonesia); and safeguarding ICH of Aymara communities of Bolivia, Chile, and Peru; a programme for cultivating ludodiversity: safeguarding traditional games in Flanders (Belgium); the call for projects of the National Programme of Intangible Heritage (Brazil); Fandango's Living Museum (Brazil); revitalization of the traditional craftsmanship of lime-making in Morón de la Frontera, Seville, Andalusia (Spain); the Táncház method: a Hungarian model for the transmission of ICH (Hungary); strategy for training coming generations of Fujian puppetry practitioners (China); Xtaxkgakget Makgkaxtlawana: the Centre for Indigenous Arts and its contribution to safeguarding the ICH of the Totonac people of Veracruz (Mexico); a methodology for inventorying ICH in biosphere reserves: the experience of Montseny (Spain); and safeguarding the carillon culture: preservation, transmission, exchange and awareness-raising (Belgium).

What is notable here is that Spain has three and both Belgium and Brazil have two Best Practices inscribed thus far: this reflects not only the quality of these countries' implementation strategies but also, importantly, that they value the opportunity to share this experience with other Parties. It is probably not a coincidence that Spain has one of the most varied set of inscriptions to the RL also, again signalling an approach that values the diversity of ICH and responds well to the spirit of the Convention.

[124] Such cooperation begins at the stage of elaborating a nomination file and it is not necessary for the element actually to be inscribed for this to have taken place.

[125] A project or programme must usually have been in place for five years or so to be considered for inscription on the BPR.

Evolutions in implementation—gender and community participation

It is through the ongoing operation of the Convention and its application both nationally by Parties and internationally by the treaty bodies that some challenges and the potential responses to them will become clearer. The experience of the 1972 World Heritage Convention shows that, even after over 30 years of operation, the World Heritage Committee is still introducing major changes to its Operational Guidelines. Indeed, one of the most recent changes to those Guidelines[126] has been rather radical, suppressing the distinction between cultural and natural listing criteria such that a single set of criteria for all properties has now been introduced. We can look forward to similar evolution over time of the implementation of the Operational Directives to the 2003 Convention and we have already seen this happening. Once the initial Directives had been put in place (in 2008), it was then possible for the Parties to the Convention acting through the ICH Committee to address areas in which experience of implementation started to throw up issues not adequately addressed in the Convention. Equally, the Directives themselves are also subject to revision when it is felt that they do not operate as well as wished or when new situations are confronted that were not initially anticipated. We can find examples where this process has occurred or is currently underway and the section below examines two of them, namely gender and ICH, and community participation.

Gender dynamics of ICH safeguarding

The, as yet unresolved, question of how to address the gender dynamics of ICH and its safeguarding within the framework of the 2003 Convention is a recently acknowledged issue. Up until recently, there has been little proper debate about gender equality and ICH and most of the Convention's mechanisms and the related documents, forms, and assessments have been 'gender blind'.[127] This may well reflect a nervousness on the part of States Parties, the ICH Committee of the Convention, and UNESCO itself of entering into an arena where it is necessary to deal with ICH elements—some of which may already be inscribed on the RL—that may pose a challenge to the principles of non-discrimination and equality.[128] Since much traditional culture, in one way or another, would seem to undermine human rights notions of gender equality, there has been an

[126] Introduced in 2006.

[127] Currently, the nomination files (for the RL, USL, International Assistance or Register of Best Practices) do not require any information on the links between gender equality and ICH elements. This is true also of the Periodic Reports submitted by Parties although some have started to comment on this.

[128] Article 2(1) very clearly requires that 'For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments'.

understandable fear that a high proportion of ICH might be excluded from the Convention's scope if such a test were too strictly applied. However, it has recently been accepted that it is desirable for the ICH Committee to define more clearly where the limits lie in order to exclude ICH that clearly violates universal human rights standards.[129] One way would be for the Committee to encourage cultural communities to engage in dialogue in order to find ways to remove discriminatory elements from their practices if they wish them to be included as ICH for the purposes of the Convention.[130] Such an approach would recognize the fact that traditional cultural practices are inherently flexible and have a great capacity to evolve to meet current needs, of which gender equality is one.

The gender dynamics of ICH are many and various and gender, in all its variety, should itself be appreciated as an important form of diversity. For example, in the *Châu van shamans' song* from Viet Nam, gender roles are reversed with female mediums taking on traditionally 'male' roles and dress and male mediums taking on traditionally 'female' roles, dress, and behaviours. Unfortunately, for the purposes of nomination to the RL it has been reduced to a performing art and its more subversive gender roles have been removed which places under question how far gender issues can ever be satisfactorily addressed within the Convention's framework.[131] The *onnagata* in Japanese Kabuki theatre (male performers who play female roles) manipulate corporeal gender acts in such a way as to create a specific *onnagata* gender role.[132] *Taquile* in Peru demonstrates clear gender-based divisions of labour, with the pedal loom and needles used only by men to make garments of Spanish colonial influence, like trousers and hats, and the plain loom used only by women to make more traditional garments, such as blankets.[133] Others are not only practised and/or performed by one sex but also represent a narrow age band, such as the *Leuven Age Group Ritual* (Belgium) which involves only men aged between 40 and 50 years old.[134] In some cases, women have traditionally been involved in a secondary role in an otherwise male-exclusive activity, but become practitioners themselves over time: in Iran, women have begun to enter the traditionally all-male domain of performing *naqāli* poetry in public

[129] Torggler and Sediakina-Rivière, *Evaluation of UNESCO's Standard-setting Work* (n 33). It should be remembered that Art 2(1) of the Convention explicitly requires that 'For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments'.

[130] In her report on cultural heritage and human rights, Farida Shaheed (UN Special Rapporteur for Cultural Rights) stressed the vital importance of establishing democratic societal dialogue on such matters. Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, Human Rights Council Seventeenth session Agenda item 3, 21 March 2011 [UN Doc A/HR/C/17/38].

[131] Barley Norton, *Songs for the Spirits—Music and Mediums in Modern Vietnam* (University of Illinois Press, 2009) at pp 155–89.

[132] Katherine Mezur, *Beautiful Boys/Outlaw Bodies: Devising Kabuki Female-likeness* (Palgrave Macmillan, 2005).

[133] As noted by Peru in its Periodic Report submitted to the ICH Committee in the 2012 reporting cycle.

[134] This is described in Belgium's Periodic Report submitted to the ICH Committee in the 2013 reporting cycle.

tea-houses. Hence, gender roles are prevalent throughout ICH and the practitioners are often either exclusively male or female: this does not, in itself, constitute a form of discrimination or sexual inequality, but it is worth considering the implications more fully. Importantly, the transmission of ICH is frequently a gendered activity[135] and we need to appreciate what this means for the future viability of certain ICH elements and how they should be safeguarded. It is worth considering, for example, whether gender-bound attitudes may contribute to problems in transmission and how these might be addressed.[136]

In addressing this great diversity of gender roles in ICH, however, it is advisable to tread carefully since it is easy to make false culture-bound assumptions about gender issues.[137] The uncritical imposition of poorly fitting gender roles and values can damage gender systems that operate differently from one's cultural expectations and these may be crucial to the transmission and safeguarding of certain ICH elements. It is equally important that gender should be viewed within the context of other social power relations since the differences that are attributed to one or other biological sex are, in fact, a result of their position in the social structure and the expectations placed on them by society. Thus, a gender-based perspective towards ICH safeguarding is one that contextualizes the practices and activities through an analysis of the prevailing social relationships and system of power. In undertaking gender analyses of ICH, the community's own understanding of gender balances should be given prominence while bearing in mind the importance of a diversity of voices from within the community being heard.[138]

As part of its responsibilities under the UN Global Priority Gender Equality, UNESCO is currently introducing gender mainstreaming into its cultural Conventions.[139] With regard to the 2003 Convention, this question is how to mainstream gender into the related policies, legislation, development planning, safeguarding plans and programmes, etc. At its Eighth meeting in 2013, the ICH Committee adopted a Decision[140] in which it decided to revise all relevant documents and forms (including the Operational Directives, the Periodic Reporting formats, and nomination files) to include gender-specific guidance and questions. At an Expert Meeting held in Turkey in September 2014, a draft paragraph on

[135] As an example, the pottery art of the *Mangoro* in Côte d'Ivoire has been transmitted by women to girls for centuries.

[136] Some elements may remain viable because their transmission is less obviously gendered or because it has evolved over time from a single-sex to a more open form of transmission.

[137] Oyewumi has argued that the current use of gender as a universal and timeless social category must be read in relation to the global dominance of European/American cultures and the ideology of biological determinism which underpins Western systems of knowledge. See: Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press, 1997). Similarly, Marilyn Strathern in *The Gender of Gift* (1988) employed a feminist approach to argue that Papuan women are not being exploited as thought, but rather that the definition of gender is different than the western one.

[138] Madhavi Sunder, 'Cultural Dissent', *Stanford Law Review*, vol 54 (2001): p 495 and UC Davis Legal Studies Research Paper No 113.

[139] UNESCO, *Gender Equality—Heritage and Creativity* (Paris: UNESCO, 2014). The 2003 Convention is addressed here in: Janet Blake, 'Gender and intangible cultural heritage' at pp 49–59.

[140] Decision 8.COM 5c.

gender equality was proposed for the Operational Directives[141] which called for States 'to foster the contributions of intangible cultural heritage to greater gender equality and to eliminating gender-based discrimination, while recognizing that communities pass on their values, norms and expectations related to gender through intangible cultural heritage and it is therefore a privileged context in which community members' gender identities are shaped'.[142] The Committee has not yet deliberated on these but they give a good hint as to the likely development of the Directives in this area. However, it should be mentioned that gender would need to be mainstreamed into other paragraphs of the Directives dealing with nomination files, periodic reporting, community participation, etc.

Community participation

As this discussion on gender and ICH has demonstrated, a diversity of voices from within the community needs to be heard in order to achieve truly participatory approaches to safeguarding.[143] However, developing such community-based strategies towards ICH safeguarding is still in its infancy,[144] and this is another area in which the ICH Committee's work in drafting Directives has proved to be significant. At the time of negotiating the Convention, some Member States of UNESCO were reluctant to employ the term 'communities' and to accord to them such a high degree of involvement they now enjoy in identifying ICH and in implementing and designing safeguarding measures. Indeed, there is no definition of the term given in the Convention text, despite the transversal character of the requirement of community participation throughout the implementation of its provisions. Given that ICH is embedded in the day-to-day lives of communities (and other groups), official safeguarding as a public policy will inevitably intervene directly in social and cultural processes taking place within communities. Moreover, the Convention's provisions regarding community involvement raise important questions about 'ownership' of that heritage and also of the process by which it is to be given official recognition. Safeguarding ICH may provide the

[141] Information communicated in an email from the UNESCO ICH Secretariat.

[142] For this, Parties are encouraged: to exploit ICH's potential to create common spaces for dialogue on how best to achieve gender equality; to promote the important role that ICH can play in building mutual respect among communities and groups whose members may not share the same conceptions of gender; to foster scientific studies and research methodologies (including those conducted by the communities themselves) towards understanding the diversity of gender roles within particular ICH expressions; and to ensure gender equality in the planning, management, and implementation of safeguarding measures, involving the diverse perspectives of all members of society.

[143] Sunder, 'Cultural Dissent' (n 138).

[144] As noted by Harriet Deacon and Chiara Bartolotto, 'Charting a Way Forward: Existing Research and Future Directions for ICH Research Related to the Intangible Heritage Convention', *Report on The First ICH Researchers Forum of 2003 Convention International Research Centre for Intangible Cultural Heritage in the Asia-Pacific Region (IRCI)* (2010) pp 31–41 at p 39: 'Although the text of the Convention acknowledges a new role for social actors, in different countries the interpretation of the notions of "participation" and of "community" varies widely and depends on cultural, political and institutional frameworks'.

State and communities with opportunities to democratize the process by which we give value to heritage, assigning a larger role to local people and communities.[145] Kuruk regards the inclusion of explicit reference in the 2003 Convention to community involvement in safeguarding ICH—based upon the principle of consultation—as a potentially balancing factor to the fact that, otherwise, the 2003 Convention tends towards giving the impression that the State has exclusive rights over ICH found within its territories.[146] It clearly responds to a human rights dimension requirement, calling on States to ensure the participation of communities in the definition, identification, inventorying, and management of ICH.[147]

However, the text of the 2003 Convention does not specify how such communities will be able effectively to influence government policy since it would appear that, unless they are invited to do so by the State, they cannot initiate safeguarding measures of their own or block state-sponsored programmes to which they are opposed. Lixinski has noted that the mechanisms for ensuring real and effective community participation in the operation of the Convention are weak,[148] despite the importance given to this approach in the treaty[149] and the drafters' intentions in this regard.[150] In addition, community participation as conceived of under the Convention is mostly restricted to actions taken at the national level[151]—identification and inventorying of ICH, designing and carrying out safeguarding and management actions etc—and their involvement in its international aspects, such as inscriptions to the RL and USL, has been limited to the requirement for consultation and proof of free, prior, and informed consent. Revisions to the Operational Directives for the implementation of the Convention have begun to move in the direction of more effective community participation in the measures taken for identifying and safeguarding ICH. Importantly, these new Directives have the effect of diluting the privileges reserved for States under the Convention,[152] particularly with regard to deciding what should be identified

[145] As Deacon and Beazley in 'Safeguarding Intangible Heritage Values' (n 11) make clear, to assign significance to heritage is often a very contentious question.

[146] Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights' (n 40) at p 126 draws attention to 'the danger posed by granting States the sole right to determine which items of cultural property are worthy of protection [as under the World Heritage Convention] … granting each state the right to subjectively specify the scope and content of cultural property includes the right to exclude property from protection that others outside the state might find more culturally valuable'.

[147] Articles 11(b) and 15 of the 2003 Convention.

[148] Lucas Lixinski, 'Selecting Heritage: The Interplay of Art, Politics and Identity', *European Journal of International Law*, vol 22, no 1 (2011): pp 81–100.

[149] Article 15 calls upon Parties to ensure 'the widest possible participation of communities, groups and, in some cases, individuals that create, maintain and transmit such heritage, and to involve them actively in its management'.

[150] Blake, *Commentary on the 2003 UNESCO Convention* (n 118) at p 76 noted that: 'The majority of intergovernmental experts wished to recognise the important role played by communities and other groups in implementing and managing measures for safeguarding ICH'.

[151] Lixinski, *Intangible Cultural Heritage in International Law* (n 85) at p 53.

[152] Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights' (n 40) noted that the Member States of UNESCO in their treaty-making have, in general, strongly preserved their sovereignty over cultural heritage located on their territories.

as ICH for national safeguarding and international recognition. In 2010, new directives dealing with raising awareness of ICH were approved which, according to Lixinski, 'enhance much stronger forms of community participation' and, although they refer to what is apparently a rather benign and unthreatening aspect of the Convention, 'can be read as a backdoor through which stronger views about… more effective means of community involvement are snuck into the system'.[153] Hence, he notes, the Convention is now developing two different levels of application, namely the international listing mechanism where parties retain control and other safeguarding activities in which the Operational Directives have moved towards a much more community-oriented approach and away from the original 'state-centric' one adopted by the intergovernmental negotiators. Chapter III of the Directives[154] sets out guidelines for States to ensure participation in the implementation of the Convention.[155]

With reference to Article 11(b) and in the spirit of Article 15 States Parties are encouraged 'to establish functional and complementary cooperation among communities, groups and, where applicable, individuals who create, maintain and transmit intangible cultural heritage, as well as experts, centres of expertise and research institutes'.[156] The inclusion here of reference to experts and research institutes is significant since the original expert draft to the Convention contained an article allowing for greater input by non-governmental experts through a Scientific Committee (on the model of environmental treaties, for example).[157] This provision was removed from the treaty text during the intergovernmental negotiating stage since the Member States wished to retain the direct control that governing bodies composed of nominated representatives of States Parties (the ICH Committee, in particular) would give them.[158] Here, then, is an example of a subject not included in the final treaty text by the intergovernmental negotiators, for a variety of reasons, now being revisited by Parties in the forum of the ICH Committee through revisions to the Directives.

The following paragraph is more directive in its content, encouraging Parties 'to create a consultative body or a coordination mechanism to facilitate the participation of communities, groups and, where applicable, individuals, as well as experts,

[153] Lixinski, *Intangible Cultural Heritage in International Law* (n 85) at p 54. General Assembly of the States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, Third Session (UNESCO Headquarters, 22–24 June 2010), *Resolutions*, Resolution 3.GA 5, UNESCO Doc ITH/10/3.GA/CONF.201/RESOLUTIONS, of 24 June 2010 at paras 100–2.

[154] *Operational Directives* (n 91).

[155] Paragraphs 79–89 address 'Participation of communities, groups and, where applicable, individuals, as well as experts, centres of expertise and research institutes'.

[156] *Operational Directives* (n 91) at para 76.

[157] This provision was contained in Art 10bis of the *First Preliminary Draft of an International Convention for the Safeguarding of the Intangible Cultural Heritage*. UNESCO Doc CLT-2002/CONF.203/3, Paris, 26 July 2002. This is the version originally presented to the intergovernmental experts by the RDG. It called for a Scientific Committee to be established to 'provide advice on the scientific and technical aspects of [the Committee's] deliberations'.

[158] As Lixinski, 'Selecting Heritage: The Interplay of Art, Politics and Identity' (n 148) correctly notes, this lack of expert knowledge in the operation of the Convention has been a serious shortcoming.

centres of expertise and research institutes' in particular in safeguarding activities. The activities referred to include: identification and definition of the different elements of ICH present on their territories; drawing up inventories; elaboration and implementation of programmes, projects and activities; and preparation of nomination files for inscription on the Lists. This last activity is interesting since it suggests that Parties should not dominate the process of nominating ICH for the Lists. If Parties take this directive seriously, it will go a long way towards ensuring meaningful community involvement in all stages of the process both of safeguarding and nomination of ICH. Although significant, it is wholly discretionary as to how far States Parties allow for participation in the identification and definition of ICH elements in view of the exhortatory language used here.

An essential safeguarding action is for States Parties to take measures to sensitize communities, groups, and, where applicable, individuals to the value of their ICH and to promote the Convention among these communities so that the bearers of this heritage may fully benefit from its measures: This will help to validate ICH for local communities who may regard it as a negative rather than positive force in contemporary society. In addition, Parties are enjoined to take appropriate measures for building the capacity of communities, groups, and, where applicable, individuals to enable them to become fully and effectively involved in this process.[159] The Committee may consult with 'experts, centres of expertise and research institutes, as well as regional centres active in the domains covered by the Convention' and private persons 'with recognized competence in the field of intangible cultural heritage' on specific matters and 'in order to sustain an interactive dialogue'.[160] This has the potential to provide much greater representation for experts in the Convention's decision-making process which is, otherwise, a heavily intergovernmental one. Further actions Parties are encouraged to take to strengthen community participation include: facilitating access to results of research carried out among them (while fostering respect for practices governing access); establishing networks of communities, experts, centres of expertise and research institutes to develop joint approaches; and sharing ICH-related documentation relating to ICH located in another State.[161]

A potential point of friction between communities and government bodies is with regard to nominating elements for international inscription. The process of choosing ICH for nomination to the RL is one that can easily become an overly state-dominated one, excluding communities and their wishes entirely.[162] The most relevant (here) of the five inscription criteria for the inclusion of ICH in the RL set out in the Directives[163] requires that: the element has been nominated following the widest possible participation of the community, group, or, if applicable, individuals concerned and with their free, prior, and informed consent (criterion R.4).

[159] Paragraphs 80–82. [160] Paragraphs 84 and 89. [161] Paragraphs 86–88.

[162] A point made succinctly in Bahar Aykan, 'How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage', *International Journal of Cultural Property*, vol 20, no 4 (2013): pp 381–406.

[163] As set out in para 2.

For the selection of programmes, projects, or activities (under the terms of Article 18), the proposing State(s) should demonstrate that 'the programme, project or activity has been or will be implemented with the participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent' and that they are willing to cooperate in the dissemination of best practices, if their programme, project, or activity is selected.[164] Criteria for the Committee to grant financial or other assistance for ICH safeguarding (under the terms of Article 19 include that 'the community, group and/or individuals concerned participated in the preparation of the request and will be involved in the implementation of the proposed activities, and in their evaluation and follow-up as broadly as possible'. If we take all these references to community involvement and participation in implementing the Convention and in ICH safeguarding generally, it adds up to a fairly comprehensive approach which, if followed closely by Parties, will render the Convention's somewhat vague notion of community participation much more concrete. What these cases illustrate above all is the importance of the flexible model of the 2003 Convention that allows it to respond to new understandings and novel situations, a characteristic that is especially necessary with regard to an aspect of heritage that is constantly evolving and of which we still have a relatively limited understanding. Indeed, this also points to another important aspect of this treaty in that it is itself a part of the learning process for the international community and that the evolution over time of the Operational Directives and of State practice should, themselves, make an important contribution to our understanding of the regulatory needs in this area and to the better safeguarding of ICH.

Another way in which certain issues not explicitly dealt with in the treaty text can be introduced into its implementation is through Parties including them in their own national implementing measures. An interesting example of this relates to the treatment of languages as ICH. This was a hotly debated question during the intergovernmental negotiations, with some Member States strongly supporting the inclusion of languages as a domain of ICH and others, equally forcefully, rejecting the idea.[165] For many multilingual States, in particular those for whom the national language is seen as a unifying factor, to treat language as a form of ICH can be an extremely sensitive issue. There is a residual fear that giving too much significance to minority languages may lead, eventually, to their secession from the State.[166] Eventually, a compromise was found in wording that described the first domain of ICH as 'oral expressions and language *as a vehicle for* intangible cultural heritage' (emphasis added) which avoids including languages per se as ICH.[167] However, it is notable that several Parties—mostly in Latin America

[164] Paragraph 7, at P.5 and P.7.

[165] Blake, *Commentary on the 2003 UNESCO Convention* (n 118) at p 37. See also: Rieks Smeets, 'Language as a Vehicle of the Intangible Cultural Heritage', *Museum International*, vol 221-2 (2004): pp 156–65.

[166] Susan Wright, 'Language and Power: Background to the Debate on Linguistic Rights in Lesser Used Languages and the Law in Europe', *International Journal on Multicultural Societies*, vol 3, no 1 (2001): pp 44–54.

[167] Article 2(2)(a).

and Africa—now treat language as a domain of ICH. This move is, thus, shifting the focus of the treaty towards a subject matter that several Member States had wished to avoid in negotiating the final draft. It will be interesting to observe over time how far this practice changes the way in which the relationship between language and ICH is perceived. In addition, this question deserves fuller consideration both in terms of (a) how language policies affect ICH and (b) a broader comparison between the realities of ICH safeguarding on the ground and the domains of ICH as expressed in the Convention. A further related question worth examining concerns the impact of documentation and recording on oral cultural traditions: does documentation enhance the viability of an oral form where traditional modes of transmission are threatened or does it somehow distort it? This also relates to a more general issue now exercising several Parties: is change in the form of an ICH element (to make it more attractive to young people, for example) necessarily a threat to the element's originality and a potential distortion or dilution of it, or is it a positive evolution that shows the ability of ICH to adapt and, therefore, a cultural strength?[168]

Another interesting example of how State practice is subtly changing or, at least, adding an underlying conception of the Convention is with regard to the domains that are employed by Parties in identifying ICH for the purpose of national inventorying. Although the domains set out in Article 2(2) are generally used as a basis for these, locally specific additions or exclusions are also usually found. Hence, in Egypt, additional domains include inter alia folk *sirah* and protective devices (listed under oral expressions) and practices for preventing evil deeds (under social practices). The Republic of Korea, with its long tradition of inventorying ICH, employs domains that overlap to some degree with those of the Convention,[169] with the notable additional domain covering the techniques required for the above elements or any technology vital to manufacturing or repairing relevant equipment. The Peruvian inventory-making domains include indigenous languages and oral traditions, traditional political institutions, ethno-medicine, ethno-botany, gastronomy, and the cultural spaces directly related to such cultural practices. Similarly, in the criteria designed for inventorying we find overall similarities to those set out in the Operational Directives for the RL (and, sometimes, also for the USL), but with local specificities. The criteria used by Mexico provide a noteworthy example in that they are divided into two main sets as follows: (1) general criteria of elaboration and structuring (14 elements) and (2) general criteria of community participation (three elements). The Mongolian criteria, as do those of a few other Parties, include specific criteria for ICH bearers in order to accord them specific recognition, which is a significant departure, as well as for the role of the environment in maintaining the distinctiveness of the traditional livelihood and folk customs. This last criterion is wholly novel. In the Republic of Korea,

[168] This concern was raised by Lithuania in its Periodic Report to the ICH Committee submitted in 2013.

[169] Namely, drama, dance, craftsmanship, other rituals, recreational activities, martial arts, and cuisines.

these are quite different and comprise three main categories, each with detailed sub-elements: heritage value; capability of transmission; and the transmission environment. The central importance accorded to transmission in these criteria is especially noteworthy. Indonesia takes the approach of employing a set of general criteria followed by further technical ones (relating to viability, significance for the community, acceptability, authenticity, representing tribal and ethnic peoples, etc) and administrative criteria (relating to geographic area, community and local government support, completeness of the data, and the representative character of the cultural categories) to be fulfilled. Since the inventories in Brazil are structured around the key concept of cultural reference, this is a selection process carried out by bearer communities themselves who indicate the elements considered most important and representative of their culture: only those elements will be included in the inventory.

Conclusion

One indicator which we may wish to apply in order to judge the success of UNESCO's Convention for Safeguarding Intangible Cultural Heritage (2003) might be the number of ratifications secured up until now. The speed of ratification since its adoption in 2003 has been relatively high and compares favourably even with the 1972 World Heritage Convention that had secured 191 States Parties by August 2014[170] and is generally regarded as UNESCO's most successful international treaty. This might seem to be a good indicator, then, of the success of this Convention and it certainly suggests that it was a treaty of its time, responding to the perceived needs of members of the international community at the time of its adoption. However, it may be a somewhat overly quantitative approach towards evaluating a Convention that deals with a form of heritage that is both an essential element in the cultural identity of communities and individuals and also has an important role to play in ensuring the sustainability of development strategies. It is necessary, therefore, to attempt to find a more qualitative means of evaluation that takes account of how far the Convention has been able to respond to its main purposes both on the international and national levels.

If we wish to evaluate the impact of the 2003 Convention internationally, we need to look at its impact on international policy-making, especially in areas such as setting cultural policy, implementing the sustainable development agenda, and supporting indigenous rights. The influence that the Convention may have begun to have over developments in other related areas of international law, such as

[170] The 2003 Convention had secured 161 States Parties by 15 May 2014 which is very high compared with the 2001 Underwater Heritage Convention, eg, which had 48 States Parties by 28 April 2014. Information on the ratification status of the 2003 Convention was accessed at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00024>. Information on the World Heritage Convention was accessed at: <http://whc.unesco.org/en/statesparties> and on the 2001 Convention accessed at: <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha>.

in human rights and environmental law, is also a significant factor in judging its overall impact and effectiveness: Chapters 4 and 9 address these areas of law in more detail and would suggest that the impact of the 2003 Convention thus far and likely to occur in the future is not inconsiderable. It is also important to ask how far the international listing of ICH has contributed to the increased 'visibility' of this heritage and to our understanding of the character, scope, and possible domains of ICH. Although there has been justified criticism of the RL listing process, as noted above, it cannot be denied that this has greatly increased the visibility of this aspect of heritage and, even, introduced many communities, individuals, and even States to the very existence of ICH and its significance. As to whether the RL has responded effectively to the value of cultural diversity, in other words, how far it is truly 'representative' of the totality of the world's ICH, we must accept that this has not been wholly successful up until now and that work is needed by the Committee to improve the record of Parties.

It is on the national level, however, that the most important impact of the Convention should be felt in the development of legislative, administrative, financial, and other measures as well as cultural and other policies needed for implementing Part III.[171] It is important also to evaluate, through an examination of State practice internally, how the Convention has contributed to the creation of a new paradigm for identifying and safeguarding ICH, to a fundamental shift of focus with regard to assigning significance, and to defining a new role in this process for non-state actors (heritage bearers, NGOs, cultural and other civil society organizations, etc) vis-à-vis state authorities as well as local government authorities. Over time, it will be possible to identify a shift in the idea of 'national' heritage away from a purely state-driven concept towards a more inclusive one that accords more closely with the requirements of participation and the human rights of cultural communities. A useful test of the Convention's success is to examine how effectively Parties have managed to engage communities, groups, and individuals in the aforementioned activities. Other questions that should be considered in evaluating the impact of the Convention on national systems include the degree to which implementation has led to the development of new national policy strategies for promoting the function of ICH in society and integrating ICH into planning and development programmes, as required in the text.

If we look at the policy environment, it is possible to see that several Parties have begun to make ICH a priority line of action within national development planning over the last decade.[172] Parties are implementing the Convention within a variety of different social, cultural, political, geographical, and environmental contexts which, given the character of this Convention and the requirements it places on Parties, has significant outcomes for the range and diversity of policy

[171] This is examined in more detail in: Janet Blake, 'Seven Years of Implementing UNESCO's Intangible Heritage Convention—Honeymoon Period or the "Seven-year Itch"?', *International Journal of Cultural Property*, vol 21, no 3 (2014): pp 291–304.

[172] ICH is incorporated into development programming, eg Viet Nam's Strategy for Cultural Development 2010–2020 and Mongolia's 2008 'Endorsement of the Millennium Development Goals-based Comprehensive National Development Strategy'.

approaches and measures chosen by different countries. Federal States face a particular challenge in building a coherent and evenly spread institutional approach to ICH safeguarding given their distinct levels of government: Argentina, for example, comprises 24 autonomous provinces and, while the State is responsible for promoting federal ICH policies, each province retains the capacity to implement these within its own territory. Local authorities, as in Cyprus, may have a pivotal role in safeguarding ICH elements and their wider physical and social environments and, in some countries, we are seeing safeguarding functions becoming devolved to community-level groups (as in Brazil and Belgium). This diversity of approaches and the degree to which the traditionally centralized regulation of heritage is devolved to 'lower' social and political levels is a striking effect of the Convention in a number of Parties that will, surely, impact on cultural heritage protection more broadly in the future. It is also possible to observe in Parties where traditional community level management of the ICH still operates, as in some African countries, accommodations being made between customary rules and the 'black letter' law.

A criticism levied at the 2003 Convention in view of its generally exhortatory and 'soft law' approach is that it lacks 'legal bite'.[173] This criticism is certainly justifiable in the sense that there is little to be found in this treaty in terms of strict obligations placed on Parties to govern their behaviour towards this heritage or even towards the communities, groups, and individuals who create and practise it and, for whom, it represents a key part of their identities. On the other hand, the 2003 Convention has proven to be successful in achieving the twin objectives of raising awareness of and stimulating the development of safeguarding policies for this heritage and it could be argued also that a treaty based on more explicit and stronger obligations (and with fewer incentives for Parties) would be very unlikely to have been adopted. At least, not in the holistic form that this treaty has taken with its broad, cultural approach to ICH safeguarding.

[173] Lixinski, *Intangible Cultural Heritage in International Law* (n 85) at p 56.

6

Cultural Heritage

The Diversity of Cultural Expressions

Introduction

Cultural diversity is not an artificial construction imposed on international society in order to promote certain values—it is a fact. Worldwide and also on the national level there exists a wide range and variety of distinct cultures, expressed in terms of linguistic, ethnic, or other differentiating factors. During the past two decades this diversity of cultures, including its management and its promotion, has become a major social concern that is linked to the growing variety of social codes within and between societies. Moreover, the globalization of exchanges and the greater receptiveness of societies to one another have served to make us increasingly aware of this diversity. With the emergence of local communities, indigenous peoples, and other marginalized groups on the political stage, new forms of diversity have been discovered within societies. This has set up the challenge as to how an economic, political, legal, and cultural order can be built which allows for and encourages equitable exchanges and encounters between cultures and peoples on the basis of mutual understanding, respect, and the equal dignity of all cultures. One of the purposes of safeguarding cultural heritage, then, is to ensure adequate space and freedom of expression for all of the world's cultures.

UNESCO has been the leading international forum within which these questions have traditionally been addressed and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)[1] ('the 2005 Convention') is one of a series of cultural Conventions adopted by UNESCO over the years. Although the 2005 Convention is the main cultural heritage treaty addressed in this chapter, it is by no means the only one of relevance to the broader field of cultural diversity and can be seen to respond to a rather specific aspect of the question. As noted below, the 2003 Intangible Heritage Convention is also firmly predicated on the preservation of certain aspects of cultural diversity

[1] Convention for the Protection of the Diversity of Cultural Expressions approved by UNESCO in its 33rd General Conference (Paris, November 2005), accessed online on 17 February 2015 at: <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/convention-text/>.

and the UNESCO Conventions of 1970, 1972, 2001, and 2003[2] can all be seen to play their role in safeguarding different faces of the diversity of cultures and heritages. It is not, however, a straightforward 'cultural heritage protection' instrument in the sense of the aforementioned Conventions nor is it a straightforwardly human/cultural rights-oriented text. Indeed, one of the problems facing anyone seeking to understand and interpret this instrument is that its primary purpose is not immediately clear. As the introductory section below demonstrates, it is a treaty that reflects the many competing aspects of the compendium notion of cultural diversity and, as a result, it can be seen as an instrument with somewhat confused ambitions and character: is it a human rights treaty, a trade-related treaty, an intellectual property treaty, or all three? To some degree, this hybrid character of the 2005 Convention is an inevitable function of the complexity of the subject matter it seeks to protect and promote as the section below illustrates. However, the speed of its drafting and adoption by UNESCO and the deeply political context within which it was developed are also underlying factors that may explain this treaty's rather uncertain character and purpose.

Some Contextual Issues

Identifying cultural diversity

First, it is useful here to clarify what cultural diversity itself is, both as a general notion and for the specific purpose of the 2005 Convention. The essential concept is, of course, the totality of the variety of cultures and a helpful starting point to understanding this is the statement by Claude Lévi-Strauss in which he underlined that the protection of cultural diversity should not be confined to simply preserving cultures in their current forms: '[it is] diversity itself which must be saved, not the outward and visible form in which each period has clothed that diversity'.[3] This view is analogous to the notion of biological diversity which is predicated on the value of the diversity of species (and their genetic markers) as a whole, not on the preservation of any particular species: each species has no particular value beyond its contribution to biodiversity and, as such, all species are of an equal value. However, cultural diversity is not a straightforward notion and is one that carries potential challenges to the international order as well as being a value to uphold. This is made clear in UNESCO's 2009 World Report[4] which stated that, 'the meanings attached to this catch-all term are as varied as they are shifting' and, while some see it as an inherently positive idea that points to a sharing of the wealth embodied in each of the world's cultures others perceive

[2] For the prevention of illicit trade and trafficking in cultural property, protection of the world cultural and natural heritage, protecting underwater cultural heritage, and safeguarding intangible cultural heritage, respectively.

[3] Claud Lévi-Strauss, *Race and History* (Paris: UNESCO, 1952).

[4] UNESCO, *World Cultural Report—Investing in Cultural Diversity and Intercultural Dialogue* (Paris: UNESCO, 2009) in the General Introduction at p 1.

cultural differences as lying at the root of conflicts. The essential challenge, then, is to propose 'a coherent vision of cultural diversity so as to clarify how, far from being a threat, it can become beneficial to the actions of the international community'. Although this concern may be more in the domain of human rights than cultural heritage law, it is still germane for us to consider that the preservation of cultural diversity as a value per se is not without its risks and that it therefore presents the international community with a complex challenge as far as a subject for regulation.

We should note also here that it is by no means a new departure for the international community to seek to defend cultural diversity, even if it was not articulated as such. The drafters of UNESCO's Constitution in 1947 called for the preservation of the 'fruitful diversity of the cultures and educational systems of the states members of the Organization'[5] while the 1966 UNESCO Declaration of the Principles of International Cultural Co-operation is another foundation document that recognizes that 'each culture has a dignity and value which must be respected and preserved'. It goes on to set out the aim of international cultural cooperation as 'to enable everyone to have access to knowledge . . . and to contribute to the enrichment of cultural life'.[6] The world's cultural wealth is its variety and the dialogue that exists and can develop between these various cultures. While each culture draws from its own roots, it must also be able to flourish when crossing other cultures. A more recent international (policy) document, the 1982 Mexico City Declaration,[7] made explicit the linkage between cultural identity and cultural diversity and note that, internationally, the call to recognize the value of cultural diversity can be seen as asserting 'the equality and dignity of all cultures' and the right of each people to affirm and preserve its own cultural identity.[8] Some of the ways in which the international community can recognize this right would be to ensure the restitution to the country of origin of illicitly removed cultural artefacts (under the 1970 Convention of UNESCO or UNIDROIT's 1995 Convention). Equally, protecting the equality of all cultures might extend to their right (i) to be protected by placing obstacles to trade and other protectionist measures and (ii) to equal access to the international cultural marketplace. Of course, the leading international instrument in this field is now UNESCO's Universal Declaration on Cultural Diversity that was adopted in 2001. In this, cultural diversity is characterized as a 'common heritage of humanity' that should be recognized and affirmed for the benefit of present and future generations.[9] In addition, the defence of cultural diversity is clearly presented as an ethical imperative, inseparable from respect for human dignity, implying that its protection is required by human rights.

Appadurai has noted that the idea of cultural diversity has been transformed in international cultural policy-making into a normative 'meta-narrative' through which culture is seen in terms of 'the conscious mobilization of cultural differences

[5] Article 1(3). [6] Article 1.
[7] Mexico City Declaration on Cultural Policies (World Conference on Cultural Policies, 1982).
[8] Paragraph 6. [9] Preamble.

in the service of a larger national or transnational politics'.[10] Again, it is not hard to see the position of the 2005 Convention within this meta-narrative. In order to understand more clearly where the 2005 Convention is situated vis-à-vis cultural diversity as a whole, it is useful to consider various domains in which it operates. This will serve to illustrate the breadth of the notion and the fact that the Convention responds only to certain of these domains. The various domains include the formation of (individual, group, and even national) cultural identity, linguistic diversity (including in cultural productions and in cyberspace), with regard to biological diversity, as a basis for ensuring cultural pluralism and democratic values, in inter-cultural exchanges, in the media and, in relation to cultural heritage. Among these, cultural identity, linguistic diversity, inter-cultural exchanges, and the media are all implicated to some degree in the framework of the 2005 Convention which, of course, is situated also in the domain of cultural heritage. In addition, the relationship between cultural diversity and sustainable development is a key one with regard to the Convention and it clearly operates within an international context that has been dominated by different forms of globalization since the 1990s. Given their significance as wider contexts for the development of the Convention, these two domains are set out in more detail in the following subsections.

Globalization and the diversity of cultural expressions

Over recent decades, globalization has resulted in an ever-increasing social and economic interdependence worldwide, not only between countries and their economies but also across different social and cultural groups. Globalization is both multidirectional and multidimensional[11] and comprises a complex network of connections and interdependencies that operate within and between the economic, social, political, technological, and cultural spheres. As such, it exerts increasing influence on material, social, economic, and cultural life in today's world.[12] Globalization has also been described in terms of the increasing 'flows' of virtually everything that characterizes contemporary life: capital, commodities, knowledge, information, ideas, people, beliefs, and so on.[13]

A phenomenon that clearly provides opportunities for increased cultural participation (including the cross-border communication of cultural communities), it also poses very serious challenges for local communities, their identities, and their livelihoods which may already have been made vulnerable as a result of such global challenges as armed conflict, rapid urbanization, environmental

[10] Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996) at p 15.

[11] UNESCO, *World Cultural Report* (n 4).

[12] UNESCO, *Second Round Table of Ministers of Culture: Cultural Diversity: Challenges of the Marketplace*, Paris, 11–12 December 2000.

[13] See essays on 'Creative Economy', 'Creativity', 'Cultural Statistics', and 'Cultural Capital' by Tyler Cowen, Ruth Towse, and David Throsby in *A Handbook of Cultural Economics* edited by Ruth Towse (Cheltenham: Edward Elgar, 2011) at pp 120–65.

degradation, etc. Globalization can render such issues much more acute for local communities and less developed countries as a result of the asymmetry which it creates in opportunities for development and in access to the world's natural resources. This has resulted in an inequitable situation that is pithily described by Shiva as a form of 'apartheid'.[14] Diversity of the expressions of culture is therefore an essential resource for countries and communities that they can rely on in facing these global challenges. It can help them to do this in a variety of ways, either through stimulating economic growth, in encouraging (non-economic) human development, serving as a repository of environmental knowledge, and even representing a symbolic power to strengthen local communities. This can enable even the most marginalized individuals and groups to participate in and benefit from development processes and allow for development that responds better to local needs and specificities.

The global turn in cultural production endowed objects and ideas with new significance that carries with it a feeling of localization and/or cultural singularity[15] which may be manifested in cultural products, goods, and services. This aspect of heritage is therefore moving up an international agenda that is critical of globalization, in particular the concentration of material and intellectual power and resources in certain parts of the world, as well as the concomitant poverty and social exclusion in others. As a result of this, interest has grown on the international level in inventorying and protecting cultural diversity which has led, inter alia, to the adoption of UNESCO's 2005 Convention with the aim of providing more protection to diverse cultural products in the global marketplace. To achieve this objective requires cultural policies that create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that are able to assert themselves at both the local and global levels. This, in turn, needs new approaches to cultural expressions in their many and diverse forms to be developed, posing a serious challenge to countries and to the global community. These may be very difficult for those countries, in particular, where cultural pluralism poses complex questions: for example, despite the clear advantages of the international aspects of ratifying the 2005 Convention for the country,[16] thus far no national consensus on the question of ratifying the Convention has yet been reached in Iran.

Cultural diversity and development

Cultural diversity is a value that has important linkages to the development process too as was formally recognized in the Stockholm Declaration and Action Plan

[14] Vandana Shiva, 'Ecological Balance in an Era of Globalization', in *Global Ethics and the Environment* edited by Nicholas Low (London and New York: Routledge, 2000) pp 47–65.

[15] Antonio A Arantes, 'Diversity, Heritage and Cultural Practices', *Theory Culture Society*, vol 4 (2007): pp 290–6.

[16] Janet Blake, 'The Legal and Political Context of UNESCO's 2005 Convention on the Diversity of Cultural Expressions—Will it be Good for Iran?', *Iranian Review of Foreign Affairs*, vol 1, no 3 (2010): pp 63–84.

in 1998.[17] In addition, cultural diversity is viewed as an indispensable asset for poverty reduction and the achievement of sustainable development. The Istanbul Declaration (2002)[18] issued by a UNESCO Roundtable of Ministers of Culture in the lead-up to the adoption of the 2003 Convention reiterated the importance of this while making the direct connection with cultural heritage, '[a]like (sic) cultural diversity, which stems from it, intangible cultural heritage is a guarantee for sustainable development and peace'. Similarly, the 2005 Convention emphasizes the relationship between cultural diversity and human development in its Preamble: 'Cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations.'[19] It further strategically situates the Convention in a broader national and international development framework.[20] Through the exchange, transfer, and viewing of such cultural goods, services, and events—along with the cultural diversity they comprise—they acquire economic value, are marketed and can then contribute to the economic dimension of development.[21] This dual economic and cultural character of such goods and services is underlined as follows: 'cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value'.[22]

Participatory approaches and the involvement of a range of stakeholders in the process are now understood to be prerequisites for achieving sustainable forms of development. The 2009 UNESCO World Report noted the important role that cultural diversity can play in this: 'the recognition of cultural diversity can help to ensure that ownership of development and peace initiatives is vested in the populations concerned'.[23] For this, it is important that respect for cultural diversity be incorporated into development policies in a variety of sectors, including education, science, health, the environment, and tourism, as well as in relation to creative industries. However, this integration of the principles underpinning cultural diversity into public policies, mechanisms, and practices remains a major challenge in many countries and one that the full implementation of the 2005 Convention would pose. An extremely important, but relatively poorly considered, aspect of this concerns the role of public/private partnerships. The protection and promotion of cultural diversity as a key element in ensuring sustainable human

[17] Action Plan on Cultural Policies for Development adopted by the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 2 April 1998).

[18] Final Communiqué issued by the Third Round Table of Ministers of Culture held by UNESCO in Istanbul in September 2002 at para 7.

[19] Paragraph 4.

[20] It places an emphasis on 'the need to incorporate culture as a strategic element in national and international development policies, as well as in international development cooperation' (para 7).

[21] Patricio Jeretic, 'Culture, Medium of Development', in *Culture and Development: A Response to the Challenges of the Future?* (Paris: UNESCO, 2010) [Doc CLT/2010/PI/152] at pp 26–7.

[22] Preamble, para 19.

[23] Preface by Françoise Rivière, Assistant Director-General for Culture of UNESCO to UNESCO (n 4).

development cannot be left to either government or market forces alone: in order to achieve this, partnerships must be forged between government agencies and a wide range of stakeholders in society, not only but in particular private sector enterprises. This is not simply an internal matter for countries, either, and, there is the need for global partnerships that bring together international organizations, networks, and cooperation with the public and the private sectors. One of the notable innovations of the 2005 Convention is the way in which it addresses the need for forging such partnerships and for exploring the potential synergies that these may offer.

The human rights dimension

The linkage between the cultural goods and services and the diversity thereof with human rights values is also alluded to in the Report of the World Commission on Culture and Development (1995).[24] In it was stressed that development should not only be viewed as a means to have access to goods and services, but is also a concept that embraces the opportunity to choose a full, satisfying, valuable, and valued way of living together. This latter responds to the human rights-based approach to development which regards the enhancement of people's capacities to live better lives as an essential objective:[25] 'development embraces not only access to goods and services, but also the opportunity to choose a full, satisfying, valued and valuable way of living together, the flourishing of all forms of human existence in all its forms and as a whole'. Interestingly for the main subject of this chapter, it continues by stating that, '[e]ven the goods and services stressed by the narrower, conventional view are valued because of what they contribute to our freedom to live the way we value'.[26] Here, although not stated explicitly, is a suggestion that some goods and services (in particular the cultural ones that are the subject of the 2005 Convention) play a specific role in fulfilling the human rights dimension of what might otherwise prove a rather sterile development process. Culture, here, is not simply viewed as a means to material progress: it is the actual aim of 'development' when that is understood as the flourishing of human existence in all its forms and as a whole.[27] Hence, culture has an important duality that lies at the heart of the human rights aspect of the 2005 Convention,

[24] Report of the World Commission on Culture and Development presented to UNESCO General Conference in 1995, published as: World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO, 1996).

[25] Arjun Appadurai, 'The Capacity to Aspire: Culture and the Terms of Recognition', in *Culture and Public Action* edited by Vijayendra Rao and Michael Walton (The World Bank and Stanford University Press, 2004) pp 58–84. See also: United Nations Development Programme, *Human Development Report* (New York: United Nations, 1994).

[26] Report of the World Commission on Culture and Development (n 24) at p 15.

[27] Lourdes Arizpe, 'The Intellectual History of Culture and Development Institutions', in *Culture and Public Action* edited by Vijayendra Rao and Michael Walton (The World Bank and Stanford University Press, 2004) pp 163–85 puts this well at p 164: 'Culture is not embedded in development, but…development is embedded in culture'. For more on such ideas and their relationship to human (cultural) rights, see: UNDP, *Cultural Liberty in Today's World* (New York: UNDP, 2004).

both enjoying a 'far-reaching instrumental function' in development but also as 'a desirable end in itself, as giving meaning to existence'.[28]

Beyond its potentially central place in sustainable development policies, cultural diversity is also inextricably linked to the protection of cultural identity and, hence, of human dignity which is a fundamental objective of human rights. The Preamble to the 2005 Convention celebrates 'the importance of cultural diversity for the full realization of human rights and fundamental freedoms'[29] situating the Convention clearly within human rights as one of its broader legal and political contexts whose objectives it shares. Shaheed, the UN Special Rapporteur on Cultural Rights, described the importance of cultural diversity in the following terms: '[e]ach individual is the bearer of a multiple and complex identity, making her or him a unique being and, at the same time, enabling her or him to be part of communities of shared culture… These multiple cultural identities, which include, but also go beyond, issues relating to ethnic, linguistic and religious affiliations, are relevant for private life as well as the sphere of public life, and are an integral part of cultural diversity'.[30] She also clearly states the obligation this places on States to foster and protect cultural diversity, of which the 2005 Convention is an important part: 'It is the responsibility of States, however, to create an environment favourable to cultural diversity and the enjoyment of cultural rights, by meeting their obligations to respect, protect and fulfil those rights.'[31] Since many cultural expressions have this function in identity-formation, they should be protected from appropriation and misuse and treated not simply as commodities but as vectors of identity. In an economic analysis of this question, Bicksei and her colleagues examined the utility of 'cultural carriers' while taking into account the effects on identity of economic activities related to cultural goods in order to determine which cultural goods require additional legal protection. They pointed to the fact that, 'outside cultural reproducers and outsider consumers negatively affect the identity and thus the dignity of "cultural carriers" '.[32] They also identified three main categories of cultural goods as follows: those whose consumption by outsiders has no negative effect on the utility of cultural carriers; those where the utility is unaffected (a narrow range of goods); and those whose utility is diminished by outside consumption (such as sacred rituals and traditional Samoan *tatau* tattoos).[33] This also brings into play the proviso by Brown

[28] Report of the World Commission on Culture and Development (n 24) at p 23.

[29] Paragraph 6.

[30] Human Rights Council, 'Report of the independent expert in the field of cultural rights (Farida Shaheed)' submitted pursuant to resolution 10/23 of the Human Rights Council, adopted at the 14th session of the Human Rights Council, 22 March 2010 [Doc A/HRC/14/36] at para 23.

[31] Human Rights Council, 'Report of the independent expert in the field of cultural rights (Farida Shaheed)' (n 30) at para 30.

[32] Mariana Bicksei, Kilian Bizer, and Zulia Gubaydullina, 'Protection of Cultural Goods—Economics of Identity', *International Journal of Cultural Property*, vol 19, no 1 (2012): pp 97–118 at p 99.

[33] Bicksei, Bizer, and Gubaydullina, 'Protection of Cultural Goods—Economics of Identity' (n 32) conclude at p 108 that 'when a cultural good is an inseparable component of a culture and the fundamental identity of the culture carriers is thereby influenced, the protection-worthiness of the cultural good would be corroborated'.

that it is important to be able in such cases to separate claims relating to economic justice from those relating to the respectful treatment of cultural elements.[34]

For many years, the gap that exists between the economically developed and the developing countries has been a fundamental basis for any discussion of global policy-making.[35] Cultural specialists and those involved in international cultural policy-making have begun increasingly to emphasize that economically poor countries can also be culturally rich. The 2003 Intangible Heritage Convention and the 2005 Convention might, therefore, be seen jointly to represent this revision of our way of thinking about the relationship between culture and development over the preceding two decades. However, we still face a lack of conceptual clarity in this area on the international level and a concomitant lack of tools with which to measure our progress in this field. We have many indicators to measure economic achievements, but we are still searching for indicators that are appropriate to assess/measure cultural development and, in particular, to assess the (economic) potential of the cultural field. Indeed, one of the great challenges of implementing the 2005 Convention is to develop such indicators and this may actually prove to be one of its important contributions in the future.[36] It is necessary that the international community (probably through UNESCO and its Statistical Centre) develops a set of tools that clearly reflect the cultural dimension of development and the fact that civil society is the key actor, not government.[37]

In a matter closely related to human rights issues,[38] the 2005 Convention also addresses IP questions, which is natural given that its subject matter is 'those expressions that *result from the creativity* of individuals, groups and society and have a cultural content' (emphasis added). In the Preamble, it notes the importance of IP rights to sustaining those involved in cultural creativity[39] and the requirement for the 'recognition of the equal dignity of and respect for all cultures' would imply also an IP-related issue. Other human rights related issues that can be seen as relevant to the 2005 Convention[40] include the right to preserve and develop a culture which is responded to by the requirement placed on Parties to create an environment that encourages individuals and

[34] Michael Brown, *Who Owns Native Culture?* (Harvard University Press, 2003) at p 234.

[35] Mike Van Graan, 'Culture and Development: A Response to the Challenges of the Future', in *Culture and Development: A Response to the Challenges of the Future?* (Paris: UNESCO, 2010) [Doc CLT/2010/PI/152] at pp 15–18.

[36] The cultural specificities of different countries (and even of different cultural communities within countries) make the identification of appropriate indicators of cultural development a rather challenging task. UNESCO, *UNESCO Framework for Cultural Statistics* (Montreal: UNESCO Institute for Statistics, 2009) attempts to define culture for statistical measurement purposes and facilitates cross-national comparisons by using standardized definitions and classifications.

[37] Mike Van Graan, 'Culture and Development' (n 35) at p 15.

[38] Article 15 of the International Covenant on Economic, Social and Political Rights (1966) sets out the intellectual rights that form part of human rights.

[39] Preamble, para 16.

[40] Preamble at para 13 reaffirms that, 'freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies'.

groups to create, produce, disseminate, distribute, and have access to their own cultural expressions.[41] The right of participation in cultural life is strongly supported by the encouragement of the 'active participation of civil society' in efforts to achieve the objectives of the Convention, ie the protection and promotion of diversity of cultural expressions.[42] The 2005 Convention also suggests not only the need for specific human rights to be supported but also for the fostering of a 'framework of democracy, tolerance, social justice and mutual respect between peoples and cultures' within which cultural diversity can flourish.[43] Hence, it makes a direct link between democracy, social justice, and cultural pluralism and the value of cultural diversity which is a strong and direct support for human rights values. It further adds an important international dimension to the notion of social justice by calling for international cooperation and solidarity towards, in particular, 'enhancing the capacities of developing countries . . . to protect and promote the diversity of cultural expressions'.[44] The reference here to international solidarity is significant since this recalls the notion underpinning so-called 'third generation' human rights, in particular the right to development.

International Cooperation for Cultural Diversity and Development

Unfortunately, negative attitudes still impede progress in the area of international cultural cooperation and, as a result, it often remains on the margins of development cooperation. For example, culture is frequently regarded either as an obstacle to development or as a luxury that developing countries cannot 'afford'.[45] Enhanced cooperation in cultural matters is needed to achieve this, not only across the public sector, but also across civil society and the private sector, as is made explicit in the 2005 Convention. This international cultural treaty represents an attempt to put in place such elements of international cultural cooperation in that it gives a central role to both these sets of actors and explicitly demands effective public/private sector/civil society cooperation both nationally and internationally to achieve its objectives.[46]

[41] Article 7. [42] Article 11. [43] Preamble, para 4.

[44] Article 1(g)(i) calls for Parties 'to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions'.

[45] Mary Douglas, 'Traditional Culture—Let's Hear No More about It', in *Culture and Public Action* edited by Vijayendra Rao and Michael Walton (The World Bank and Stanford University Press, 2004) at p 88 presents a spirited rebuttal of this position, noting that: 'there is no such thing as "traditional culture" . . . At any point in time, culture of a community is engaged in a joint production of meaning and, as such, it is a dynamic and constantly evolving fact'.

[46] See, eg, Art 11. Also relevant are Arts 6, 7, 12, 15, and 19 of the Convention.

Protection and promotion of cultural diversity

Falling generally within the category of Conventions adopted by UNESCO in the cultural field,[47] the 2005 Convention does, of course, share with them the broad fact of being part of an international process of cultural policy-making. It also shares specifically with the 2003 Intangible Heritage Convention the characteristic of being a direct descendant of the 2001 Declaration on Cultural Diversity.[48] However, it is at this point that it is essential to make clear the important differences between these instruments, the understanding of which can greatly inform us as to the nature and intention behind the 2005 Convention as a treaty text. The 2003 Intangible Heritage Convention grew directly out of the notion of preserving cultural diversity as a value per se and the more obviously human rights-oriented aspects of the 2001 Declaration. The 2005 Convention, in contrast, responds particularly to the call for cultural policies that 'create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global levels'.[49] Further, the 'current imbalances in flows and exchanges of cultural goods and services at the global level' are noted and it calls for a reinforcement of international cooperation and solidarity to allow developing States to establish viable and competitive cultural industries.[50]

The two aforementioned Conventions, therefore, should be understood to complement each other and, jointly, contribute to protecting an important part of cultural diversity. They can also be understood to represent the internal (2003 Convention) and external (2005 Convention) dimensions of the value of cultural diversity, respectively, as set out in the 2001 Declaration. Although, given this shared ancestry, they have some potential overlaps they also deal predominantly with very different aspects of heritage. Nowadays, the intangible cultural elements are increasingly understood to be an important aspect of cultural heritage, safeguarding them contributes directly to ensuring as high a level of cultural diversity as possible. At the same time, the Representative List established by that Convention[51] is strongly oriented towards reflecting the range of cultural

[47] Universal Copyright Convention (1952) 6 UST 2731, 25 UNTS 1341 (as revised 1971); Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954 [249 UNTS 240; First Hague Protocol 249 UNTS 358]. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, The Hague, 14 May 1954 [249 UNTS 358]; Convention on the Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970) [823 UNTS 231]; UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)]; Convention on the Protection of the Underwater Cultural Heritage (UNESCO, Paris, 2 November 2001) [41 ILM 40]; and the Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO, 17 November 2003) [2368 UNTS 3].

[48] Articles 6, 8, 9, and 10 and para 12 of the associated Action Plan of the 2001 Declaration are those on which the Convention for the Protection of the Diversity of Cultural Contents and Artistic Expressions adopted by UNESCO at the 33rd session of the General Conference on 20 October 2005 is based.

[49] 2001 Declaration, Art 9. [50] Article 10.

[51] Article 16. Representative List of the Intangible Cultural Heritage of Humanity.

diversity present both within Parties and internationally. The 2005 Convention, in its turn, deals with the products of human creativity, namely cultural expressions that are cultural products[52] and the cultural goods and services that are the means by which these are conveyed to the public. It operates by supporting local production and distribution capacities and ensuring a fair and equitable international marketplace in which the diversity of cultural expressions can be protected and promoted. A further instrument deriving directly from the 2001 Declaration is UNESCO's Recommendation on Multilingualism and Universal Access to Cyberspace (2003).[53] This instrument aims to create a 'level playing field' in cyberspace for speakers of all languages, both on a technical and more general level. This would potentially have relevance to achieving the objectives of the 2005 Convention since, increasingly, the internet is a major market-place for cultural goods and services. Unfortunately, this whole question of equitable access to cyberspace has not yet received the prominence it deserves and may well be an area in which the future operation of the 2005 Convention can add some useful developments.

The notion of 'cultural diversity' espoused by the 2005 Convention is somewhat different, however, from that of the 2001 Declaration and is less straightforward. Although it reiterates the idea that 'cultural diversity is a defining characteristic of humanity' and 'forms a common heritage of humanity and should be cherished and preserved for the benefit of all',[54] the actual subject of this instrument is not cultural diversity per se but the diversity of cultural expressions. This fact is the key to understanding the specific orientation of the 2005 Convention as opposed, for example, to the 2003 Intangible Heritage Convention: where the latter concerns cultural practices and expressions that do not generally have a physical form, the 2005 Convention is concerned with those cultural expressions that are *cultural products, goods and services*. This distinction clearly has important implications for the interpretation of the 2005 Convention and of its intention as a text. With the 2005 Convention, we are dealing primarily with cultural expressions that are the products of human labour and creativity and that are part of a global cultural marketplace: The subject matter of the 2005 Convention can thus be placed within the broad rubric of 'creativity' and relates to the products of such creativity, namely cultural products, goods, and services. Although these may not always be directly the subject of IP protection, they enjoy the aforementioned dual economic and cultural character and are often treated as commodities whose economic value is central to their overall value. This is, from the viewpoint of the 2005 Convention, somewhat of a double-edged sword since, as much as such cultural products may contribute to development and sustainability, their economic

[52] Creations deriving from human activity/labour that have a symbolic value and the potential to generate IPRs.

[53] Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace (2003).

[54] Preamble, paras 2 and 3.

character may also bring them under the control of international trade regulation whose fundamental premise is inimical to such cultural goods.

A 'cultural exception' to international trade rules

A central concern has therefore been to ensure that international trade in cultural expressions (as defined by the Convention) is carried out on an equitable basis, benefits the community and society that creates these products, goods, and services, and does not damage their special cultural character. This last point is a central one since much of the effort in this area has been directed towards ensuring that a 'cultural exception' is afforded to such products, goods, and services and that they are not traded (under the GATT and other trade agreements)[55] simply as economic commodities, without taking account of their cultural character and its implications. This reflects a strong philosophical position taken by certain Member States of UNESCO, such as France and Canada, who, over the last 15 to 20 years, have been struggling within the World Trade Organization (WTO), demanding a similar exception for cultural goods and services as that allowed for public health.[56] As Burri has noted; 'The UNESCO [2005] Convention was intended to provide a counter balance to this high level of institutionalization of economic regulation and to cater for non-economic objectives that States might wish to pursue, in particular in the field of culture.'[57] Indeed, the speed with which the 2005 Convention was negotiated and adopted in UNESCO (over the space of two years, between 2003 and 2005) is in large part due to this strong desire on the part of many Member States to shore up the cultural exception through this treaty.[58] However, this should not detract from the fact that it also enjoyed extremely swift ratification by Member States, with 130 ratifications secured within five years of its adoption; this is suggestive of the fact that the treaty does respond to the concerns of Member States at the time of drafting, in particular over the negative impacts on their cultural industries from globalization and multilateral trade rules.

[55] The General Agreement on Tariffs and Trade (GATT) (World Trade Organization, 1994) [1867 UNTS 187; 33 ILM 1153 (1994)], the General Agreement on Trade in Services (GATS) (World Trade Organization, 1994) [1869 UNTS 183; 33 ILM 1167 (1994)], and the Agreement on Trade-related Aspects of Intellectual Property Rights (World Trade Organization, 1994) [33 ILM 81 (1994)] of the World Trade Organization (WTO) are the main ones of relevance here.

[56] GATT Art XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules, such as adopting policy measures that are inconsistent with GATT but are necessary to protect human, animal, or plant life or health (para (b)).

[57] Mira Burri, 'The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after its Entry into Force', *International Journal of Cultural Property*, vol 20, no 4 (2013): pp 357–80 at p 358. See also: Mary E Footer and Christophe Beat Graber, 'Trade Liberalization and Cultural Policy', *Journal of International Economic Law*, vol 3 (2000): p 115.

[58] It is also suggested that France's volte face (from a rather lukewarm response to whole-hearted support) towards the 2003 Intangible Heritage Convention that occurred between the first and second sessions of intergovernmental negotiation may well have been the result of an agreement with UNESCO that, if they supported the 2003 Convention, the process of drafting the 2005 Convention would be expedited.

The Marrakesh Agreement (of GATT) establishing the WTO in April 1994 also included as an annex the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In the years following, the global spread of intellectual property rights began to impact progressively and negatively on the diversity of cultural expressions; the exercise of copyright law with regard to the cultural industries has resulted in reducing cultural works to the status of simple commodities, and the emergence of highly dominant players in what MacMillan has called the process of 'copyright facilitated aggregation'.[59] It is extremely ironic that the individual human right in defence of creativity, cultural self-determination, and individual freedom of expression[60] has resulted in creating a system which now gives global multimedia corporations the opportunity to act as a 'cultural filter' by exercising their dominant (and monopolistic) control of marketplaces for cultural products.[61] The 2005 Convention is thus firmly situated on the 'battleground' between two quite opposing approaches to protecting cultural diversity: a market-oriented approach based on laissez-faire capitalism whereby the market is seen as able to regulate itself and provide the necessary protections, with limited state intervention and exclusive ownership rights granted over the products of creativity; and a state interventionist approach in which the State creates an environment conducive to its own cultural products through tax incentives,[62] quota systems,[63] and direct funding support of film production.[64] The former most closely reflects the approach taken by the WTO under its main agreements,[65] while the second more closely matches the 'cultural exception' approach with regard to TRIPS advocated by France and Canada, among other countries. The 2005 Convention reflects this latter belief that States are entitled to impose domestic measures aimed at maintaining and developing domestic production of cultural goods and services. Furthermore, it reaffirms the sovereign right of States to design their own cultural policies and not to have these imposed by outside bodies. It also takes the fundamental position of recognizing the special character of cultural goods and services as vehicles of identity, values, and meaning. Through strengthening international

[59] F Macmillan, 'The UNESCO Convention as a New Incentive to Protect Cultural Diversity', in *Protection of Cultural Diversity from a European and International Perspective* edited by P van den Bossche and H Schneider, Maastricht Series in Human Rights (Belgium: Intersentia Publishing, 2008) pp 163–92.

[60] Copyright as expressed in Art 15(c) of the International Covenant on Civil and Political Rights.

[61] Macmillan, 'The UNESCO Convention as a New Incentive' (n 59) at p 166.

[62] In Brazil, eg, there is a 100 per cent tax exemption on all audio-visual products while, in the UK, film production costs are tax deductible up to €15 million.

[63] South Korea used to require that locally produced films are screened on 146 days out of a 356-day year; following US pressure, this was reduced in 2006 to 73 days; notably, the market share of Korean films dropped dramatically following this from 50 per cent to 20 per cent in 2007. Source: Toshiyuku Kono presentation at the Asia/Pacific regional Seminar on Animation Culture and Industry for Promotion of Cultural Diversity (Tokyo, Japan, 16–18 July 2008).

[64] Sweden levies a 10 per cent tax on box-office revenues to fund the Swedish Film Institute and, in France, there is a special tax on cinema tickets and a 2 per cent levy on the sale of DVDs that help fund the Centre Nationale de la Cinematographie.

[65] GATT/GATS and TRIPS treaties of the WTO (n 55).

cooperation and solidarity, its objective is to favour the cultural expressions of *all* countries. Hence, the Convention allows for preferential treatment for developing countries[66] in order to redress the current imbalance in international markets, provides international cooperation to respond to cases where cultural goods and services are under serious threat,[67] and establishes a Fund for cultural diversity[68] to provide financial support, especially to developing countries, in implementing the Convention.

The main other treaties of significance governing this area of cultural and economic activity (other than the 2003 Intangible Heritage Convention that takes a purely 'cultural' approach) are GATT/GATS[69] and the TRIPS Agreement of the WTO. The 2005 Convention has the potential for both positive and negative interaction with these.[70] For example, had the 2005 Convention offered certain forms of protection for cultural products and/or industries, this would have placed it in conflict with basic principles of WTO as contained in GATT and GATS, namely: gradual liberalization of commercial exchange; restriction of preferential national treatment; and the 'most favoured nation' clause. For this reason, its aims and scope and its basic principles of assistance and capacity-building have been carefully crafted to try to avoid clashes with existing trade agreements. Although fewer problems are likely with regard to TRIPS, finding the correct balance between States that export copyright and those that import it may still prove a challenge; it will continue to be difficult to defend the legitimate interests of the copyright importing States, including their cultural interests. However, there is at present an insufficiently clearly regulated space in the international cultural policy arena in which human rights and WTO law come into conflict,[71] where a clash of these legal domains remains unresolved that will require further conceptualization and negotiation to address. Unfortunately, the 2005 Convention does not provide enough guidance on how 'appropriate, future-oriented instruments capable of protecting and promoting cultural diversity in a world of rule fragmentation' since it contains no meaningful framework for dealing with cases where conflicts occur with the WTO. Moreover, even if it tried to do this, it is difficult to see how the TRIPS regime could be modified to respond to this need.[72] Coupled with the scant reference to intellectual property rights in the treaty (in the Preamble and not elsewhere in the substantive provisions), this renders the

[66] Article 16. [67] Article 17. [68] Article 18.

[69] The most relevant provision here is Art XIX of GATS which (i) aims at 'achieving a progressively higher degree of liberalisation' of trade; and (ii) states that '[t]he process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual members'.

[70] See Art 20 for more on this.

[71] See: Michael Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law', *Journal of International Economic Law*, vol 9, no 3 (2006): pp 515–52, accessed online on 17 February 2015 at: <http://jiel.oxfordjournals.org/content/early/2006/08/20/jiel.jgl021.full.pdf>.

[72] Burri, 'The UNESCO Convention on Cultural Diversity' (n 57) at p 359 states that the conflict of laws clause found in Art 20 contains a 'rather paradoxical formulation [which] involves no modification of rights and obligation of the Parties under other existing treaties'. See also p 360.

2005 Convention poorly prepared to counter seriously the worst damage to cultural industries caused by economic globalization.

In effect, the 'cultural diversity' of the 2005 Convention has become an alternative approach aimed at shoring up the *exception culturel* (as applied to TRIPS) as a means of safeguarding cultural goods and services. As noted by Isar: 'The shift from exception to diversity as the master concept allowed French international diplomacy to tap into a much broader range of cultural commitments and anxieties in international relations.'[73] This view is neatly expressed in the 2001 Declaration on Cultural Diversity in an article entitled 'Cultural goods and services: commodities of a unique kind' that states:

> In the face of present-day economic and technological change, opening up vast prospects for creation and innovation, particular attention must be paid to the diversity of the supply of creative work, to due recognition of the rights of authors and artists and to *the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods* (emphasis added).[74]

Following this lead, a major objective of the 2005 Convention has been to legitimize policy measures taken by national governments designed to protect nationally produced cultural goods and services. The goal here is to foster the dynamism of contemporary cultural production rather than to play a preservationist role. As Aylett has noted with regard to this question, 'in terms of policy, cultural activity has always been the poor relation. From a governmental point of view this reflects the difficulty of converting cultural benefits into a quantifiable, economic return.'[75] The 2005 Convention, then, aims to provide a form of international cultural governance that can produce a more equitable international cultural marketplace and, at the same time, protect human rights and the value of cultural diversity. In order to achieve this, the Convention calls for international cooperation and solidarity to be strengthened in a spirit of partnership[76] 'with a view, in particular, to enhancing the capacities of developing countries, in order to protect and promote the diversity of cultural expressions'.[77] This presents a challenge to the market dominance of a few States and corporations and, intriguingly, is couched in terms reminiscent of a third generation 'solidarity' right: it is therefore worth considering whether a 'right to the cultural diversity of humankind' may be in the process of crystallizing in the wake of the 2001 Declaration and subsequent law-making. Moreover, the overall approach of this Convention[78] would imply a major shift towards contemporary development agendas in which culture is given

[73] Yudhishthir Raj Isar, 'Cultural diversity', *Theory, Culture & Society*, vol 23, nos 2–3 (2006): pp 372–5 at p 374.

[74] Article 8.

[75] Holly Aylett, 'An International Instrument for International Cultural Policy: The Challenge of UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005', *International Journal of Cultural Studies*, vol 13 (2010): pp 355–73 at p 355.

[76] Thus recalling the language of the United Nations General Assembly, Declaration on the Right to Development, GA Res 41/128, annex, 41 UN GAOR Supp (No 53) at 186, UN Doc A/41/53 (1986).

[77] Article 1(3).

[78] Especially as seen in Arts 12, 14, 16, and 17.

equal status with economic, social, environmental, and educational priorities. A central plank of the Convention for achieving this is found in the provision that calls on Parties to correct powerful market dynamics and to adjust existing asymmetries in trade.[79] This is aimed at achieving a more equitable position for minority cultures that are currently excluded or weakened in cultural exchange by the hegemony of more dominant cultures.[80] A further necessary element in achieving this will be to pay more attention to the relevant human rights provisions when applying the 2005 Convention, to date the most elaborate international treaty to address contemporary creative activity and international equitability within this.

International cultural policy issues

The 2005 Convention was, as we have seen, drafted in response to increasing economic and cultural globalization and raises many issues relating to international and national cultural policy-making. In this context, although many arts, crafts, and media products are still national in character, an increasingly large sector of cultural production is circulating through transnational communications networks and is effectively 'de-territorialized'. As a result, cultural policies can no longer be approached as a purely domestic matter, to be implemented by national governments; rather, both their development and implementation require international cooperation and an international response. When seeking to create an international policy framework that aims to protect the interests of States, producers, and consumers as well as providing as effective a protection as possible for the cultural products, goods, and services themselves, it is necessary to address certain central questions.

First, given the transnational character of the contemporary cultural market, it is necessary to find a balance between public and private interests on a global level, which could be conceived of as a 'common ground of public interest'.[81] The current imbalance in the global cultural marketplace has created a dichotomy between those States that are 'central' and others that are 'peripheral' which needs to be addressed by granting greater equality of access and opportunity for all. The issues at stake here reflect the deep gulf in international economic and cultural policy-making between the objective of making markets as efficient as possible (through GATT and a reliance on market forces) and the broader considerations of equity in the international trade system called for in the Rio Declaration (1992). A second, related, challenge is how can private freedom to act (including that of the private sector itself) be balanced against the public need for international and national regulation? This is not just a question of giving equal access to markets to cultural industries and producers around the world: it must also address the inequality of access to the audio-visual industries, in particular, experienced by millions of people worldwide due to technological,

[79] Article 16.
[80] Aylett, 'An International Instrument for International Cultural Policy' (n 75) at p 364.
[81] Report of the World Commission on Culture and Development (n 24).

linguistic, or educational reasons.[82] A further, more philosophical question is also raised: in a world in which much culture is now commodified, reduced to the status of a commodity traded on the market, how can the creative process be properly valued? An important purpose of this treaty, then, is to give more value to the creative process and the creators of cultural goods and services through strengthening, updating, and expanding endogenous production and allowing for more efficient circulation of cultural goods within countries currently under pressure.

The drafting of the 2005 Convention was UNESCO's response to the above issues and questions and a major challenge that the Organization faced in this endeavour was how it could remain consistent with other UNESCO treaties in the cultural heritage field[83] while dealing with such a commercially sensitive area. To achieve this required the development of a new approach to culture within the existing international law context governing an area in which commercial considerations have traditionally taken precedence. The 2005 Convention was therefore given a *purely cultural objective* and designed in such a way as not to modify the rights or obligations of States under existing trade treaties. This approach, as has been discussed above, has both advantages and disadvantages. As a result of this approach, the Convention aims to: reaffirm the sovereign right of States to draw up their own cultural policies; recognize the specific nature of cultural goods and services as vehicles of identity, values, and meaning; and strengthen international cooperation and solidarity in order to favour the cultural expressions of all countries.

The types of cultural heritage that are most likely to fall within the category of 'expressions of cultural diversity' covered by the 2005 Convention are: books; films; music; works of art; and handicrafts. From this listing, it becomes immediately obvious that many of these are already covered by IP rules and there is no doubt that the IP regime is highly relevant to the achievement of the objectives of the 2005 Convention. In an Information Note prepared at the final stages of negotiation of the Convention, WIPO demonstrated this closeness of purpose, stating that, 'IP, as protected by several international instruments, encourages creativity, promoted cultural industries and contributes to the protections and dissemination of distinctive cultural goods and services'. However, it also commented that the text does not appear to grant any enforceable property rights with respect to its subject matter, whether to communities or other legal persons.[84] The approach taken by the Convention is rather aimed at supporting domestic cultural industries using a variety of tools in order to allow them to flourish and to compete internationally. Despite this, there remains the potential for clashes between the 2005 Convention and IP treaties, especially with regard to the preferential treatment it

[82] Eg, after the 1994 NAFTA, some 70 per cent of films screened in Brazil, Mexico, and Argentina are US imports. See: Nestor Garcia Canclini, 'Cultural Policy and Globalization', in *World Culture Report* edited by UNESCO (Paris: UNESCO, 1999).

[83] In particular, the 1952 Universal Copyright Convention (revised 1971); 1970 Convention Prohibiting Illicit Import, Export, Transfer of Ownership of Cultural Property; the 1972 World Heritage Convention; and the 2003 Intangible Heritage Convention.

[84] WIPO, *Information Note Provided by the Secretariat of the World Intellectual Property Organization (WIPO)*, Geneva, 12 November 2004 at pp 4–5.

gives to developing countries. Moreover, the 'national treatment' approach taken in IP treaties, whereby a foreign national seeking IP protection in another country is afforded the same level of protection as a national of that country, could also be in conflict with certain provisions of the 2005 Convention.[85] For these and other reasons, cooperation with WIPO in the implementation of the Convention will no doubt prove necessary and, for example, WIPO's expertise could be beneficial in resolving any IP-related issues arising out of the public-private partnerships that are encouraged under it.[86] Handicrafts present a useful illustration of the issues at stake: When dealing with traditional handicrafts, it is vital to take account of the economic and social as well as the cultural aspects of the question and to use a dynamic approach of adaptation rather than the more static one of conservation. Economic issues that have been addressed as a consequence include the use of export tariffs and the creation of a special category for handicrafts within the World Customs Organization.[87]

The 2005 Convention on Diversity of Cultural Expressions

Definition of some basic terms

First, when addressing the terms of this Convention and seeking to understand its implications for setting national and international cultural policies, it is important to understand the definitions of some key terminologies employed in it.[88] This is true especially in this treaty which, in view of its mixed cultural and economic character, uses terms that have rather technical and specific meanings and that are not found elsewhere in cultural heritage treaties. Beyond this, these terms also carry the baggage from *two* distinct viewpoints, namely from cultural theory and the law. This requires a cross-disciplinary consideration and the difficulty associated with accurately interpreting its most fundamental terminology, namely 'diversity of cultural expressions', illustrates the problem well. It is vital, here, that the distinction between this concept and the broader notion of 'cultural diversity' is fully appreciated and this requires a clear understanding of the term 'cultural expression'. The Convention provides a general definition for 'cultural diversity' as 'the manifold ways in which the cultures of groups and societies find expression' but then continues by providing an explanation of the more extensive sense employed in the text: 'Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used'.[89]

[85] WIPO, *Information Note Provided by the Secretariat* (n 84) at p 6. [86] Article 18.

[87] It is estimated that craft items comprise 5–6 per cent of all world trade and thus are economically significant, particularly for many developing States.

[88] These key terms are defined at Art 4. [89] Article 4(1).

'Cultural expressions', then, are expressions resulting from the creativity of individuals, groups, and societies that have 'cultural content' (the symbolic meaning, artistic dimension, and cultural values that originate from or express cultural identities) and are distributed through 'cultural industries' (the means of production and distribution of cultural goods or services). Further important terminologies include 'cultural activities, goods and services' as the means by which cultural expressions may be conveyed to the public. It is noted that the commercial value of the expression(s) is not material in this definition. When cultural expressions take the form of activities, goods, and services (eg as libraries, archives, museums), they do not necessarily follow the logic of the cultural industries. The notion of 'cultural capital', which may be that of the community, a nation, or even humanity as a whole, is one that describes the relationship between cultural products and creativity and can be compared to natural resources.[90]

In the context of this Convention, as with cultural heritage instruments in general, 'protection' does not carry the connotations of the term when used in intellectual property law: here, it refers to taking measures aimed at preserving, safeguarding, and enhancing the subject of protection.[91] When it is combined here with the notion of 'promotion' it implies the need to keep cultural expressions alive that are under pressure from globalization and other market forces. A central idea employed in the Convention and one that runs through its protection approach is that of the 'cultural value chain' that is made up of five 'links' for each of which cultural policies and measures are required (creation, production, dissemination, distribution of, and access to cultural activities, goods, and services). These links and the policies and measures set out for them are as follows: (i) Creation: for this, support should be provided for artists, creators, craftspeople, etc to allow them to produce new works, through a support system that may include funding arrangements and local, regional, or national level programme; (ii) Production: the creation of and access to the platforms of production need to be supported as well as those artists who are willing to act as cultural entrepreneurs and local companies wishing to expand their activities in the cultural industries; (iii) Distribution and dissemination: here, support and opportunities should be provided for artistic works to be distributed in the marketplace and through public institutions, at both national and international levels; and (iv) Access to diverse cultural expressions: this requires increasing society's participation in cultural life in order to enhance the overall quality of life (through providing information, increasing awareness of the availability of cultural expressions, providing physical access to these, etc).

[90] It is rooted in expressions, products, know-how, languages, heritage, landscapes, etc.

[91] Article 4(7) defines protection as 'the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions' while to protect means 'to adopt such measures'.

Objectives of the Convention

The Preamble to any international treaty is an important indicator of the political and legal context in which it is developed and highlights some of the main purposes underlying its development.[92] An interesting conception of cultural diversity (for the purposes of the Convention) is presented here as 'embodied in the *uniqueness and plurality* of the identities and cultural expressions' of peoples and/or societies (emphasis added). This adds the important element of their specificity to the basic concept of the variety of cultural forms, in other words the special importance they have for the cultural communities that create, maintain, and practise them. This reflects a human rights-oriented viewpoint that draws out the relationship between cultural expressions and cultural identity, reminding us that the overall diversity of cultural forms may be a value for humanity but each cultural expression itself also can play a role in identity-formation. The importance of cultural diversity for the full realization of human rights is also underlined by the emphasis placed here on freedom of thought, expression, and information along with diversity of the media as providing an enabling environment for cultural expressions to flourish within societies. The role played by IP rights in supporting creators of culture is also noted. A central point made in the Preamble concerns the dual economic and cultural nature of cultural activities, goods, and services whereby they must not be treated solely as having a commercial value. This position highlights a fundamental philosophical difference between the cultural and trade-based approaches to regulating cultural expressions, with the IP approach lying somewhere between the two. In institutional terms, then, UNESCO champions the former, WTO supports the latter, and WIPO straddles the two positions. A final contextual issue noted here is that, although the processes of globalization and improved ICTs have their positive side, they also increase risk of imbalances between rich and poor countries. As noted before, this is an area in which there is room for more effort by the international community and other actors to create more equitable access to ICTs.[93]

The main purpose of the 2005 Convention is, of course, to protect and promote the diversity of cultural expressions and respect for this should also be encouraged at all levels (local, national, and international).[94] The importance of the link between culture and development for all countries (both nationally and internationally) is also reaffirmed by this treaty.[95] These broad objectives are allied with the more specific one of allowing the free interaction of cultures in a mutually beneficial manner while ensuring not only wider but *more balanced* cultural exchanges in the world. This treaty also acknowledges the distinct nature of cultural activities, goods, and services, by recognizing their importance not only

[92] *Akehurst's Modern Introduction to International Law*, edited by Peter Malanczuk 7th revised edn (London: Routledge, 1997).

[93] Based around UNESCO's 2003 Recommendation on Multilingualism and Universal Access to Cyberspace.

[94] The purposes are set out in Art 1.

[95] For more on this, see the discussion on Art 13 below.

for economic reasons but also for identity and other values. A stated objective that clearly determines the later substantive provisions of the treaty is the strong reaffirmation of the sovereign rights of States to set their own cultural policies.[96] Lastly, and mirroring the call in the 2001 Declaration, the Convention is aimed at strengthening international cooperation and solidarity in a spirit of partnership, especially to enhance capacities of developing countries to act in this area. It is worth noting that the language of this objective, in particular the reference to 'solidarity in a spirit of partnership' recalls the wording of the General Assembly Declaration on the solidarity right to development (1986),[97] reminding us of the influence of developing States in the negotiation of this instrument.

Rather unusually for a cultural heritage instrument, a set of Guiding Principles upon which the treaty is based are set out.[98] In many ways, these reflect and add weight to the aforementioned objectives by providing them with a series of legally recognized principles upon which related duties and rights can then be based. The principle of respect for human rights and fundamental freedoms is presented as essential for any action to protect and promote cultural diversity[99] while, at the same time, the Convention should not provide a basis for anyone to infringe internationally recognized human rights.[100] A similarly human rights-oriented approach is asserted in the principle of the equal dignity of and respect for all cultures (including the cultures of persons belonging to minorities and indigenous peoples) as a basis for the protection and promotion of the diversity of cultural expressions.[101] Another principle that contains a human rights-related dimension is that of equitable access to a rich and diversified range of cultural expressions from all over the world, for the dual purpose of enhancing cultural diversity and encouraging mutual understanding.[102] With respect to 'third generation' human rights, the principle of international solidarity and cooperation is noted with the stated aim of enabling all countries to create and strengthen their means of cultural expression, including their cultural industries. The principle of the sovereign right of States to adopt measures and policies in this area is also affirmed and serves as a fundamental and balancing principle of this Convention. In terms

[96] The effect of this is that the obligations of States (Art 7) are placed following an article affirming their sovereign rights (Art 6).

[97] United Nations General Assembly, Declaration on the Right to Development (n 76).

[98] Article 2.

[99] Eg, the importance of guaranteeing the freedom of expression, information, and communication as well as the ability of individuals to choose cultural expressions is noted.

[100] This responds to the position taken by the human rights bodies, as articulated by the seven UN experts who served as special procedures mandate holders, who declared that: 'No one may invoke cultural diversity as an excuse to infringe on human rights guaranteed by international law or limit their scope', in *Human Rights are Essential Tools for an Effective Intercultural Dialogue*, Statement by United Nations experts on the World Day on Cultural Diversity for Dialogue and Development, 21 May 2010.

[101] A similar assertion is made in UNESCO's Declaration on Principles for International Cultural Cooperation (1966) at Art I(1): 'Each culture has a dignity and value which must be respected and preserved.'

[102] This can be seen as responding, in part, to the right of access to culture and cultural heritage which is an element in the right to participate in cultural life.

of development, the 'principle of the complementarity of economic and cultural aspects of development' sets forth both an important philosophical position of the Convention as well as being a new addition as a principle underpinning an international legal treaty text. It is based on the view that, since culture is a mainspring of development, the cultural aspects of development should be seen as important as its economic aspects. The closely related principle of sustainable development is also mentioned, predicated on the idea that cultural diversity is a rich asset and resource for individuals and societies. Lastly, a principle of openness and balance in policy-making is expressed. This is, again, an attempt to balance apparently conflicting objectives which, in this case, are the measures adopted to protect national cultural diversity and the promotion of openness to other cultures.

Rights of States

As has been noted above, the sovereign right of States to set their own cultural policies within the framework of this Convention is strongly protected. For this reason, any obligations placed on Parties should be understood in this context. The rights and obligations expressed in this treaty operate at both international and national levels and are designed to take account of the situation, jurisdiction, and social context of the individual States. It is possible to identify two underlying approaches in this, which are: providing preferential treatment for developing countries; and asserting the rights of States to take appropriate measures to promote diversity of cultural expressions, with due regard for human rights.[103] The strong reservation of State sovereignty that runs through this treaty is again reaffirmed,[104] confirming their right to formulate and implement their own cultural policies and to adopt their own measures for the protection and promotion of the diversity of cultural expressions on their territory. However, this wide discretion given to Parties in the realm of policy- and law-making is balanced by the requirement that all such policies and measures should be consistent with the provisions of the Convention and not contradict any of the duties placed on Parties.[105] In a more positive sense, they should contribute to achieving the aims and objectives of the Convention[106] which establishes a form of cultural governance that regulates the interaction between individual and institutional stakeholders.

The specific rights of Parties are set out regarding measures that they may choose to take at national level.[107] There is no strict requirement on States to implement the following actions but it is clearly expected that they will take some or all of the following measures, in order for their actions to be in conformity with the objectives and spirit of the Convention. However, they are free to do so in terms appropriate to their own policy, legal, economic, political, and cultural

[103] Here again, although this is not primarily intended to be a human rights treaty, it contains many elements in which human rights play a central role.
[104] Article 5(1). [105] Article 5(2).
[106] The four-yearly reporting system established by Art 9(a) is one means of monitoring this.
[107] Article 6.

situations, a particularly important issue for States that do not wish to develop an overly pluralistic approach. The first such measure would strengthen the domestic chain of production of cultural expressions by providing opportunities for the creation, production, dissemination, distribution, and enjoyment of all domestic cultural activities, goods, and services. In addition, these measures may provide effective access for independent domestic cultural industries and the informal sector to the means of production, dissemination, and distribution of cultural activities, goods, and services. Provision of public financial support for such cultural activities is also foreseen. Further, encouragement should be given to non-profit organizations, as well as public and private institutions, artists, and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions, etc and their creative and entrepreneurial spirit. These measures could go a long way towards increasing cultural participation and democratizing the domestic chain of production but assumes, at the same time, a relatively high degree of cultural pluralism and freedom for various groups and individuals to express their own culture. Further suggested actions include the establishment of and support for public institutions, as appropriate, and nurturing and supporting artists and others involved in the creation of cultural expressions. These measures, since they are less prescriptive in the manner in which they should be achieved, would be easier for most States to accept. Lastly, and again presupposing a culturally pluralistic system, Parties are encouraged to enhance the diversity of the media, including through public service broadcasting.

Obligations placed on States Parties

As mentioned above, the aforementioned rights in the realm of cultural policy-making are balanced by a series of obligations placed on Parties. It should be noted, however, that the relevant articles[108] are intended to be read in conjunction with Article 6,[109] suggesting that the reservation of the sovereign right of States to set their own cultural policies is a strong one. Moreover, it is possible to assert that only two articles set out any clearly binding obligations on Parties and that even these are rather vague in their drafting.[110] Parties should endeavour to create in their territory an environment which encourages individuals and social groups: (a) to create, produce, disseminate, distribute, and have access to their own cultural expressions; and (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.[111] In implementing part (a), due attention should be paid to the special circumstances

[108] Articles 7 and 8.

[109] See: Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, First Extraordinary Session, Paris, UNESCO Headquarters, 24–27 June 2008—Item 3 of the Provisional Agenda [Doc CE/08/1.EXT.IGC/3] at p 2.

[110] Burri, 'The UNESCO Convention on Cultural Diversity' (n 57). She suggests that the only really binding provisions are found in Art 16 (on preferential treatment for developing countries) and Art 17 (obliging international cooperation in situations of serious threat to cultural expressions).

[111] Article 7.

and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples which again places a clear human rights framework on this obligation. In addition, the important contribution of artists and others involved in the creative process, including cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions should be recognized. This is a further statement of the broad range of actors and stakeholders that need to be taken into consideration in taking these measures and, importantly, the central role envisaged for civil society in this. In cases where cultural expressions when they are 'at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding',[112] Parties are expected to 'take all appropriate measures' to protect and preserve them and report to the Intergovernmental Committee[113] on the measures taken. These might include short-term emergency measures for immediate effect, the reinforcement or amendment of existing policies and measures, or putting in place new policies and measures. It should be noted, however, that it is at the discretion of the Parties themselves to determine the existence of such special situations in the first place, a further reservation of state sovereignty. It is also worth noting that the phrase 'in need of urgent safeguarding' was first used with respect of intangible heritage to be inscribed on the international list of that name under the 2003 Convention[114] which, again, underlines the shared characteristics and ancestry of the cultural expressions of the 2005 Convention and the ICH.

It is, of course, necessary that some oversight exists of the actions taken by Parties to implement the Convention, especially in the case of a treaty that leaves so much to the discretion of the Parties. In order to ensure information sharing and transparency, Parties are required to submit four-yearly reports to UNESCO in which they should provide appropriate information on measures taken both nationally and internationally to implement the Convention. They are, in addition, required to share and exchange information relating to the protection and promotion of the diversity of cultural expressions.[115] This is interesting since it makes a distinction between the reporting system (designed mainly to monitor Parties' performance) and information-sharing which is aimed predominantly at improving this performance by sharing best practice, for example. It is also recognition of the newness of this area of regulation and the need for States and other stakeholders to learn from experience. As is now becoming a common provision of treaties in the field of cultural heritage (as has been the case for some time for environmental conservation treaties), a provision is included on the need to promote public understanding of the importance of protecting and promoting the diversity of cultural expressions through educational and public awareness

[112] Article 8.

[113] Established under Art 23. International cooperation over cultural expressions in need of urgent safeguarding is covered by Art 17.

[114] The List of World Heritage in Danger of the 1972 World Heritage Convention employs different terminology that reflects the different character of that heritage and the different orientation of that Convention.

[115] Article 9(a) and (c).

programmes, etc.[116] Although such provisions tend to be placed at the end of the 'main' obligations for national level safeguarding measures, they are extremely important and may, in some cases, be the key to the effective implementation of the rest of the measures taken.[117] To underline the importance of the international dimension of this treaty, Parties are also required, unusually, to cooperate with other Parties and international and regional organizations in taking education and awareness raising actions.[118]

Role of civil society in the 2005 Convention

According to background documents prepared for the Intergovernmental Committee of the Convention,[119] civil society should be understood as 'the self-organization outside the realm of the state and the market, i.e. a set of more or less formal organizations or groups that do not belong to either the governmental sphere or the market'. It should be mentioned here that civil society is a very broad notion that extends beyond NGOs and can include foundations, philanthropic institutions, advocacy groups, collaborative groups of artists and producers, artistic or literary guilds, etc which may be organized at the local, national, or international levels. Civil society, understood in these terms, performs a wide range of services and actions in support of the public good, including monitoring government policy and its implementation: in this way, it has the potential to assert a positive influence within relevant domains. In the 2005 Convention, civil society is mainly concerned with how the roles of the State, on the one hand, and the market, on the other, operate relative to that of citizens and society as a whole, acting as a kind of 'buffer zone' between the two that may be able to curb the excesses of both. This role of civil society runs through the text of the 2005 Convention (both implicitly and explicitly) and the fundamental role of civil society in protecting and promoting the diversity of cultural expressions is explicitly acknowledged and their active participation in efforts to achieve the objectives of this Convention is encouraged.[120]

Within the framework of regional and international cooperation, Parties are encouraged to reinforce partnerships with and among civil society, NGOs and the private sector in fostering and promoting the diversity of cultural expressions.[121] This latter provision contains two unusual aspects, namely the reference to such partnerships beyond the national level and, second, the inclusion of the private sector in this picture. Of course, the latter makes sense in a domain where much

[116] Article 10(a).

[117] A similar point is made by Lucas Lixinski, 'Selecting Heritage: The Interplay of Art, Politics and Identity', *European Journal of International Law*, vol 22, no 1 (2011): pp 81–100 with regard to a similar provision in Art 13 of the 2003 Intangible Heritage Convention.

[118] Article 10(c).

[119] See: Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, First Extraordinary Session, Paris, UNESCO Headquarters, 24–27 June 2008—Item 5 of the Provisional Agenda [Doc CE/08/1.EXT.IGC/5], Annex I at p 1.

[120] Article 11.

[121] Article 12(c).

relevant activity is commercial, but it is still unusual and innovative in a cultural heritage convention that signals a potentially broader development in thinking to include a wider range of stakeholders in the protection of heritage.[122] More implicit references are also made to civil society elsewhere, with regard to the role of non-profit organizations[123] and reference made to the contribution of social groups, cultural communities, and organizations.[124] Specific roles that are envisaged for civil society in this Convention include: promoting public consensus and local 'ownership' of national cultural policy; strengthening and improving the impact of development programmes, for example, by using local knowledge; providing innovative ideas/solutions to development issues; providing professional expertise and capacity-building, especially where public sector capacity is weak; and improving public transparency and accountability. These reflect a variety of aspects of the roles civil society can play, including their condition of being embedded in local communities, the fact that they may develop capacities unavailable to local, regional, and/or central government bodies and the key and rather specific place they have in ensuring procedural human rights.

Although the 2003 Intangible Heritage Convention contains a direct call for Parties to ensure the involvement of 'communities, groups and . . . individuals' in the identification, inventorying, and safeguarding of the ICH,[125] this is a more limited role since it applies to these communities, groups, and individuals and entities with respect to their own ICH. In contrast, the 2005 Convention is the first cultural heritage Convention to make such a reference to the role of civil society (and other actors) in achieving the goals of the Convention per se. The breadth of 'civil society' for the Convention is clear from the Operational Guidelines on Article 11 which read: 'For the purposes of this Convention, civil society means non-governmental organizations, non-profit organizations, professionals in the culture sector and associated sectors, groups that support the work of artists and cultural communities'.[126] The Committee may consult such organizations (and individuals) on specific issues, whether it has been accredited to participate in sessions of the Committee or not.[127] The importance of giving space to non-governmental actors is emphasized by Burri who notes that there remain some important elements missing from the regulatory regime of the 2005 Convention as a result of the high degree of reservation of state sovereignty, so that 'many of the processes of cultural homogenization have occurred precisely because of state-led policies aimed at cultural standardization'.[128] The

[122] The prominent role of communities in the 2003 Intangible Heritage Convention and the notion of the 'heritage community' as employed in the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 2006) [CETS 199] are further evidence of this.

[123] Articles 6, 15, and 19. [124] Article 7.

[125] Articles 11, 12, and 15 of that Convention.

[126] At para 3. The Operational Guidelines were accessed on 31 October 2014 at: <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/operational-guidelines>.

[127] Paragraph 8 of the Operational Guidelines on Art 11 and in accordance with Art 23(7). Arrangements are set out in para 9 for civil society organizations authorized to participate as observers in the Conference of Parties and the Intergovernmental Committee.

[128] Burri, 'The UNESCO Convention on Cultural Diversity' (n 57) at p 359.

types of support that CSOs may offer to Parties in implementing the Convention include designing and implementing cultural policies and giving voice to groups such as women, persons belonging to minorities, and indigenous peoples in this, capacity-building, and cooperation for development at local, national, and international levels, by initiating, creating, or being associated to innovative partnerships with the public and private sectors as well as with civil society overseas.[129] An additional role assigned to them (in support of the Committee) is to 'maintain the dialogue with Parties in an interactive manner with regard to their positive contribution to the implementation of the Convention',[130] which, again, underlines the centrality of their position in the implementation of this Convention.

Sustainable development and the 2005 Convention

One of the innovative aspects of this Convention is the requirement to integrate culture in development policies at all levels for the creation of conditions conducive to sustainable development and to foster the protection and promotion of the diversity of cultural expressions within this framework.[131] This introduces a commitment to integrate culture into development policies at all levels (ie local, national, and international) and is the first time that such a commitment has been made in an international treaty. This reflects the culmination of work at the international level in recognizing the constitutive role of culture in development discussed above.[132] Although also implied in the Preamble to the 2003 Convention,[133] no such explicit obligation is included in that treaty's substantive provisions; its inclusion in the main body of this Convention is potentially a 'game-changer' in international cultural and development policy-making.

Given its relative novelty as a substantive provision in a cultural heritage treaty, the question is raised as to what approaches and measures might be taken to put it into practice. Throsby has proposed a series of principles that are aimed at achieving an operational approach to ensuring the culturally sustainable development envisaged here.[134] First, according to the principle of inter-generational equity, development must not compromise the capacities of future generations to access cultural resources and meet their cultural needs. The second is intra-generational equity such that the development must provide equitable access to cultural production, participation, and enjoyment to all members of the community (in particular the poorest) on a fair and non-discriminatory basis. Third, the value of diversity itself to the processes of economic, social, and cultural development and

[129] Paragraph 6 of the Operational Guidelines on Art 11.
[130] Paragraph 9 of the Operational Guidelines on Art 11.
[131] Article 13.
[132] World Conference on Culture and Development, *Our Creative Diversity* (n 24).
[133] At para 2 it refers to 'the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development'.
[134] David Throsby, *Culture in Sustainable Development: Insights for the Future Implementation of Article 13*, Information Document presented to UNESCO at p 4 [Doc CE/08?Throsby/Art.13, January 2008].

for achieving sustainable development should be recognized. The precautionary principle must also be given attention so that, when facing decisions that might result in the irreversible loss of cultural heritage or valued cultural practices, a risk-averse position must be adopted. Finally, the principle of interconnectedness suggests that a holistic approach is required towards economic, social, cultural, and environmental systems.[135]

If we conceptualize the cultural industries as a series of 'concentric circles' built around the core components of primary artistic and cultural production, we can see that a healthy and flourishing environment for creative artists and arts organizations is necessary to support the more commercial operations of the cultural sector.[136] A policy that ensures sustainable development in this context, then, would maintain the harmony of the local cultural ecosystem while optimizing the economic contribution from commercial cultural enterprises. The Operational Guidelines to Article 13 set out a series of actions that can be taken by Parties in fulfilment of this obligation, including: providing the conditions necessary for creative abilities to flourish, with special attention given to disadvantaged and/or marginalized groups and regions; foster the development of viable cultural industries and, in particular, micro, small, and medium enterprises operating at local level; encouraging long-term investment in the necessary physical, institutional, and legal infrastructure; raise awareness among key local stakeholders, including local authorities, of the importance of the cultural component of sustainable development; build sustainable capacities (budgetary, technical, and human) in local cultural organizations; facilitate sustained and equitable access for all members of society to the creation and production of cultural goods, activities, and services; consult with and include public authorities, civil society, and representatives of the cultural sector; and invite civil society to participate in the design of development policies and measures for the cultural sector.

International cooperation and assistance framework

In many ways, the international dimension is the heart of the 2005 Convention and one of its major aims is to identify and develop new arrangements for international cooperation (and solidarity).[137] The main objectives of the international cooperation framework established under the Convention are as follows: to provide access to all countries to the diversity of each others' cultural expressions by creating a level playing field for all; to support developing countries in establishing cultural industries that are competitive in the international cultural marketplace; to strengthen the production and/or distribution capacities of developing countries that face competition in terms of cultural goods and services from

[135] These respond to recognized elements of sustainable development as expressed in the Final Declaration of the UN Conference on Environment and Development (Rio de Janeiro, 1992), with certain adaptations to meet the needs of the cultural sector. Thus, the principle of interconnectedness is similar to the principle of integration that is commonly associated with environmentally sustainable development.

[136] David Throsby, *Culture in Sustainable Development* (n 134).

[137] As seen in the Preamble and Arts 1(i), 2(4), 12, 13, 14, 15, and 16.

industrialized States, in order to combat commercial, cultural, and social dumping; to encourage Parties to develop international partnerships between the public sector, private sector, and civil society (through such means as development funding, technology transfer, preferential treatment, support for cultural institutions, etc); and to establish a development fund to show States Parties' commitment to this process. These are set out mainly in five articles, of which Article 13 (on sustainable development) has already been discussed.

The provision on promoting international cooperation in the cultural sector is relatively straightforward requiring Parties, inter alia, to facilitate dialogue on cultural policy, to strengthen strategic management capacities in the public sector through international cultural exchanges and sharing best practices, and to encourage co-production and co-distribution agreements.[138] A potentially challenging requirement is to strengthen partnerships with (and among) civil society, NGOs, and the private sector for fostering and promoting the diversity of cultural expressions.[139] Although it does not require Parties to encourage such partnerships where they do not already exist, it still requires them to help these to develop which will, inevitably, shift more focus away from state-driven actions to those initiated in these other non-governmental sectors. It will probably also lead to the development of new partnerships over the long term. A key provision in this section relates to international cooperation for development with the objective of supporting cooperation for sustainable development and poverty reduction in order to foster the emergence of a dynamic cultural sector. In applying this provision, the specific needs of developing countries should be taken into account which again suggests the importance of the international dimension of intra-generational equity.

The centrality of this provision can be understood from the number of measures set out for its realization, a summary of which is given here.[140] International cooperation should be directed towards strengthening cultural industries in developing countries through a variety of measures, such as improving their cultural production and distribution capacities, better access to global market and distribution networks and encouraging appropriate forms of cooperation between developed and developing countries in the music, film, and other industries. Capacity-building is obviously also a central element in such cooperation, to be achieved through the exchange of information, experience, and expertise, as well as training public and private sector human resources in developing countries. The envisaged range of such capacity-building for a cultural heritage treaty is both surprisingly broad and technical.[141] Another area of cooperation is that of transfer of technology and know-how, especially in the areas of cultural industries and enterprises.[142] This is not a common provision in a cultural heritage

[138] Article 12(a), (b), (d), and (e). [139] Article 12(c).

[140] Article 14(a)(i)–(vi), (b), (c), and (d)(i)–(iii).

[141] Article 14(b). Involving strategic and management capacities, policy development and implementation, promotion and distribution of cultural expressions, small-, medium- and micro-enterprise development, the use of technology, and skills development and transfer.

[142] Article 14(c). International assistance is suggested by the 1972 World Heritage Convention at Art 23 for: 'the training of staff and specialists at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage'. The 2003

treaty and is one more normally found in environmental treaties,[143] reflecting the very technical aspects of some of the areas that this Convention addresses. Again, although the establishment of the International Fund for Cultural Diversity[144] has precedents in other cultural heritage international assistance frameworks, the additional references to providing development assistance to stimulate and support creativity and to low interest loans, grants, and other funding mechanisms to be available alongside the Fund similar to the 2003 Intangible Heritage Convention,[145] but also partly reflects the fact that contributions to the Fund are voluntary[146] and the diverse nature of the potential recipients of such assistance.

The provision advocating partnerships between, and within, the public and private sectors and non-profit organizations as a form of international collaboration is innovative in view of the anticipated character of these partnerships, as is explicitly recognized in the text of the article. It has been necessary, therefore, to develop a definition of such partnerships in the Operational Guidelines to this article and the main principles applying to their operation[147] as follows:

3. Partnerships are voluntary collaborative arrangements between two or more organizations from different parts of society, such as governmental authorities (at the local and national levels) and authorities (at the regional and international levels) and civil society—including the private sector, the media, academia, artists and artistic groups, etc., in which the risks and benefits are shared between the partners and the modalities of functioning, such as decision-making or allocation of resources, are agreed upon collectively by them.
4. The major principles underpinning successful partnerships include equity, transparency, mutual benefit, responsibility and complementarity.

The purpose of such partnerships is to provide cooperation with developing countries in order to improve their capacities for achieving the main objective of the Convention and to respond to their practical needs, including through infrastructure and human resource development, setting policy and cultural exchanges. The innovative character of the partnerships envisaged lies in the fact of building such international links outside the intergovernmental framework and between, for example, a private sector actor in a developed country with a non-profit organization or public body in a developing one: such types of links are not commonly encouraged in the framework of international treaties and definitely represent a wholly new departure in the 2005 Convention.[148] This provision does require the Parties and their implementing bodies to open their doors to and work

Intangible Heritage Convention provides at Art 21(f) for 'the supply of equipment and know-how' which is closer to this provision.

[143] Such as the UN Framework Convention on Climate Change (1992) [1771 UNTS 107].

[144] Article 18.

[145] Article 21(g) of that treaty allows for 'other forms of financial and technical assistance, including, where appropriate, the granting of low-interest loans and donations'.

[146] Article 18(3). [147] Operational Guidelines to Art 15 at paras 3 and 4.

[148] The 2003 Intangible Heritage Convention, eg, encourages the development of networks of communities, experts, centres of expertise, and research institutes at sub-regional and regional levels (as per Section B.5 of the Periodic Reporting form for the Convention).

hand-in-hand with a range of actors they may not be familiar with. Given its untried character as an approach in international cooperation for cultural heritage, the modus operandi of, inter alia, identifying the needs of developing countries, identifying appropriate partners, and creating, maintaining, and reviewing such partnerships is set out in detail in the Guidelines.[149] Over the long term, the operation of this form of collaboration may well have a positive spin-off in helping to define more clearly what types of collaboration are useful between the private and public sectors, for example. In many countries, this is a new question and one that has important implications not only for the operation of this Convention, but also for other heritage treaties, in particular the 2003 Intangible Heritage Convention.

Providing preferential treatment to developing countries, especially for cultural goods and services,[150] is of fundamental importance to achieving the objectives of the 2005 Convention in view of its underlying philosophy. In order to realize this, developed countries are required to grant preferential treatment to (i) artists and other cultural professionals and practitioners and (ii) cultural goods and services from developing countries. The purpose of this provision is to redress an imbalance in power and access in favour of developing countries in order to create more equitable international cultural exchanges. The onus is clearly placed on developed countries to make it easier for developing countries to play a proactive role through their national policies and other measures, as well as through multilateral, regional, and bilateral frameworks and mechanisms, and to let developing countries articulate their own needs and priorities.[151] In addition, it is envisaged as having both a cultural and a trade dimension.[152] This approach is notable since it does not allow developed States simply to place this requirement in the category of external relations, but it requires them to act upon it in their internal policy-making and measures also. This would imply, for example, implementing positive actions in favour of the circulation in developed countries of cultural activities, goods, and services originating from developing countries and could be seen to challenge the dominance cultural industries in developed countries enjoy, in part, through being able to create monopolies through IP rules and use trade rules to 'dump' their cultural goods and services on developing countries' markets.

In the first five years since the 2005 Convention entered into force, certain trends regarding the practice of the Parties could be identified.[153] First, the

[149] Operational Guidelines to Art 15 at paras 6 and 7.

[150] Article 16. It is made clear in the Operational Guidelines to Art 16 that Art 16 is to be interpreted and applied in relation to the Convention as a whole. Parties should seek complementarities and synergies with all relevant provisions of the Convention and the various operational guidelines (para 1.2).

[151] Operational Guidelines to Art 16 at paras 2.2 and 2.3.

[152] Operational Guidelines to Art 16 at Section 3. With regard to trade: '3.4.1 Multilateral, regional and bilateral frameworks and mechanisms belonging to the field of trade can be used by Parties to implement preferential treatment in the field of culture'.

[153] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, Seventh Ordinary Session, Paris, UNESCO Headquarters, 10–14 December 2012, Item 4 of the provisional agenda: Strategic and action-oriented analytical summary of the quadrennial periodic reports [UNESCO Doc CE/13/7.IGC/5, Paris, 18 November 2013].

breadth of activities undertaken in the field of international cooperation reflects the heavily external orientation of the treaty itself. Some countries provide explicit preferential treatment for developing countries when applying regulations governing the movement of artists and other cultural professionals, such as Kuwait's exemption for foreign artists' works from customs duties when they participate in international events held in Kuwait.[154] A specific project implemented by Andorra to promote international artistic exchange, entitled Project Art Camp, is outlined as an example of good practice in Annex III.[155] This is one of the notable aspects of this Convention that sets it apart from other cultural heritage treaties, even if international cooperation lies as the basis of the development of most of them. In the case of the 2005 Convention, this is taken beyond the broad cooperation and assistance framework that is put in place by both the 1972 and 2003 Conventions to include encouraging Parties to build and foster international partnerships between a variety of actors and to put in place projects and programmes to this end. As mentioned above, the technology transfer element of this cooperation is a new element and, in addition, Parties have begun putting in place bilateral and multilateral agreements designed to facilitate the flow of cultural goods and services and the mobility of artists and creators of culture.[156] This represents a very concrete action for cooperation within specific cultural industries and also reflects the fact that the international cooperation involves a broad-based network of actors, as envisaged in the Convention.

Internally, a variety of policies and actions have been put in place to respond to each of the five links in the 'cultural value chain' (creation, production, dissemination, distribution of, and access to cultural activities, goods, and services).[157] The great majority of measures reported on by Parties in 2013 fall within one of the cultural policy goals aimed at supporting: artistic creation; cultural production; distribution and/or dissemination; and participation in and/or enjoyment of cultural life. Hence, the value chain approach espoused by the Convention appears to be increasingly recognized and implemented by Parties.[158] Measures taken to fulfil these goals range from providing financial and other forms of legal and social support to artists and creators, training and capacity-building (eg for skills in entrepreneurship), supporting production infrastructures and companies, developing marketing and distribution locally and nationally, and promoting the export of cultural goods and services. For example, measures targeting individual artists and arts-producing or delivery organizations were reported as significant components of the policies developed by a majority of Parties to implement the

[154] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153). Part III (paras 16–22) deals with 'International cooperation and preferential treatment' and this reference is at para 21.

[155] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at para 22.

[156] Burri, 'The UNESCO Convention on Cultural Diversity' (n 57).

[157] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at Part I (paras 2–21) reports on 'Cultural policies and measures'.

[158] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at para 5.

Convention.[159] Cultural production was supported in various ways, including via a Cultural Entrepreneurship Programme (2012–2016) worth USD 4.4 million per annum in the Netherlands to support entrepreneurial efforts in the areas of art and design, new media, film distribution, public libraries, and digitalization and a Fund for Assistance of Culture (FAC) established in Togo to support artistic production and cultural projects, as well as the construction and rehabilitation of infrastructure.[160] To encourage better distribution of cultural goods and services, efforts have been made to: promote market access, both nationally and internationally, through funding and subsidies; support or organize promotional events such as 'markets', 'fairs', 'festivals', or 'years'; establish local or national schemes to build distributional and/or marketing capacities; develop local distribution mechanisms; and promote export of domestic cultural goods and services.[161]

Cultural and arts education (in both formal and non-formal settings) was the most widespread measure aimed at increasing cultural participation and/or enjoyment, linking it closely with cultural participation schemes into a specific priority area. Other actions included promoting access and participation for specific individuals and social groups (eg young people, women, the socially disadvantaged, disabled persons, the elderly), promoting access to cultural services and goods in rural regions, and promoting access to digital cultural products and those from overseas.[162] With regard to the requirement under Article 13 of the Convention concerning sustainable development, most measures adopted by Parties were aimed at delivering long-term economic, social, and cultural benefits and, in some cases, addressed issues of fairness and equity towards specific regions or disadvantaged groups. The main means by which this was achieved can be categorized as follows: integration of culture into overall national development planning; measures to assist the sustainability of creative industries; strategies to secure equitable treatment for regions or minorities; and education and training activities.[163] All of this would suggest that the Convention is leading towards both internal policy development targeted towards the various stages of the aforementioned chain and also aimed at various stakeholders whose activities are necessary to developing local and national cultural industries and strengthening their presence both in the local market and internationally.

[159] These Parties were Albania, Andorra, Armenia, Bangladesh, Bosnia and Herzegovina, Cambodia, China (for art collections), Côte d'Ivoire, Egypt, Guinea, Kuwait, the Netherlands, Serbia, and the United Kingdom. Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at para 6. Measures included providing financial and fiscal support, organizing fairs and festivals, establishing incubators for artists, etc.

[160] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at para 12.

[161] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at para 13.

[162] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at paras 14–15.

[163] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (n 153) at para 23.

Conclusion

The regulation of cultural heritage has, over recent decades, moved beyond purely the competency of UNESCO and is now a broad discipline in which other global institutional actors, in particular WTO and WIPO, have important but not always helpful roles to play. This has resulted in rule fragmentation, a multiplicity of arenas in which conflicts occur, various actors and stakeholders. This, according to Burri, makes 'meaningful communication between them and a solution-oriented forward thinking difficult'.[164] Depending on one's viewpoint, the 2005 Convention can be seen either as an attempt to help to resolve this dilemma or as a case of 'forum hopping' by States wishing to move the debate from the WTO (where they have found it difficult to secure the cultural exception) to UNESCO which they feel is more favourable to their ambitions. Whichever position you take on this, it is a treaty text that contains innovative approaches that have the potential to impact on future cultural heritage policy- and law-making and to lead to a readjustment of the relationships between various actors, in particular public/private and government/civil society, with regard to regulating the cultural industries and the flow of cultural goods, services, and activities. However, in order to achieve this outcome, sacrifices have been made in terms of the lack of binding obligations and substantive incompleteness, especially with regard to its interaction with other regulatory regimes. For example, the adoption of this treaty was very much in reaction to the process of economic globalization and the emergence of enforceable multilateral trade rules in the WTO that were perceived as damaging to cultural diversity worldwide. Despite the impressive number of Parties it has secured in a short period of time, Burri argues that it has not had any serious impact on the WTO regime and has rather shored up the 'trade-versus-culture status quo'.[165] Furthermore, it has not yet succeeded in addressing the IP-related aspects of protecting and promoting diversity of cultural expressions. In the years following the adoption of TRIPS, the global reach of IP rights had had an increasingly damaging impact on the diversity of cultural expressions, reducing cultural works to simple 'commodities' and allowing for the development of copyright-based monopolies by a few very dominant players. Unfortunately, with the exception of the reference in the Preamble, IP rules are not explicitly addressed in the Convention despite their high relevance to the subject matter. This is an area in which the development of future practice, quite possibly through cooperation with WIPO,[166] will be important. However, it is also possible to say that its likely impact will be slow and incremental and that, over time, it will help to shift currently entrenched attitudes on both sides.[167] Indeed, one of the contributions

[164] Mira Burri, 'The International Law of Culture: Prospects and Challenges', *International Journal of Cultural Property*, vol 19, no 4 (2014): pp 579–81 at p 579.

[165] Burri, 'The UNESCO Convention on Cultural Diversity' (n 57) at p 362.

[166] The following chapter deals with intellectual property approaches towards protecting traditional cultural expressions and folklore, including the ongoing work in WIPO.

[167] Allowing, eg, a more expansive interpretation of Art XX(a) of GATT which justifies measures that violate the trade rules on the grounds of public morality.

that this treaty can make is to take the concept of 'diversity of cultural expressions' beyond the narrow confines of the trade-versus-culture debate and encourage States and other actors to develop new and innovative cultural policy-making approaches. Without doubt, the Convention has managed to establish 'cultural diversity' and its promotion as a global public good to be achieved through concrete forms of international cooperation. It has also placed the achievement of sustainable development through international cooperation in the cultural sphere as a global policy goal.

7

Cultural Heritage and Intellectual Property Law

In this chapter, the question of the protection of traditional knowledge and cultural expressions—both now regarded as elements of ICH—through the IP regime will be considered. Here, the potential for IP rules to protect these elements of cultural heritage will be examined along with the difficulties that are associated with taking such an approach. As has been seen in Chapter 5 with regard to the historical review of efforts to develop a protective regime for ICH, for at least two decades the main thrust of such activities aimed at developing an IP-based regime for its protection. Ultimately, UNESCO took the view that safeguarding ICH would have to be a much broader-based cultural approach since IP protection could only respond to a rather limited aspect of the needs both of the heritage itself and its cultural communities, namely protecting it from distortion and inappropriate forms of commercial exploitation and the communities' moral and economic interests in their ICH. However, that decision does not deny the continuing importance of extending this form of protection to those aspects of ICH that (a) are threatened by such misappropriation and exploitation and (b) can benefit from the use of IP-style protection. Indeed, as has been seen in Chapter 5, some States Parties to the 2003 Intangible Heritage Convention have based much of their national safeguarding on IP approaches (this is particularly true of the Pacific region which, along with the Arab States, has developed its own IP model law for this purpose) and UNESCO has recently put on the agenda the need for closer cooperation with the World Intellectual Property Organization (WIPO) over the IP-related aspects of safeguarding ICH.

Although these approaches can be regarded as, to some degree, complementary and 'two sides of one coin', at the same time there are important differences between them that need to be appreciated in order to ensure effective protection and safeguarding of traditional knowledge and cultural expressions and of ICH in general.[1] Again, if we break down the main stakeholders with regard to (i) safeguarding ICH and (ii) IP protection, we can see the differences between the two

[1] This is examined by Miranda Forsyth, 'Lifting the Lid on "the Community": Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture', *International Journal of Cultural Property*, vol 19, no 1 (2012): pp 1–31 with regard to the cases of the Samoan *tatau* (tattoo) and the Vanuatu land dive traditions.

approaches in that, in the former approach, there are a number of parties with an interest in this (humanity, the State, the national population, local populations, tradition-holders, etc) while, for the former, it is primarily the owners of TK (if identified) who have the primary say over protection measures. Another way to understand the different bases of the IP and cultural approaches to this question is to regard the former as treating traditional cultures (knowledge and expressions) as part of the common heritage of mankind and therefore in the public domain unless an intellectual property right is claimed over them, while the latter asserts the sovereign jurisdiction of the State over this heritage and views its protection as a 'common concern'.[2] On this latter basis, several developing countries have enacted access and benefit-sharing (ABS) regimes that make access to and community use of it subject to certain conditions.

How Appropriate are Intellectual Property Rules?

The character of intellectual property rules

IP rules are based on the economic imperative to encourage creativity and innovation through the protection of economic rights, an approach which can obviously be a highly beneficial one when applied to the appropriate subject and in the appropriate social and cultural context. They are often crucial, for example, to encouraging the creative activity that is necessary for the economic development of societies: 'An important priority in the development process is to encourage national and indigenous creation of works . . . Such encouragement requires not only the recognition of creators, but also providing them with a means of obtaining a reward for their creative endeavours.'[3] However, as shall be seen in more detail below, the premises on which IP rules have been developed are contradictory to the needs of much traditional culture and knowledge, and of the communities that have created and maintained it. Moreover, IP rules are essentially individualistic in character and their underlying values place a high premium on the central concepts of authorship and innovation; these are regarded as 'Eurocentric' and alien to the value-systems of many indigenous and local societies.[4] Some of the main issues of concern over the misuse and misappropriation of such heritage and the unconsidered application of IP rules include: the reproduction of traditional crafts in overseas factories, thus damaging the cultural and economic interests of the tradition-holders and their communities; non-recognition of collective as

[2] Graham Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (London and Stirling, VA: Earthscan, 2004) notes that the UN Convention on Biological Diversity (1992) has taken the latter approach.

[3] Shahid Alikhan, 'Role of Copyright in the Cultural and Economic Development of Developing Countries: The Asian Experience', *Copyright Bulletin*, vol XXX, no 4 (1996) 3–20 at p 5.

[4] *Statement of the Bellagio Conference on Cultural Agency/Cultural Authority*, Bellagio (1993) ('Bellagio Declaration') which sees contemporary intellectual property law as constructed around 'a notion of the author as an individual, solitary and original creator' for whom protection is reserved.

opposed to individual ownership of the heritage (and associated collective rights); failure to protect the economic interests of the producer communities; and the need to respect the sacred and secret nature of certain aspects of this heritage, particularly that of indigenous peoples.

Copyright protection

Copyright law is the form of intellectual property protection that has been most widely applied to protect traditional cultural expressions (previously 'folklore') and continues to be used today in national laws and regional model laws. Indeed, it has been a central demand for many cultural communities that hold traditional cultural forms that can be exploited for commercial gain that their creative input into this be fully recognized in any such commercial exploitation.[5] A further important protection afforded by the copyright system is enshrined in the moral rights they protect. These are the non-economic rights enshrined in copyright law and relate to attribution of source and integrity as covered by the Berne Convention and the 1982 Model Provisions (both discussed below). These comprise the right to preserve the integrity of the work, the right to withdraw or divulge it and the right to be acknowledged as the author of the work. These would seem to answer concerns relating to the desire for the source (community and/or geographical place) of a traditional form to be correctly attributed when it is exploited and for the integrity of that form (in keeping with its origins) to be respected and protected.

However, certain fundamental characteristics of the copyright regime as classically applied render it an inappropriate form of protection for this range of heritage.[6] Some of the major challenges that have been identified in applying copyright-based protection to this form of heritage have been identified as follows. Even the very concept of ownership itself which is fundamental to copyright protection may be alien to the cultures to which it would be applied: customary law often does not include any distinct right of ownership equivalent to the legal concept of property upon which copyright rules are predicated. In Aboriginal custom, for example, control over their heritage by the cultural community is governed by a complex system of obligations within which artists operate and according to strict traditional rules, viewed as akin to a relationship of custodianship. Under this arrangement, the cultural expression in question is not a commodity or property but rather representative of the values and interrelations affecting

[5] Patrick J O'Keefe, 'Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-colonial Era', *International Journal of Cultural Property*, vol 4, no 2 (1995): p 383 cites some declarations by indigenous peoples that argue for IP-related protection for their TK and other ICH, such as the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*.

[6] Mihály Ficsor, '1967, 1982 and 1984: Attempts to Provide International Protection for Folklore by Intellectual Property Rights', in report of the *UNESCO-WIPO World Forum on the Protection of Folklore ('Phuket Report')*, Phuket, Thailand, 8–10 April 1997 (UNESCO-WIPO, 1998) p 213 at p 216: 'It seems that copyright law is not the right means for protecting expressions of folklore.'

the community.[7] Another basic notion, that of 'artistic and literary works' as the subject of copyright protection, is an inappropriate category for many of the traditional cultural expressions for which such protection is needed since it only extends to forms and not to the ideas (know-how, ancestral knowledge, ways of doing, etc) underpinning them. As a result, it is a fundamental requirement for copyright protection that the heritage in question be reduced to a material form or 'fixed'. This would obviously render copyright protection a wholly inappropriate mechanism for oral traditions that exist only in the collective and individual memories of a cultural community, such as music, dance, songs, poetry, stories, technical know-how, rituals, etc. Of course, these can be recorded and their recordings protected by copyright, but this would not really address the needs either of this heritage to continue to be transmitted through traditional means nor of the cultural community to continue to practise, perform, and transmit it.

The requirement of the copyright system to demonstrate 'originality' in the protected work is an inappropriate one to apply to the majority of traditional culture which, by its very nature, has been developed over generations on the basis of traditional knowledge and practices handed down within families and the community. A related problem is that of derivative works or transformations of works, since a large number of traditional cultural expressions are developed over a long period of time through continual reproduction and adaptation which means that they are all, in some sense, derivative. A further, fundamental aspect of the copyright regime, as classically understood, that militates against its application to this range of heritage is the requirement for there to be a sole identifiable author (or team of authors). This is problematic for a heritage where it is frequently very difficult to identify an individual and which is predominantly a collective form of creativity. Hence, although it may be possible to identify an individual author in the case of some traditional cultural expressions, this is generally contradictory to the basic character of this range of heritage. In cases where rights are collectively held, and where it may not always be easy to identify all the members of the group in question, this raises a further difficulty over who can give authorization for such purposes as fixation and reproduction of 'the work' and under what circumstances.

Further technical aspects of copyright that do not lend themselves to protecting traditional cultural expressions include that of the duration of protection usually applied. Copyright protection normally extends for a period of between 25 and 70 years after the death of the author. After this period, the protected form then becomes part of the public domain. This would be anathema for much traditionally held culture, both in terms of the relatively short time periods involved (for a heritage that may be of ancient origins to have been handed down over successive

[7] Ficsor, '1967, 1982 and 1984: Attempts to Provide International Protection for Folklore' (n 6) at para 26: 'Indeed, indigenous peoples do not view their heritage in terms of property at all—that is, something which has an owner and is used for the purpose of extracting economic benefits—but in terms of community and individual responsibility . . . For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.'

generations) and, in particular, where it concerns a practice or knowledge that can only be performed or held by a specific group of people. In view of the great religious, social, and cultural significance of much traditional culture for the cultural community, especially that held by indigenous communities, it is essential that whatever protection is extended to such heritage should be granted in perpetuity in order to prevent it from lapsing into the public domain after a period of time.[8]

Moreover, the rights granted under copyright law are exclusive to the identified author. The concept of exclusivity of rights over traditional cultural heritage is one that is frequently incompatible with the customs of the community within which it originates. This is particularly true of indigenous and tribal peoples whose custom involves group or community ownership of traditional art forms and cultural practices. This, as Daes points out,[9] is theirs to share with other peoples if and when they wish. An exception allowed under copyright, the fair use exception, allows for parody or pastiche which is viewed as fair dealing under copyright rules. Under this, a sacred symbol could be used as the 'inspiration' for a new work of art without the need for any specific community authorization. Although obviously desirable for encouraging and fostering creativity, this exception is inimical to the needs of many cultural communities when, for example, their sacred symbols are employed in this way. It has been suggested that industrial design laws (see below) might be extended to deal with this loop-hole in the copyright legislation or that it might be easier to refer to the use of traditional materials (such as a particular clay or reed only found in a certain geographical location) allied with style as a form of protection against such pastiche.[10]

Industrial property rights

This set of IP rights can also offer some limited protection to certain traditional cultural forms and expressions (TCEs) which are worth noting here. Trademark protection[11] can be used to ensure the correct attribution of, prevention of distortion of, and compensation for the use of TCEs. They have the advantage of not being of any limited duration, unlike copyright protection. However, they are only applicable to the commercial exploitation of TCEs and thus do not address the important problem of the misappropriation and commodification of such

[8] Ficsor, '1967, 1982 and 1984: Attempts to Provide International Protection for Folklore' (n 6) points out that the legislations of Congo, Ghana, and Sri Lanka for the protection of folklore explicitly state that protection is in perpetuity.

[9] Erica-Irene Daes, *Protection of the Heritage of Indigenous People* (New York and Geneva: UN, 1997) at paras 24 and 25. See also: Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, UN Doc E/CN.4/Sub.2/1993/28, 28 July 1993.

[10] Marc Denhez, 'Follow-up to the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore', in *Phuket Report* (n 6) at p 195.

[11] The main international treaty governing trademarks and industrial designs is the Paris Convention for the Protection of Industrial Property (1883) (revised 1900, 1911, 1925, 1934, 1958, and 1967 and amended in 1979) establishing the Paris Union [21 UST 1583, 828 UNTS 305].

heritage against the wishes of the cultural community of origin. Trademark law is mainly useful in cases where the consumer has a potential confusion over the source of goods and services or where there is a false attribution of the goods in question. It would not, for example, address the problem of a significant distortion of the cultural expression that is a major problem when TCEs are subject to commercial exploitation. Moreover, the problem of commodification can be even deeper in that the cultural community may resist any form of commercialization of their heritage which trademark protection would not prevent.

Industrial design protection can offer some additional protection for traditional symbols and artistic motifs as well as clan and tribal names. However, its duration is limited (often to only 15 years) and it may be inadequate for the protection of designs of particular spiritual or cultural significance where it is more important to protect the integrity of the design rather than its commercial value. A further form of industrial property right that might be of use would be appellations of origin[12] which indicate the geographical origin of a product and can be employed to verify its authenticity, as with fine wines. These geographical indicators could be employed to protect products typical of particular indigenous, local, or other cultural communities (eg foodstuffs, textiles, ceramics, etc) and are particularly useful for small-scale producers and cultivators. However, the usefulness of such protection is, again, limited to cases where their economic exploitation is acceptable to the cultural community. Perhaps a more appropriate industrial protection is that extended to trade secrets: in industry, just as among indigenous and local communities, protecting 'know-how' and trade secrets is a challenge and this is achieved through protection of the secrecy of such information. Following this approach, it would be open to indigenous and local peoples to keep part of their traditional knowledge secret unless it is divulged on the basis of licensing arrangements that provide for confidentiality, appropriate use, and economic compensation for the community of origin. Trade secrets can only be protected in this way if they have the potential for commercialization and so, again, this would not protect the knowledge and information that a community does not wish to be known for spiritual or cultural reasons.

Patent protection

Much consideration has been given to the use of patents for the protection of traditional (often indigenous) knowledge in areas such as medicinal plants, agricultural methods, and genetic resources. Patents grant the holder a legal monopoly over the commercial exploitation of the intellectual property to which it applies for the lifetime of the patent and permission may be granted by the patent holder for its use through a licensing agreement. Patents are regulated internationally by the Paris Convention[13] which does not create any internationally enforceable

[12] The main international treaty governing appellations of origin is the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration (1958) revised at Stockholm (1967) and amended in 1979 (Lisbon Union) [923 UNTS 205].

[13] Paris Convention for the Protection of Industrial Property (as revised in 1967 and amended in 1971) (n 11).

patent right but rather sets out the standards to be applied in national legislation. Unfortunately, the rights of ownership over components of biological diversity claimed through patents, as sanctioned and promoted by international trade agreements, have been seen as a major threat to traditional knowledge.

There are, moreover, certain requirements for the issuing of patents that would limit their usefulness for the protection of traditional knowledge by the holder communities themselves. First, patents apply only where 'novelty' can be demonstrated which is contradictory to the character of a knowledge developed and transmitted over generations, if not millennia. The further requirement to show an 'inventive step', often demonstrated in patent applications by laboratory-based research, is difficult if not impossible in the case of such traditionally transmitted knowledge.[14] Indeed, the very notion of an 'inventor' is an alien one in relation to such knowledge. Even if novelty is not always a basis available for patents related to TK, it can be enough to show that one is the first to prove the effectiveness of the compound (such as turmeric) through some laboratory tests and chemical formulae.[15] In addition to this, patent offices around the world may not be sufficiently careful in investigating applications and may allow patents to be granted where no real novelty or innovative step has been demonstrated. The cases of the hoodia plant and neem[16] are good illustrations of some of the issues surrounding the patenting of biological entities and their associated knowledge. The neem tree that grows in India has several valuable properties and is subject to *c.*150 patents worldwide, of which 40 are US patents, most of which have used public domain TK as their basis. In the case of a patent taken out in the European Patent Office (no 436 257 B1) over the fungicidal action of neem oil, the Indian Government was successful in having it overturned on the ground that it did not involve any inventive step. The hoodia is a plant used by some groups of San (Bushmen) in the Kalahari for its appetite-suppressant properties while on extended hunting forays in the desert. Having learned of this property, the South African Council for Science and Industrial Research (CSIR) took out a patent on certain compounds of the hoodia plant, without acknowledging the San as the source of the TK, for development into a commercial drug. After pressure was brought by an international NGO and a San organization, a benefit-sharing agreement was concluded in 2003 under which a Trust was set up for the San people.

Patent rights are granted to individuals or corporations (legal persons) and not to cultural communities or peoples. Indeed, much TK cannot be traced to a specific group or community and, even where it does fulfil the criteria of being subject to a patent, it is unlikely that the tradition-holders could afford the huge

[14] An example of this is the patent granted in the US for laboratory-acquired derivatives of the neem seed that has been used for centuries in India as a natural pesticide (but not eligible for patenting as such).

[15] The state of the art for the use of neem as a fungicide, eg, is not just the TK itself but also includes the industrial process necessary to produce the neem derivatives that can be sold as a commercial product. Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (n 2).

[16] Both cases are described in Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (n 2) at pp 52–3.

costs involved in acquiring a patent. Again, a problem also occurs with the limited duration of the rights granted by patents over the patented knowledge which then enters the public domain on their expiry. Patents are therefore neither useful for protecting traditional knowledge that people wish to keep confidential[17] nor are they suitable mechanisms for protecting most TK, even where the holders wish to exploit it commercially themselves. Although the holders of patents based on TK cannot prevent the communities themselves from continuing to use the knowledge in question,[18] there is concern amongst tradition-holders that they ought to share in the economic benefits of commercial exploitation of their knowledge.[19] Moreover, the issue remains that outside individuals and corporations are able to patent 'innovations' that are clearly based on local and indigenous traditional knowledge without the consent of these communities. In relation to this, many problems lie with the application of patent rules rather than the rules themselves: in theory, patents could protect the interests of TK-holders as well as commercial enterprises utilizing their knowledge but, in reality, their poverty and marginalization often makes this very difficult to achieve. In relation to the patenting of local and indigenous knowledge, an important requirement is proof that their free, prior, and informed consent has been obtained where a patent application that uses such knowledge is concerned.[20]

Trade secret protection[21] should perhaps be considered as a form of protection for such knowledge since this is traditionally extended to intellectual property that is not patentable and can be applied to a wide range of information that could include TK. Ecuador has been attempting to protect its TK through this route with the support of the InterAmerican Development Bank. In this project Ecociencia, an NGO, has been documenting the TK of six indigenous groups and registering it in a closed-access database (after checking that it is not in the public domain or held by other communities). By 2003, 800 items of TK had been registered in this way. As a result, the holder community has the trade secret to this TK which can be disclosed to interested companies through a standardized contract that guarantees benefit-sharing.[22] However, trade secret protection suffers from the limitations stated above with relation to TCEs.

[17] An exception to this may be the potential for patenting application of traditional knowledge to practical problems (eg of harvesting or fishing) as technology since that category can include any knowledge that is useful, systematic, and organized to address a specific problem.

[18] Indian farmers, eg, may continue to use the neem seed as a pesticide.

[19] GS Nijar, 'Intellectual Property Rights and the WTO: Undermining Biodiversity and Indigenous Knowledge Systems', paper presented to *Second Regional Worlds Colloquium for 1999-2000*, University of Chicago, January 2000 notes at p 2 that, '75% of plants providing active ingredients for prescription drugs are discovered by researchers because of their use in traditional medicine and that 40% of the world economy is based on biological products and processes'.

[20] See, eg, the later discussion on traditional knowledge and UN Convention on Biological Diversity (1992) [1760 UNTS 79; 31 ILM 818 (1992)].

[21] Recognized as a measure against unfair competition by the Paris Convention (Art 10bis) and the TRIPS Agreement (Art 39).

[22] This is described in more detail by Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (n 2) at pp 105–6.

IP rules essentially treat all knowledge as being in the public domain, unless protection can be extended to it through patents or other IP rights. Moreover, many States (including the US and Japan) do not recognize undocumented traditional knowledge as prior art, thus leaving it vulnerable to patenting.[23] This is an extremely unsatisfactory situation for the holders of such knowledge, many of whom are indigenous people, since IP rights tend to favour those exploiting traditional knowledge for commercial gain. Indeed, the occupation of the world's resources by the wealthy and powerful has been described by Shiva as a form of 'environmental apartheid' in which IP law has played a role.[24] The TRIPS Agreement (discussed below) has effectively extended this private domain created by the IP regime to the territory of all WTO Member States since its provisions are mandatory for them. Furthermore, there is no reciprocal obligation on WTO Member States to recognize the public domains of other States.[25] Where States conduct a policy of making TK publicly available, they must be able to protect it from being privatized and ensure that the economic benefits from any commercial exploitation is shared with the tradition-holders themselves. Dutfield rightly asks: if indigenous peoples in WTO Member States must accept the existence of patents that they cannot benefit from, why should their own knowledge-related regimes not be respected by others? He continues by noting that, in effect, 'one type of IPR system is being universalized and prioritized to the exclusion of all others'.[26] There is really no reason other than use and wont and the dominance of the players that are benefiting from the current arrangement for choosing this system over other, alternative ones. In response, for example, Dutfield has argued for creating other private domains based on customary rather than IP rules since it is the failure to respect these customary rules that is the main problem with the IP system *a propos* TK.[27]

This is not to deny that there are aspects of copyright, industrial property, and patent rules that offer some protection to elements of traditional cultural expressions and knowledge. Although these can certainly be of value, however, the protection they offer is patchy and does not add up to the comprehensive system that would be needed as the basis of any new international instrument. For these

[23] Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (n 2) at p 50 cites the case of the patent for the wound healing properties of turmeric that was granted to the University of Mississippi Medical Centre that was later overturned, but only when the Indian Government produced published documents to prove the existence of prior art. See also: 'Turmeric Patent: India's Winning Case', *Businessline*, 16 October 1998.

[24] Vandana Shiva, 'Ecological Balance in an Era of Globalization', in *Global Ethics and the Environment* edited by Nicholas Low (London and New York: Routledge, 1999) pp 47–69.

[25] Manuela Carniero da Cunha, 'The Role of UNESCO in the Defense of Traditional Knowledge', in *Safeguarding Traditional Cultures: A Global Assessment* edited by Peter Seitel (Washington DC: Smithsonian Institution, 2001) pp 143–8 at p 146: 'As a result, knowledge that has been in the public domain for generations in one country might be privatised and enjoy IPRs in another country. Not only is the original country excluded from its benefits, but a supplementary irony is that the TRIPS agreement obliges it to honor such an intellectual right. What was originally in the public domain in the country comes back, thanks to these regulations, as private property'.

[26] Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (n 2) at p 59.

[27] Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (n 2) at p 7.

reasons, consideration has been increasingly given to the type of proposals—based largely on concepts employed in IP protection—that can provide the basis for some form of *sui generis* protection for traditional cultural expressions and knowledge. Some elements that have been proposed for such a *sui generis* approach in national legislation and/or international protection include the following:

- the recognition of traditional forms of ownership through contractual or legislative arrangements;
- taking into account the customary rules of the holders of this knowledge in developing the existing IP system;
- establishing an officially recognized body to determine the 'author' (in copyright terms) of a TCE who has the right to exercise control over and derive economic benefit from it;
- prohibiting on non-traditional uses of secret sacred material and on debasing, destructive, or mutilating forms of exploitation;
- obliging respect of attribution of source and other moral rights relating to TCEs such as the prevention of distortion;
- payment of economic compensation to the traditional holders of TCEs and knowledge for any commercial exploitation, including punitive damages for unauthorized exploitation;
- a requirement for informed prior consent in patent applications relating to the exploitation of TK;
- the development of principles by which such knowledge can be documented where the holder communities so wish it, even in the case of secret and sacred knowledge;
- the development of databases of TK (with suitable protections for secret knowledge) that can be used by national patent offices to determine the existence or otherwise of prior art.[28]

IP Rules as Applied to Traditional Culture and Knowledge

Traditional cultural expressions

Treaty-based protection

Several international treaties relating to different aspects of international property protection can also be applied to protecting expressions of traditional culture,

[28] India, eg, has launched a programme to create digital databases of its traditional knowledge that will be accessible to the patent offices of other countries in order to prevent patents being granted to foreign companies for traditional Indian medical remedies. It will cost $1 million, much less than the cost of contesting patents in foreign courts once granted. See: KS Jayaraman, 'Greens Persuade Europe to Revoke Patent on Neem Tree', *Nature*, vol 405 (2000): pp 266–7.

but these are generally limited in their scope and effect.[29] First, the Universal Copyright Convention (1952, as revised in 1971), jointly administered by UNESCO and WIPO, provides for the protection of literary and artistic works through the application of copyright rules. This can be invoked for the protection of such expressions through the application of national treatment as foreseen by Article II (3). However, as has been seen above, the value of copyright rules for safeguarding this type of heritage is limited. The Berne Convention (1967 and 1971 Acts) (WIPO)[30] sets out international standards for harmonizing the copyright rules of the Parties and its subject matter, 'literary and artistic works' is relatively widely defined,[31] allowing for it to cover a number of traditional cultural expressions. Its protection is based on minimum standards whereby the copyright protection offered nationally should not be less than that set out in the Convention and national treatment (Article 5). Protection is also provided for performers of literary or artistic works through the application of 'neighbouring rights'[32] and the moral rights of authors are granted protection that goes some way to answer their needs to be protected against distortion.[33]

Most importantly, the Berne Convention offers the possibility of international protection for the 'unpublished works of an unknown author' who is a national of a country of the Berne Union.[34] This could, then, apply to traditional cultural expressions in a way that copyright rules usually cannot. However, only one notification has thus far been deposited with WIPO by any State (by India in 1996) designating a national authority to protect the unpublished works of authors whose identity is unknown. Parties may decide whether a work must be 'fixed' in a physical form before it can be granted copyright protection[35] which is important since the requirement of fixation is clearly problematic in the case of oral cultural expressions that are constantly repeated in slightly differing forms

[29] *Model Provisions on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions with a Commentary* (UNESCO/WIPO, 1985) at para 10 noted that: 'legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient'.

[30] Berne Convention for the Protection of Literary and Artistic Works, opened for signature 9 September 1886 (as amended in 1914, 1928, 1948, 1967, 1971, and 1979) [25 UST 1341, 828 UNTS 221]. On 15 July 2000, there were 160 States Parties, of which the majority are party to the Paris Act of 1979 establishing the Berne Union.

[31] It covers 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression' and includes 'dramatic or dramatico-musical works, choreographic works… works of drawing, painting, architecture, sculpture, engraving' (Art 1(1)).

[32] Article 11 covers the authorization rights of authors of dramatic and musical works, including their performance.

[33] Article 6bis(1) reads: 'Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation'.

[34] Article 15(4)(a) reads: 'In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union'.

[35] Article 2.

and frequently evolving. The 1971 amendment of the Convention additionally allows Parties to designate a competent authority to control the licensing, use, and protection of national folklore. If a State has enacted legislation specifically for the protection of folklore—which few States have so far done—then the authority responsible for folklore could carry this out.

The WIPO Copyright Treaty (1996)[36] is a further agreement concluded within the framework of the Berne Convention[37] and applies only to Parties of that Convention. Hence, its relevance for the protection of traditional cultural expressions should be understood in this light. In its Preamble it recognizes 'the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and economic developments'. By stating that '[c]opyright protection extends to expressions and not to ideas',[38] this reiterates the limitations of copyright protection which only extends to artistic and literary expressions and not, for example, to the skills and know-how that underlie traditional cultural expressions. In general, it does not appear to offer much additional protection for TCEs except in terms of better enforcement of existing rights through the provisions relating to enforcement of the rights granted, including those that may be granted to folklore expressions under Article 15(4) of the Berne Convention.

Protection for performers and producers of phonograms is provided under the Rome Convention (1961) (WIPO).[39] Through the exercise of 'neighbouring rights', it can protect a limited range of TCEs. However, the 'performers' to which it applies are defined as those who perform literary or artistic works and so they are not clearly traditional cultural practitioners.[40] On the other hand, since the Rome Convention sets out *minimum* standards,[41] it would be open for Parties to include the performers of traditional cultural expressions on the basis of national treatment; this would then extend to foreign performers as well. Through this approach, when traditional stories, dance, instrumental music, songs, etc are performed live then the protection given to the performers is extended to the expressions themselves, as it already is in many countries. However, this treaty cannot provide protection against the unauthorized performance or the fixation of traditional cultural forms and is therefore an indirect form of protection. The WIPO Performances and Phonograms Treaty (1996) is intended to be applied alongside the Rome Convention.[42] 'Performers' are similarly defined as in the Rome Convention, but with the significant addition of 'expressions of folklore'

[36] Adopted by WIPO's Diplomatic Conference 2–20 December 1996.

[37] Article 20 of that Treaty. According to Art 1(1) and (2), nothing in this Treaty derogates from existing obligations of Parties to the Berne Convention (n 30).

[38] Article 2.

[39] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 26 October 1961 [496 UNTS 43].

[40] Article 3(a) defines 'Performers' as 'actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works'.

[41] Article 7(1).

[42] Nothing in it derogates from the obligations of Parties to that Convention, nor should it affect in any way the copyright protection of literary and artistic works (Art 1(1) and (2)).

to the type of performance covered. Protection under this treaty is provided to nationals of Parties and to those nationals of other Parties who meet the criteria for eligibility under the Rome Convention.[43] The moral rights of performers (who are identified as the performer of any live performance that is fixed) to object to any distortion, mutilation, or other modification of his/her performance that would be prejudicial to/her reputation are protected.[44] The duration of such moral rights should be at least until the expiry after his/her death of any economic rights granted to the performer and at least 50 years from the time of the fixation of the performance.[45] Performers are also granted the economic rights to their unfixed performances[46] and the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms and making available to the public the originals and copies of these fixed performances.[47]

The TRIPS Agreement of the WTO[48] was built upon the substantive obligations contained in the Berne and Paris Conventions,[49] and its provisions dealing with copyright, neighbouring rights, and national treatment apply broadly to both traditional culture and folklore. However, when judging the impact of the TRIPS Agreement on traditional culture and folklore, we should bear in mind that its objective was to harmonize IPR standards as they apply to trade in order to encourage international trade and provide it with a more secure basis.[50] The level of protection through copyright and neighbouring rights offered under TRIPS is essentially determined by reference to the economic rights afforded by the Berne Convention and, by implication, the Rome Convention which has the effect of lowering the protection available to TCEs.[51] Furthermore, the economic rights are granted only in the context of achieving the objectives of TRIPS and not for the sake of protection per se.

Member States must therefore establish the economic rights set out in the Berne Convention, apply that legislation to the categories of works set out in Article 2 of the Paris Act and respect the nationality treatment clauses. Certain neighbouring rights of performers are protected under TRIPS,[52] allowing them to prevent the following acts without their authorization: the fixation and subsequent reproduction of their unfixed performance; and the broadcasting and communication to

[43] Article 3. National treatment for nationals of other Parties is guaranteed under Art 4 'with regard to the exclusive rights specifically granted in this treaty'.

[44] Article 5(1) and (2). [45] Article 17. [46] Article 6. [47] Articles 7 and 8.

[48] Agreement on Trade-related Aspects of Intellectual Property Rights of the Uruguay Round of GATT (WTO, 1994) [33 ILM 81 (1994)].

[49] Part I sets out general principles, in particular that of national treatment; Part II deals with different types of IPRs, such as copyright, trademarks, geographical indications, industrial designs, patents, and trade secrets.

[50] 'Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to international trade' (Preamble).

[51] As far as copyright is concerned, it is compulsory for Member States to comply with Arts 1–21 of the Berne Convention (n 30), with the important exception of Art 6bis that deals with the moral rights of the author (Art 9(1)).

[52] Article 14; no reference is made here to the Rome Convention.

the public of their live performance. The period of protection granted is 50 years from the time of the performance or its fixation. One of the main benefits of TRIPS is that it requires WTO Member States to provide the holders of the economic rights related to copyright, neighbouring rights, and industrial property rights with various means of enforcement to ensure these rights.[53] However, the failure to protect the moral rights of authors of literary and artistic works creates a significant gap in protection for TCEs since this aspect of copyright law is of great significance for the needs of the creators of that heritage. It is therefore not surprising that States with concerns over the protection of TCEs and traditional knowledge have generally concentrated their activities on these issues within WIPO rather than the WTO.[54]

It should be borne in mind that these treaty rules are aimed mostly at harmonizing IP mechanisms across different legislative systems and that most IP protection is actually effected under national legislation. The majority of industrialized countries have traditionally placed TCEs within the public domain and beyond the reach of IP rules and, as a result, even the limited protection that IP can provide for them is denied. As a result, these States operate a kind of 'legislative void' as far as traditional culture is concerned, allowing it to fall into the public domain and face the multiple threats of distortion, appropriation, etc. Developing countries, in contrast, have generally been much more active in extending legal protection to TCEs/folklore and this has mainly been achieved through the application of copyright rules.[55] Such legislation has been influenced by several regional instruments, including the Tunis Model Law on Copyright for Developing Countries (1976) and the Convention concerning African Intellectual Property (Bangui text) of the African Intellectual Property Organization (1977).[56]

With the adoption of the 2003 Intangible Cultural Heritage Convention, ironically in view of that Convention's avoidance of an IP approach to safeguarding, there has been some revival of interest in IP-based approaches towards protecting ICH and this has led to calls for UNESCO and WIPO to cooperate more closely again on this area.[57]

[53] Part III.

[54] The exception to this includes calls by some States for a review of Art 27(3)(b) concerning the patenting of genetic resources. One proposal would be to deal with traditional knowledge and folklore together under the review procedure allowed for in Art 71(1).

[55] A non-exhaustive list of such legislation adopted in the 1970s–1990s, includes: Tunisia (1966 and 1994); Bolivia (1968 and 1992); Chile (1970); Iran (1970); Morocco (1970); Algeria (1973); Senegal (1973); Kenya (1975 and 1989); Mali (1977); Burundi (1978); Ivory Coast (1978); Sri Lanka (1979); Guinea (1980); Barbados (1982); Cameroon (1982); Colombia (1982); Congo (1982); Madagascar (1982); Rwanda (1983); Benin (1984); Burkina Faso (1984); Central African Republic (1985); Ghana (1985); Dominican Republic (1986); Zaire (1986); Indonesia (1987); Nigeria (1988 and 1992); Lesotho (1989); Malawi (1989); Angola (1990); Togo (1991); Niger (1993); and Panama (1994).

[56] This regional instrument has had a substantial influence, in particular Annex VII (as revised in 1999) is devoted to literary and artistic property. This employs two approaches to protection: through copyright and cultural heritage protection.

[57] For more on this, see Chapter 5.

One area, for example, in which further consideration is needed is with regard to the treatment of secret ICH elements (including traditional knowledge) held in national ICH inventories (required by the 2003 Convention as a national safeguarding measure).[58] Aragon, however, sounds a warning about the increasingly widespread application of both IP and cultural heritage approaches in national laws that are based on what she sees as 'Euro-American assumptions about humans as self-contained creative entities whose expressive works are potentially alienable, commercial assets'.[59] She notes that, although copyright rules assume individual authors as creators of original works while cultural heritage approaches embed the idea of group ownership, these approaches are 'being hybridized around the world in practice as the enclosure of intangible property reaches around the globe'.[60] Much of this is occurring as the result of attempts by governments of 'Global South nations' to use copyright approaches to protect 'national' intangible heritage elements and working strategically to turn creative industries into sources of income.[61] For such countries, ICH expressed through regional arts and traditional knowledge appears to offer more readily available resources for economic development than the now heavily extracted and exploited natural resources such as forests.

Some such national legislation protects 'works of folklore', thus treating it as a standard subject of copyright law, while others refer more broadly to 'folklore'. The Chinese and Chilean legislation is targeted specifically towards protecting 'expressions of folklore' following the model of the Model Provisions. Algeria and Morocco have definitions of the subject of protection that conform closely to that given in Article 15(4) of the Berne Convention (Stockholm and Paris Acts). In other cases, the legislation differentiates 'folklore' from 'literary and artistic works' (the classic subject of copyright law) noting its special characteristics, such as: it is a traditional cultural heritage passed on through generations; and it is the product of the impersonal creativity of members of a community or other group. Legislation in some African and Pacific States,[62] in particular, include aspects of

[58] National inventories are required under Art 12. See: Wend Wendland, 'Intellectual Property Implications of Inventory-making: Towards Intellectual Property Guidelines for Recording, Digitising, and Disseminating Intangible Cultural Heritage', in *Safeguarding Intangible Cultural Heritage—Challenges and Approaches* edited by Janet Blake (Leicester, UK: Institute for Art and Law, 2007) pp 129–36.

[59] Lorraine V Aragon, 'Copyright Culture for the Nation? Intellectual Property Nationalism and the Regional Arts of Indonesia', *International Journal of Cultural Property*, vol 19, no 3 (2012): pp 269–312 at p 282. The new laws have the effect of '[p]roviding economic incentives for well-positioned individuals to reinterpret local ritual practices, knowledge, and cultural expressions as ownable things to be defended, bought, and sold to broader markets'.

[60] Aragon, 'Copyright Culture for the Nation? Intellectual Property Nationalism' (n 59).

[61] Aragon, 'Copyright Culture for the Nation? Intellectual Property Nationalism' (n 59) at p 273 notes that, in this process, they '[pay] surprisingly scant regard to the complex economic interests, viewpoints, and creative processes of local producers and audiences, whose interests they purport to represent'. She cites as an example the Indonesian Copyright Law of 2002, brought in as a response to TRIPS, extending State copyright over much popular ICH (myths, songs, epics, handicrafts, choreographies, calligraphy, etc). Interestingly, however, artists are reluctant to use the rights this Law grants them, being more concerned about how future generations will regard them and their under-appreciated local art than any financial gains from outsiders paying to use their copyright.

[62] Such as Rwanda, Benin, and the Seychelles.

traditional knowledge in their definitions, such as the know-how relating to producing medicines or textiles and agricultural techniques.

While the aforementioned IP treaty rules can offer some protection to traditional cultural expressions and their performers, this is extremely limited due to the IP framework itself which is not well-suited to the needs of this form of heritage as we have seen. Hence, much of the effort to protect TCEs through IP rules has concentrated on the development of specially adapted *sui generis* approaches which are the subject of the following section.

Attempts to develop sui generis *protection*

The earliest attempts at the international level to provide protection for what was then understood as 'folklore'[63] relied heavily on an IP approach, especially copyright, although with some adaptations. Of course, commercialization (based on copyright protection) is not necessarily a negative phenomenon if it reflects the wishes of the cultural group concerned and is to their benefit. However, unfortunately, their interests are frequently ignored and the cultural expression being marketed is often distorted by the process.[64] As a result of the development of new technologies and new means of exploiting and disseminating TCEs, such abuses became more widespread and, simultaneously, a greater sensitivity was developing towards such exploitation as the result both of decolonization and the increasingly vocal demands from local and indigenous groups.

In 1967, the first attempt was made to provide for the international protection of expressions of folklore through the use of copyright law during the revision of the Berne Convention[65] with the addition of a new article that provided some guidelines for the protection of folklore although it does not make any specific reference to folklore.[66] In 1976, UNESCO adopted the Tunis Model Law on Copyright for Developing Countries, with a specific article dedicated to the protection of national folklore (Article 6) and provision also for the protection of handicrafts, reflecting the importance of handicrafts to many developing States.[67] In 1977, the

[63] In this historical review, the term 'folklore' is used when describing the period when it was the term of art. It has subsequently been discarded as inappropriate and potentially derogatory.

[64] Ficsor, '1967, 1982 and 1984: Attempts to Provide International Protection for Folklore' (n 4) noted at p 215 that, 'Folklore is commercialized without due respect for the cultural and economic interests of the communities in which it originates. And, in order to adapt it better to the needs of the market, it is often distorted or mutilated. At the same time, no share returns from its exploitation to the communities who have developed and maintained it.'

[65] During the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention for the Protection of Literary and Artistic Works (n 30).

[66] Article 15(4)(a) of the Stockholm and Paris Acts of 1967 and 1971. This reads: 'In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.'

[67] Section 1(2)(ix) protects 'works of applied art, whether handicrafts or produced on an industrial scale' under copyright rules. At this time, various States adopted national legislation based on copyright mechanisms to protect expressions of folklore, including Papua New Guinea and Tunisia

Convention concerning African Intellectual Property (the Bangui text, as revised in 1991) was adopted by the African Intellectual Property Organization and part of Annex VII is dedicated to the protection of folklore. Significantly, and not surprisingly for an African regional text, it refers to folklore that is created by communities rather than by a single author.[68] Within UNESCO at this time, a request was made by the Government of Bolivia in 1973 to consider an additional Protocol to the Universal Copyright Convention (adopted in 1952; amended in 1971) for the protection of the popular arts. In response, in 1977, a Committee of Experts on the Legal protection of Folklore was set up by UNESCO, tasked with conducting a full examination of all the issues related to the protection of folklore. Until the mid-1980s UNESCO worked closely with WIPO towards developing an international framework for the legal protection of 'expressions of folklore'[69] and encouraging the Member States to employ IP rules for this purpose.

In 1982, UNESCO and WIPO jointly adopted Model Provisions (1982)[70] that were designed to provide IP-type protection to the relatively limited category of 'expressions of folklore'.[71] These were intended to provide for a *sui generis* system of protection that adapted IP rules better to suit the needs of this subject of protection and the related cultural community. A fundamental position of the Model Provisions is that, since folklore is a part of a community's social identity, it should be safeguarded against loss, prejudicial distortion, illicit appropriation, and illegitimate exploitation.[72] Hence, we can see immediately the shift from the classic individualistic IP rules to one that recognizes community-based needs and rights. Expressions of folklore (EFs) are understood to be created by (or adopted by) a community and developed and maintained by it through generations. Moreover, it is irrelevant whether it has been developed collectively or by an individual author[73] as long as it reflects the traditional artistic expectations of the community. An important *sui generis* principle is also stated, namely that the community that created and maintains EFs should be free to use and develop it without authorization.[74] These 'expressions of folklore' are defined as

in 1967; Bolivia in 1968; Chile and Morocco in 1970; Algeria and Senegal in 1973; and Kenya in 1975.

[68] The African Union (previously Organization of African States) has been one of the prime movers internationally for the recognition of collective rights, especially with regard to traditional ecological knowledge. In addition, the title of the African Charter of Human and Peoples' Rights (Banjul, 1981) is telling as to the different conception of rights applying in the African region.

[69] In the development of such texts as: Tunis Model Law on Copyright for Developing Countries (UNESCO, 1976) accessed on 25 February 2015 at: <http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html> of which Art 6 contains provisions relating to the protection of national folklore; Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (UNESCO/WIPO, 1982) accessed on 10 November 2014 at: <http://unesdoc.unesco.org/images/0006/000637/063799eb.pdf>.

[70] Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit and Other Prejudicial Actions (n 69).

[71] This terminology was later adapted for WIPO's more recent work (since 2000) to 'traditional cultural expressions'.

[72] Preamble. [73] This represents a clear departure from classic IP rules.

[74] Section 13 on 'Interpretation'.

'productions' comprising characteristic elements of the traditional artistic heritage, divided into verbal expressions, expressions through musical sounds, expressions through actions, and those that are incorporated into a tangible object. Importantly for EFs, only the final category needs to be reduced to a physical form. However, since they are also seen as a common heritage of humanity, they are free to all for *appropriate social use*. Hence, protection is provided only against harmful distortions, misrepresentation, or the falsification of origin: this protection regime is primarily designed to regulate the commercial exploitation of EFs and ensure income is enjoyed by the cultural community.[75]

Expressions of folklore are to be protected against 'illicit exploitation and other prejudicial actions'[76] and the prior informed consent of the community for any use by outsiders, was considered the best way to ensure this.[77] Certain exceptions to this are allowed, such as their use for educational purposes.[78] The source of identifiable expressions of folklore should be acknowledged by citing the community and/or geographic location from which it originated.[79] Offences such as non-compliance with the requirement to acknowledge source, unauthorized utilization, deception (or 'passing off'), and distortion are addressed[80] and sanctions are provided for.[81] The relationship between the Model Provisions and other forms of protection is dealt with in such a way that anything covered by the terms of any other laws and international treaties[82] as well as the Model Provisions should be protected under both.[83] This would allow, therefore, for TCEs to enjoy the protection available under copyright law, performers' and other neighbouring rights, industrial property law, cultural heritage law, etc. Protection of folklore expressions in foreign countries is provided for on the principle of reciprocity or on the basis of international treaties and other agreements[84] with the intention for the Model provisions to pave the way towards a system of regional and international protection.[85] Subsequently, a draft treaty for the international protection of TCEs was prepared in 1984.[86] However, in view of the lack of experience

[75] Views of the then Chief, Copyright Division of UNESCO as reported in: Salah Abada, 'UNESCO/WIPO Regional Consultations on the Protection of Traditional and Popular Culture (Folklore)', in *Copyright Bulletin*, vol XXXIII, no 4 (1999): pp 35–61.

[76] 'Illicit exploitation' is characterized as 'any utilization in violation of authorized uses made with intention for commercial gain and outside the traditional or customary context' (section 3). The 'traditional context' is its proper artistic context based on continuous usage by the community while the 'customary context' is in accordance with the practices and everyday life of the community.

[77] UNESCO, *Commentary* to the Model Provisions at p 18. [78] Section 4.

[79] Section 5.

[80] Section 6. Violation of the first and commission of the last two actions constitute the 'other prejudicial actions' referred to in the title.

[81] In Sections 7 ('Seizure and Other Actions') and 8 ('Civil Remedies').

[82] In particular: the Universal Copyright Convention (1952) [6 UST 2731, 25 UNTS 1341]; the Rome Convention on Performers (1961) [496 UNTS 43]; the Berne Convention (1971) [25 UST 1341, 828 UNTS 221], especially Art 15(4); Paris Convention on Industrial Property (1975) [21 UST 1583, 828 UNTS 305]; and the UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)].

[83] Section 12. [84] Section 14. [85] UNESCO, *Commentary* (n 77) at p 29.

[86] UNESCO/WIPO Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1984).

relating to their protection at national level and, in particular, of the application of the Model Provisions, it was judged premature to establish an international treaty at this time. In addition, this is a particularly complex issue that raises a series of fundamental questions and specific problems regarding the adoption of such a treaty, including: the lack of workable mechanisms for the protection of EFs in many countries of origin; which State's authority would be competent to authorize utilization of EFs; what should happen where one State has acceded to the treaty and another has not; and how regional cooperation can be organized in relation to shared EFs.

In 1978, WIPO and UNESCO had formally agreed on a dual-track approach to protection of folklore whereby UNESCO would examine the question from an interdisciplinary standpoint[87] and WIPO would continue to explore means of protection derived from IP rules. Following the failure to adopt the aforementioned draft treaty in 1984,[88] formal UNESCO/WIPO cooperation was suspended and UNESCO's work in this area led, in 1989, to the adoption of the Recommendation on Traditional Culture and Folklore.[89] This instrument reflects the approach assigned to UNESCO of the aforementioned twin-track arrangement with WIPO. It also represents the first international instrument to provide directly for the protection and safeguarding of traditional culture and folklore (which can be understood to include traditional knowledge).[90] A Recommendation text was chosen for this rather than a treaty setting out general principles which Member States are invited to adopt through legislative, administrative, or other means. This had the disadvantage of being non-binding but, on the other hand, paved the way both for immediate policy and legislative development in countries willing to do so and, importantly, for future legal development in this area. The approach that it took was interdisciplinary and addressed issues of the definition, identification, conservation, preservation, and utilization of folklore.

The 1989 Recommendation was adopted at the 29th session of General Conference in 1989. Among important considerations noted in the Preamble, the 'economic, cultural and political importance [of traditional culture and folklore],

[87] In other words, addressing such issues as the definition, identification, preservation, conservation, promotion, and protection of folklore.

[88] Draft Treaty (n 86). This treaty would have placed an obligation on Parties to protect folklore. It was rejected by industrialized States that objected to providing protection to community-based cultural expressions.

[89] Recommendation for the Safeguarding of Traditional Culture and Folklore (UNESCO, Paris, 1989), accessed on 10 November 2014 at: <http://unesdoc.unesco.org/images/0013/001323/132327m.pdf>. This is the first time that the term 'safeguarding' was used in the title for a cultural heritage instrument and 'protection' is used in the text to mean, specifically, IP-style protection.

[90] This was the culmination of work undertaken by a Committee of Experts on the Safeguarding of Folklore established in 1982 and a meeting of the Committee of Governmental Experts on the Safeguarding of Folklore convened in Paris in 1985 to carry out an interdisciplinary study of the possible range and scope of general regulations for the safeguarding of folklore. After General Conference decided in 1987 to develop the text, a Special Committee of Governmental Experts was set up in that year to prepare the final draft.

its role in the history of the people, and its place in contemporary culture' is recognized as is the need to safeguard the cultural community itself as well as any cultural traditions it creates or maintains. It faces threats 'from multiple factors', an open-ended formulation that allows for new dangers from changing social and economic factors (such as technological advances) to be taken into account in the future.[91] Characterized as a 'living culture', correctly emphasizing its dynamic and constantly evolving character, the definition of 'folklore',[92] however, suffers from a narrowness of focus and fails to take account of the social, cultural, and intellectual context of the creation and maintenance of folklore; the reference to TK and indigenous heritage is too limited.

The Recommendation is divided into six main substantive parts: identification (B); conservation (C); preservation (D); dissemination (E); protection (F); and international cooperation (G). The penultimate section[93] deals with the IP protection of folklore. This is understood as constituting 'manifestations of intellectual creativity', whether individual or collective, that merit protection similar to that afforded to other intellectual productions.[94] The role and purpose of IP protection is expressed as being 'indispensable as a means of promoting further development, maintenance and dissemination of those expressions'. Hence, the 1989 Recommendation seeks to create a system whereby the creators and interpreters of folklore would be treated in a manner equivalent to that of copyright-holders. In addition, folklore of other countries should be safeguarded each time an expression of folklore is publicly exploited in a manner that involves the economic or moral rights attaching to them. Significantly, the point is made that, although that IP rights can contribute to protecting this heritage, they can only provide limited protection from improper use and exploitation.[95] It is an approach, however, that has been favoured by many States in the pursuit of guaranteeing the economic rights of the creators of the material expressions of their traditional cultural heritage. Other categories of rights relevant to folklore that are already protected, and should continue to be so, include the protection of the informant as a transmitter of tradition on the grounds of privacy and confidentiality; protection

[91] The Preamble to the 1972 World Heritage Convention takes a similar approach, noting that the sites are 'threatened with destruction not only by the traditional causes of decay but also by changing social and economic conditions which aggravate the situation'.

[92] 'Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its social and cultural identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.'

[93] Section F on the 'Protection of folklore'.

[94] Section F(a) reads: 'regarding the "intellectual property" aspects: [Member States should] call attention to the important work of UNESCO and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent'.

[95] The limitations of the IP approach to protection of intangible heritage are noted in the proviso that 'this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent'.

for the interests of the collector by ensuring materials gathered are properly conserved; and safeguarding the materials against misuse, intentionally or otherwise.

A major criticism levelled against the Recommendation is that it was heavily weighted towards a view of 'safeguarding' designed with the needs of scientific researchers and government officials in mind.[96] Another criticism of relevance for IP-related rights, is that it does not address the question of the right of tradition-holders (or their communities) to authorize specific uses of their heritage which is central to their control over it.[97] A further, and very serious, gap is the lack of any specific requirement for the full, prior, and informed consent of holders for the use and exploitation of their knowledge; in its place, there is a rather weak call for the scientific community to adopt a Code of Ethics. Again, we see here the problem of the researcher-oriented character of the text. The position the Recommendation takes on the question of secrecy of folklore is also problematic since it clearly assumes that all folklore can and should be widely disseminated in order to raise awareness of its value.[98] Although this can be a useful approach to protection, recognition must also be given to the fact that some areas of folklore are, by their nature, confidential and that their secrecy must be safeguarded. Protection of the privacy and confidentiality of informants[99] should be extended to guarantee the secrecy of folklore that is traditionally confidential for spiritual or cultural reasons. Another important shortcoming of the Recommendation is the very limited reference to traditional knowledge, an aspect of traditional culture that often plays a very important role in their values, know-how, and creativity.

Traditional knowledge

Traditional knowledge—sometimes known as 'indigenous' and/or 'local' knowledge—is an important element of cultural heritage and one that remains poorly protected. For example, we have seen that it was all but ignored in the 1989 Recommendation while the 1982 Model Provisions restrict themselves to the artistic expressions of folklore and so do not address TK at all. One area of international law in which the role and importance of TK has been fully recognized and appreciated is in connection with biodiversity, with particular reference to the TK and environmentally sustainable practices of indigenous peoples.[100] Moreover, Agenda 21 of the 1992 Rio Declaration calls for recognition of the values, TK, and resource management practices of indigenous peoples.[101] Up

[96] International conference on *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Co-operation* jointly organized by UNESCO and the Smithsonian Institution in Washington DC, June 1999.

[97] To ensure this presents a very complex challenge since processes for authorization would, of necessity, differ from one cultural community to another and some communities might refuse altogether to disclose who the authorizing authority is. This is now being considered by WIPO in its Revised Provisions on TCEs and Draft Articles on TK which were tabled for consideration in 2014. See more on this below.

[98] Sections B(c)(1) and C(g) are examples of this attitude. [99] Section F(b)(i).

[100] See, in particular, Art 8(j) of the UN Biodiversity Convention (1992).

[101] Principle 22.

until the late 1990s, the social and cultural dimensions of this process have thus far been largely ignored and it is only since the late 1990s that the importance of adapting sustainable development to specific socio-cultural concepts has been properly understood.[102]

There has been an unfortunate tendency among both commentators and policy-makers to regard the communities that hold TK as homogeneous and to overlook the complexity of the group dynamics at play.[103] In so doing, they have tended to take an idealized view of culture (in WIPO's instruments and the 1992 UN Convention on Biological Diversity, for example) as 'knowledge held by a homogeneous and deindividualized collectivity that is believed to be a characteristic of premodern societies'.[104] However, as Wolfgram points out, neither the supposed collective nor the disembodied knowledge they are supposed to hold has any ontological reality forming, as they do, 'a tautological and mutually reinforcing ideological representation'. As a result of this misrepresentation of 'the community', there is a danger of approaches being taken (with the best intentions) that undermine existing social and regulatory structures within the community and that may even lead to conflicts within it. As an example of the dangers of inappropriate assumptions, the Ayurvedic pharmaceutical practitioners in Kerala do not conform to the private-versus-public and the individual-versus-collective dichotomies that are assumed in this area of legal protection and individual practitioners ensure profits either by restricting access to their knowledge (treating their innovations as secrets) or by the wide disclosure and dissemination of it that increases their fame.[105] Hence, neither the social context nor the protective approaches conform to those expected in even *sui generis* frameworks of protection.

In addition, it is important also to understand that, although they are a group of central importance, the tradition-holders of such knowledge are not confined to indigenous peoples but also include other local communities such as fishermen and rural farmers.[106] In reality, many of the characteristics that have been ascribed to the TK of indigenous people can also apply generally to the TK held by non-indigenous societies. First, it is community-generated, is usually held collectively, and customary laws often regulate its access and its use both within and outside holder communities.[107] It is transmitted orally from generation to generation

[102] See: Douglas Nakashima, 'Conceptualizing Nature: The Cultural Context of Resource Management', *Nature Resources*, vol 34, no 2 (1998): p 8. The great social and economic importance of traditional knowledge to many societies is illustrated by the fact that, in Africa, 70–80 per cent of the population relies on traditional medicinal knowledge for their primary healthcare.

[103] Forsyth, 'Lifting the Lid on "the Community"' (n 1) notes at p 14 that, 'there is no rational basis or customary norm on which to ground an assumption that knowledge-holders will act in ways that benefit the population as a whole'.

[104] Matthew Wolfgram, 'The Extratextualization of Ayurveda as Intellectual Property', *International Journal of Cultural Property*, vol 19, no 3 (2012): pp 313–43.

[105] Wolfgram, 'The Extratextualization of Ayurveda' (n 104).

[106] Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (n 2) notes at p 92: '[TK-holders include] a diverse range of (indigenous and non-indigenous) populations and occupational groups, such as traditional farmers, pastoralists, fishers and nomads, whose knowledge is linked to specific places and is likely to be based on a long period of occupancy spanning several generations.'

[107] Indeed, there exist customary systems akin to IP regimes that govern access to and use of TK.

and so is usually undocumented and is both location- and culture-specific. It is also dynamic and is based on innovation, adaptation, and experimentation, a point that it is essential to appreciate about TK: its 'traditional' character does not mean that it is somehow static, rather it means that it is a form of knowledge that has been transmitted over generations.[108] Traditions (such as beliefs and knowledge) are continually evolving and are dynamic and the 'traditional' character of TK is not its age but rather the way in which it is acquired and used.[109] As Dutfield has noted, 'the social process of learning and sharing knowledge which is unique to each indigenous culture lies at the very heart of its "traditionality" '.[110] Such knowledge forms the basis for decision-making and survival strategies and is a key element in the social capital of often-marginalized groups of people, reflecting their social relations and socio-cultural values as well as their way of viewing the world.

TK is a comprehensive notion whose elements are predominantly cultural in character, but the notion of 'culture' when viewed in relation to TK, is not primarily an artistic or aesthetic construct but rather the whole way of life of a given society. It includes such 'cultural' elements as: spirituality, spiritual knowledge, ethics, and moral values; dances, ceremonies, and ritual performances and practices; music; language; names, stories, traditions, and oral narratives; places of cultural significance, immovable cultural property, and their associated knowledge; scientific, agricultural, technical and ecological knowledge, and the associated skills; and symbols, and visual compositions (designs). Definitions of TK often emphasize its difference from 'the international knowledge system' and 'western' or 'scientific' knowledge systems. The difference, however, may be more in the way it is used rather than how it is created, with theoretical 'scientific' knowledge separated from practice in a way that traditional societies do not differentiate the two.[111] It is, however, a mistake to assume that TK is always local and informal: much of it is empirical and systematic, developed over generations through their interaction with the natural environment and providing a system of classification and resource management based on empirical observation; it

[108] Madhavi Sunder, 'The Invention of Traditional Knowledge', *Law and Contemporary Problems*, vol 70 (2007): pp 97–124 at p 106 has noted the paradox that the use of concepts such as 'TK' and 'public domain' is now becoming an obstacle to understanding poor peoples' knowledge as a form of IP since it is assumed that this knowledge is static and devoid of any innovation.

[109] Russel L Barsh, 'Indigenous Knowledge and Biodiversity, in Indigenous Peoples, Their Environments and Territories', in *Cultural and Spiritual Values of Biodiversity* edited by Darrel A Posey (IT Publications/UNEP, 1999) at p 73: 'What is "traditional" about traditional knowledge is not its antiquity but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its "traditionality".'

[110] Graham Dutfield, 'The Public and Private Domains: Intellectual Property Rights in Traditional Knowledge', *Science Communication*, vol 21 (2000): pp 274–95 at p 274.

[111] David Warren, 'Using Indigenous Knowledge in Agricultural Development', *World Bank Discussion Paper* No 127 (1997): 'Indigenous knowledge contrasts with the international knowledge system generated by universities, research institutions and private firms. It is the basis for local-level decision-making in agriculture, health care, food preparation, education, natural resource management'.

also includes more formalized knowledge systems such as the Ayurvedic health system.[112] The World Conference on Science (1999), for example, acknowledged the empirical character of TK which they viewed as a form of cultural heritage to be preserved, protected, researched, and promoted and called for the equitable sharing of benefits from its exploitation.[113] In this way, they took an approach towards safeguarding TK and protecting the interests of its holders that mixed IP and broader cultural protective strategies in an interesting manner. This is wholly appropriate given that for indigenous and local communities to continue to create and develop their knowledge, both they themselves and their way of life must be sustained.[114] To achieve this would imply, inter alia, valuing this knowledge itself, safeguarding the human, cultural, and social context within which it has been developed and transmitted, as well as providing for a variety of protective mechanisms, including IP rules.

The aforementioned TRIPS agreement of the WTO,[115] designed to harmonize IPR standards as they apply to trade and provide it with a more secure basis,[116] is relevant also to the IP-based protection of TK. The rights it protects are clearly private rights and thus the knowledge, ideas, and innovations of traditional societies viewed by them as a commonly held knowledge is not included in its protection regime. Furthermore, as with the copyright regime, IP protection is granted only to products that have an industrial application and to innovations that are trade-related. As a result, most innovations related to TK that are in the public domain are treated as for local use and fall outside TRIPS.[117] Essentially, the underlying philosophy of TRIPS does not recognize innovations in the form of TK that has been handed down through generations and that is held collectively. In addition, the TRIPS Agreement does not make any explicit reference to TK or make any distinction between the knowledge of indigenous peoples and local

[112] For more on Ayurvedic medicine as a scientific system, see: Wolfgram, 'The Extratextualization of Ayurveda' (n 104).

[113] Meeting Reports of the World Conference on Science, Budapest, June/July 1999, including the *Science agenda—Framework for Action* at paras 32 and 33 and Section 3.4 'Modern science and other systems of knowledge' at paras 83–7.

[114] The definition of 'indigenous knowledge' in the *Declaration on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific* held in Noumea, New Caledonia, 15–19 February 1999, made this abundantly clear: 'Traditional knowledge and cultural expressions are any knowledge or any expressions created, acquired and inspired (applied, inherent and abstract) *for the physical and spiritual well being of the indigenous peoples of the Pacific*. The nature and use of such knowledge and expressions are transmitted from one generation to the next to enhance, safeguard and perpetuate the identity, well-being and rights of the indigenous peoples of the Pacific' (emphasis added).

[115] Uruguay Round of negotiating the General Agreement on Tariffs and Trade (GATT) (World Trade Organization, 1994) [1867 UNTS 187; 33 ILM 1153 (1994)].

[116] It reads (Preamble): 'Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to international trade.'

[117] GS Nijar, 'Intellectual Property Rights and the WTO: Undermining Biodiversity and Indigenous Knowledge Systems', (n 19) argues that TRIPS therefore aims to reinforce the rights of transnational corporations at the expense of the people and producers of the Third World.

populations and that of industry. The rights that it provides are clearly intended to be of benefit to commercial entities rather than local communities: most importantly, indigenous and local communities do not themselves regard this knowledge primarily as a commercial asset (in most cases) in the way that such commercial entities do.[118] It is also worth noting in this regard that, although indigenous peoples and other TK-holder communities have for many years been agitating for their economic rights in this knowledge to be respected when it is exploited commercially, this has been in response to exploitation that has often occurred without their prior and informed consent: this does not necessarily mean that they would choose for it to be exploited in this manner if other avenues to protect it were available to them.

The term, scope, and enforcement of patents were also addressed in TRIPS which provides for a duration of patent of no less than 20 years from the filing of the application. Patents are also subject to the general enforcement regulations of TRIPS.[119] The Agreement requires Member States to grant protection to plant varieties through patents, *sui generis* protection or a combination of both[120] and to allow for the patenting of micro-organisms. It thus places on them the obligation to enact IP legislation that reproduces the regimes of the industrialized States by extending patents to 'modified' life forms and plant varieties.[121] This is potentially pernicious for control by cultural communities over the TK that is embedded in plant varieties which are, in many cases, the result of gradual modification over many centuries on the basis of local TK. In response to these pressures, several developing States have enacted legislation to regulate access to biological resources and to protect indigenous knowledge systems; these include *sui generis* rules to protect plant varieties and associated indigenous plant breeding customs and practices.[122] It should be noted, however, that in enacting such *sui generis* legislation to protect traditional knowledge systems Parties are not acting in violation of their obligations under TRIPS since it simply sets out minimum obligations[123] which thus leaves open the possibility of establishing broader protection under national legislation. For example, in response to calls for new forms of *sui generis*

[118] However, several Member States of the WTO have argued that nothing in the Agreement prevents them from implementing national legislation and measures that support the objectives of the CBD, including protection of traditional knowledge through *sui generis* systems.

[119] These are general enforcement obligations (Art 41), civil and administrative procedures and remedies (Arts 42–49), provisional measures (Art 50), special requirements related to border measures (Arts 51–60), and criminal procedures (Art 61).

[120] Article 27(3)(b) allows for the following exclusions from patentability: 'Plants and animals other than microorganisms, and essentially biological processes for the production of plants and animals other than non-biological and micro-biological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.'

[121] Nijar, 'Intellectual Property Rights and the WTO' (n 19) at p 5 notes that 'This means that the dominant paradigm of the industrialized West for IPRs is globalized.'

[122] Nijar, 'Intellectual Property Rights and the WTO' (n 19) at p 10 cites a number of examples, including a regional initiative in the *African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources* (OAU, 1989).

[123] Article 1(1).

IP protection by the WTO, the Third World Network (Penang) proposed the development of a model law dealing with community IP rights.[124]

Hence, TRIPS is without any favourable aspects for the protection of TK. For example, TRIPS explicitly recognizes the need to develop and use indigenous technologies for the conservation and sustainable use of biological diversity.[125] In addition, the objectives of TRIPS state that IP protection should be secured in a manner that is conducive to social and economic welfare.[126] Measures may also be taken to protect public health and nutrition and to promote the public interest in sectors of vital importance to socio-economic and technical development:[127] it is conceivable that this exception could be used to protect traditional medical knowledge among other forms of TK and related innovations. Moreover, Parties are permitted to refuse patents where their commercial exploitation is seen to be against *ordre public* and public morality:[128] States whose communities hold important TK relating to life forms could use this to protect it. However, it seems that most Parties regard this as operating on a case-by-case basis rather than as a general exception affecting a wide range of patents, such as to plant varieties and their associated knowledge. The disclosure and acquisition of undisclosed information without consent is prevented on condition that the information in question is secret, has a commercial value because of its secrecy and that reasonable steps have been taken to keep it secret.[129] This could be used to protect some TK that is kept secret by its bearers, although the requirement that its commercial value is predicated on its secret nature would limit the range of information that this applies to and would not, for example, include most sacred knowledge.

The UN Convention on Biological Diversity (CBD) is an international treaty with a potentially important contribution to make to the protection of TK of which the vast majority is environmentally related. This treaty, in the articles dealing with genetic resources, aims to reach a compromise between developing countries that are rich in genetic resources (and the associated knowledge) and the developed world that needs to ensure access to these. Of course, such access must be based on some principles and the principle of common heritage of humankind (in the sense used in cultural heritage treaties) is not appropriate since it would render these resources and knowledge in an unprotected public domain where access to them would be free to all. Beyond the arrangements controlling access to genetic resources, the CBD also contains a key article that sets out the responsibilities of Parties to respect 'indigenous and local knowledge, innovations and practices' and protect the rights of the holders of these.[130] Although the treaty

[124] Darrel Posey and Graham Dutfield, *Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa, 1997) at p 110.

[125] Article 18(4). [126] Article 7(b). [127] Article 8(a) and (b).

[128] Article 27(2). [129] Article 39(2).

[130] Article 8(j) requires States Parties to: 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustained use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge.'

text does not set out in detail what actions are required by Parties to ensure this, two important instruments have been concluded within the treaty's framework that reinforce this: the Bonn Guidelines (2002) which are voluntary but which enshrined the spirit of Article 8(j) and the Nagoya Protocol (2010)[131] which reinforces the claims of indigenous and local populations with regard to their genetic resources and TK and establishes mechanisms to prevent their misappropriation, mainly through ABS agreements.

Srinavas has identified the weakness of such ABS arrangements as the failure to implement norms relating to prior informed consent (PIC) and the general non-recognition of the rights and claims of local and indigenous communities in this regard.[132] In the CBD, although there is no clear definition of PIC or explanation of the content of ABS arrangements, both the Bonn Guidelines and the Nagoya Protocol provide detailed guidance as to their content and application. The Bonn Guidelines set out the principles on which a PIC system should operate and the expected elements of it. The Nagoya Protocol is aimed at achieving more clarity about ABS regimes: if it is properly implemented,[133] it will help to resolve some outstanding issues surrounding PIC, the role of customary norms and practices and the operation of customary protocols in ABS. In addition to ABS, Srinavas has proposed the approach of 'traditional knowledge commons' (TKC) that goes beyond protecting purely economic interests of TK-holders and other stakeholders to ensure respect for other values, including spiritual ones. In this approach, the TKC is a commons (not a public domain) to which access is regulated and restricted: he advocates the possible use of an open-source approach to licensing (akin to those applied in the internet environment) in order to encourage useful innovations for communities that lack the technological resources themselves to make them. Community protocols for governing access to TK and equitable benefit-sharing can serve as additional tools for ensuring that the non-commercial values of communities with regard to their TK are respected. Such approaches are designed, in part, to resolve the dilemma that indigenous and local communities cannot afford to place their TK in the public domain (with unrestricted access) but, at the same time, the use of IPs to protect their interests—essentially a strategy of commercialization to prevent misappropriation—may well result in the disregard for their values and commodification of the knowledge.[134]

[131] 'Bonn Guidelines' adopted by the CBD Conference of the Parties (COP) in Decision VI/24 on Access and Benefit-sharing as Related to Genetic Resources (2002). The 'Nagoya Protocol' was adopted by the CBD COP in Decision X/1 on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010).

[132] Krishna Ravi Srinavas, 'Protecting the Traditional Knowledge Holders' Interests and Preventing Misappropriation—Traditional Knowledge Commons and Biocultural Protocols: Necessary but Not Sufficient', *International Journal of Cultural Property*, vol 19, no 3 (2012): pp 402–22.

[133] Srinavas, 'Protecting the Traditional Knowledge Holders' Interests' (n 132) notes that implementation of the Protocol has been patchy thus far.

[134] For more on issues related to IP and commodification of TK (as a part of ICH), see: Paolo D Farah and Riccardo Tremolada, 'Desirability of Commodification of Intangible Cultural Heritage: The Unsatisfying Role of Intellectual Property Rights', *Transnational Dispute*

A New IP Treaty Based on *Sui Generis* Approaches to Protection?

As we have seen, the idea of developing an IP treaty that employs *sui generis*, or specially adapted, approaches to the protection of traditional cultural expressions and folklore was an objective of the joint work of UNESCO and WIPO in the 1982 Model Provisions and subsequent deliberations. Such an instrument would essentially be concerned with the following elements: identifying the specific content of these expressions;[135] identifying the rights of 'owners' over such expressions (although identification of the 'owners' themselves can prove problematic);[136] and regulating their exploitation both nationally and overseas. As the basis for developing a *sui generis* regime of protection, a series of minimum rights must be identified,[137] which might involve: including moral as well as economic rights (as do the Model Provisions); recognition for traditional (customary) forms of collective ownership and communal authorship; preventing the unauthorized registration of sacred and culturally significant symbols and words as trademarks; requiring proof of prior informed consent in patents that employ TK; and providing the relevant IP protection in perpetuity. The *sui generis* rights to be developed can take the form of defensive protection which includes, for example, the requirement for patent applicants to disclose the origin of TK, establishing prior art databases of TK (as India has done with the Traditional Knowledge Digital Library) and the use of national legislation to establish misappropriation regimes[138] with civil or criminal remedies (such as the obligation to stop using the TK or to pay compensation to the holder(s)). All of these are applied in some form in the new WIPO draft texts for TCEs and TK discussed below.

A question that has exercised WIPO since the late 1990s has been how to define key terms for this area of work, namely 'traditional cultural expressions' and 'traditional knowledge'. The artificial nature of this definitional approach is underlined by the fact that, although the intergovernmental Committee's remit divides these two heritage-related questions into the separate categories of TCEs and TK, in reality this division is not always so clear-cut and they are very closely interrelated.[139] Moreover, despite the fact that indigenous peoples have frequently

Management, vol 11, no 2 (2014), available at: <http://www.transnational-dispute-management.com/article.asp?key=2096>.

[135] A difficult aspect of this would be developing the criteria for identifying traditional cultural expressions and folklore that is shared between several regional States.

[136] In this case, often a cultural community that is the holder of the tradition in question.

[137] In a similar manner to the way in which Berne and Rome Conventions set out minimum standards of protection.

[138] For more on this, see: Carlos M Correa, *Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge* (Geneva: Quaker United Nations' Office, 2001).

[139] The Commentary to General Principle (f) on 'complementarity with protection of traditional knowledge' in Revised Provisions (n 126) reads: 'This principle recognizes the often inseparable quality of the content or substance of traditional knowledge *stricto sensu* (TK) and TCEs/EoF for many communities… The Committee's established approach of considering the legal protection of

called for better IP protection of their moral and economic rights with regard to artworks (such as Aboriginal designs), music, and traditional botanical knowledge, the IP system will always represent a rather narrow, specialist approach to heritage protection. For this reason, a more broad-based 'cultural' approach to this heritage (such as that taken by the 2003 Intangible Heritage Convention) will always be required alongside the IP one.[140] It is worth noting also that the possibility of a future international treaty dealing with the IP aspects of this heritage represented a major concern for Member States of UNESCO when negotiating the 2003 ICH Convention, desiring to avoid potential overlaps. Article 3 of that Convention, addresses its relationship with other international instruments (referring in paragraph (b) specifically to IP instruments) and is therefore an attempt to prevent any problems arising in this regard. However, this issue is not yet finally resolved and, with the increased likelihood that WIPO's work on genetic resources and TK will result in a new international treaty (as well as the possibility of some other instrument on TCEs), the question of ensuring that the 2003 Convention and WIPO's efforts are compatible remains an important one.

In 1998, a Global Intellectual Property Issues Division was established in WIPO[141] in order to address, inter alia, the question of designing appropriate IP rights for new beneficiaries such as indigenous peoples and the protection of 'expressions of folklore'. It was agreed at the WIPO General Assembly session in autumn 2000 to establish an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.[142] The primary themes for the Committee's discussions concerned the IP issues arising in the context of the following three areas: access to genetic resources and benefit sharing; protection of traditional knowledge, whether or not associated with these resources; and the protection of expressions of folklore. The last two are, of course, germane to the subject of this chapter. It was noted that each of these subjects cuts across the conventional branches of IP law and so they did not fit easily into the remit of any of the existing WIPO bodies,[143] requiring the establishment of

TCEs/EoF and of TK *stricto sensu* in parallel but separately is, as previously discussed, compatible with and respectful of the traditional context in which TCEs/EoF and TK are often perceived as integral parts of an holistic cultural identity'.

[140] Janet Blake, *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage* (Paris: UNESCO, 2000) [Doc CLT-2001/WS/8; in English and French] at pp 13–31 and pp 47–59.

[141] Its purpose was described in a WIPO briefing document as: 'a response to the challenges facing the intellectual property system in a rapidly changing world . . . [that] . . . call for the proactive exploration of new ways in which the intellectual property system can continue to serve as an engine for social, cultural and economic progress for the world's diverse populations.'

[142] 25th Session of the WIPO General Assembly, Geneva, 25 September–3 October 2000. See: World Intellectual Property Organization, 'Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', document prepared by the WIPO Secretariat [WO/GA/26/6].

[143] The pre-existing WIPO committees were the: Standing Committee on the Law of Patents (SCP); Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT); Standing Committee on Copyrights and Related Rights (SCCR); and the Standing Committee on Information Technologies (SCIT).

a new Intergovernmental Committee to address them. Within this framework, a far more far-reaching *sui generis* system than that offered in the 1982 Model Provisions has been under consideration since 2000 aimed at providing appropriate IP protection for TK as well as expressions of folklore. To achieve this involves framing specific new measures for protecting TK that go beyond the existing rights established in the IP system.

One of the long-standing objectives of the work of this Intergovernmental Committee has been the future development of a new international treaty to address with the IP-related aspects of genetic resources, TK, and folklore. This work has thus far resulted in the development of the Revised Provisions for Protecting Traditional Cultural Expressions (Rev.2) and Draft Articles on the Protection of Traditional Knowledge (Rev.2), both adopted by the Intergovernmental Committee in 2014[144] and it was agreed at the following session[145] to transmit both these texts to the WIPO General Assembly for consideration. In its discussions in 2014, thematic areas of TCEs, TK, and genetic resources were treated as containing 'cross-cutting elements'. Given that these two documents (discussed below) are currently in draft form and contain many alternative readings, the consideration given to them here must be a rather general one and cannot be taken to reflect the final form they are likely to take.[146] In addition, it should be noted that the text in brackets has been kept in some cases where it is necessary to present the alternative wordings, in others, I have summarized the text for ease of reading.

WIPO Revised Provisions for Protecting Traditional Cultural Expressions (Rev.2)[147]

Certain objectives of developing these Provisions are presented which illustrate some of the main challenges facing the protection of TCEs and important purposes of the instrument as perceived by the drafters, including the following: to provide the beneficiaries (potentially local communities, indigenous peoples, etc) with the means to prevent the misappropriation and misuse/offensive and derogatory use of their TCEs, to control ways in which their TCEs (and adaptations of these) are used outside their customary context, to promote the equitable sharing of benefits arising from their use with their PIC or approval, and to encourage traditional creativity and innovation; to prevent the exercise of IP rights acquired over TCEs without authorization; to facilitate intellectual and artistic freedom, research, etc based on mutually agreed terms which are fair and equitable and subject to the prior informed consent (of the beneficiaries); and to secure rights already acquired by third parties, legal certainty, and a rich and accessible public

[144] Documents WIPO/GRTKF/IC/27/REF/FACILITATORS DOCUMENT REV. 2 and WIPO/GRTKF/IC/27/REF/FACILITATORS TCES DOCUMENT REV. 2, respectively, adopted at its 27th session on 24 March–4 April 2014.

[145] The 28th session was held on 7–9 July 2014.

[146] It is also necessary, for the sake of clarity, to make arbitrary choices as to which of several alternative readings to present in the text here.

[147] WIPO/GRTKF/IC/27/REF/FACILITATORS DOCUMENT REV. 2.

domain.[148] A lack of terminological clarity has bedevilled this area which, combined with a multiplicity of terminologies employed, has greatly added to the complexity of an already challenging issue, namely applying traditional IP rules to TCEs (or EFs). A 'traditional cultural expression' is defined in the Use of Terms as 'any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions,[149] materials,[150] music and sound,[151] verbal[152] and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].' The first four of five types of TCE (namely, actions, materials, music and sound, and verbal) all have footnotes setting out possible forms these may take. The content of these is interesting since it broadens considerably our expectation of the subjects of IP protection and is reminiscent of the domains of the 2003 Intangible Heritage Convention.[153] Some criteria for the eligibility of TCEs to be the subject matter of protection are also set out, again containing several elements reminiscent of ICH under the 2003 Convention: (a) they are created, expressed, and maintained, in a collective context, by indigenous and local communities; (b) they are distinctively associated with the cultural and/or social identity and cultural heritage of the cultural community; (c) they are transmitted from generation to generation, whether consecutively or not; (d) they have been used for a term as determined by each [Party], but not less than 50 years; (e) they are the result of creative intellectual activity; and (f) they are/may be dynamic and evolving.[154]

Thus far, defining the beneficiaries of the protection afforded by this instrument has proven challenging and the draft provision[155] concerning this contains several alternates, as follows:

Beneficiaries [of protection] are indigenous [peoples] and local communities [and/or nations] [and nations that are custodians for the beneficiaries as provided for in

[148] In the Use of Terms, 'public domain' is defined as referring to 'tangible and intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.'

[149] 'Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.' '[W]orks of mas' refers to the Trinidadian carnival mas bands, now copyright protected. The text of this footnote is in note 4 on p 4 of the WIPO document (n 147).

[150] 'Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.'

[151] 'Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.'

[152] 'Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.'

[153] Which, according to Art 2(2) of the 2003 Intangible Heritage Convention are: '(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship'.

[154] They are reminiscent in particular of the criteria for inscription on the Representative List of the 2003 Intangible Heritage Convention. See Chapter 5.

[155] Draft Art 2 on Beneficiaries of Protection/Safeguarding at Art 2.1.

Paragraph 3] [who [create], express, maintain, use and/[or] develop the [subject matter]/[traditional cultural expressions] [as part of their collective cultural or social identity]] [meeting the criteria for eligibility defined in this [instrument], or as determined by national law.]

Or the much briefer alternative,

[Beneficiaries [of protection] are indigenous [peoples] and local communities, or as determined by national law.]

It is clear from this that identifying the beneficiaries—and even deciding on the use of that term[156]—is going to prove extremely difficult and there are some key issues involved here.[157] First, are the indigenous communities (if mentioned explicitly) to be typified as 'peoples' or simply as part of the umbrella term 'indigenous and local communities'? This is significant since, if the term 'peoples' is employed, it would suggest that they are the holders of the right to self-determination under international law.[158]

The respective rights of the beneficiaries (that should be protected by Parties) and the actions that users should be encouraged by Parties to undertake are then set out.[159] First, the rights of beneficiaries include to: create, maintain, control, and develop their TCEs;[160] prevent the unauthorized disclosure and fixation and unauthorized use[161] of [secret and/or protected] TCEs; authorize or deny the access to and use/[utilization] of TCEs based on prior and informed consent or approval and involvement and mutually agreed terms; protect against any [false or misleading] uses of TCEs, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and prohibit any use or modification which distorts or mutilates a TCE or that is otherwise offensive, derogatory, or diminishes its cultural significance to the beneficiary.[162] The actions that users should be encouraged to undertake are (i) to attribute the TCEs to the beneficiaries, (ii) to provide beneficiaries with a fair and equitable share of benefits/compensation, arising from the use of [protected] TCEs, based on prior informed consent or approval and involvement and mutually agreed terms, and (iii) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable . . .] nature of the moral rights associated with the TCEs.[163] Provision is also made here for the situation of TCEs that

[156] 'Beneficiaries', 'beneficiaries of protection', or some other term not yet proposed.

[157] The Draft Articles on Traditional Knowledge discussed below suffer from the same terminological difficulty.

[158] It is this term that is used in the UN Declaration on the Rights of Indigenous Peoples (2007) and may well be a major reason for the highly protracted nature of the process of negotiating this text (the first version of which was adopted as a draft by ECOSOC in 1994).

[159] In Draft Art 3 on [Criteria for Eligibility]/Scope of [Protection]/[Safeguarding].

[160] In the draft text, these are referred to throughout as '[protected] TCEs'.

[161] Use includes: fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution; any use for commercial purposes, other than their traditional use; and the acquisition or exercise of intellectual property rights.

[162] Draft Art 3.1. [163] Draft Art 3.2.

are still maintained by the beneficiaries but are also publicly available (although not widely known, sacred, or secret). In such cases, Parties should ensure/encourage users to attribute and acknowledge the beneficiaries as the source, unless the beneficiaries decide otherwise or the TCE is not attributable and to provide beneficiaries with a fair and equitable compensation/share of the benefits of the use of the TCE, based on prior informed consent or approval and involvement and mutually agreed terms.[164] As with any such international IP regulation, it is usual for a national body to be designated for administering the terms of the agreement. In the case of this draft set of Provisions, there are four alternative articles[165] that range from a purely State-driven one[166] to another (first alternate) that attempts to balance the interests of the State with those of the beneficiary communities.[167] The final alternate would leave it up to WIPO to designate the appropriate authority, possibly suggesting that the negotiators are not optimistic about reaching agreement on any of the other alternative readings.

Appropriate limitations and exceptions to this protection for TCEs should be adopted by Parties[168] as long as their resultant use: acknowledges the beneficiaries, where possible; is not offensive or derogatory to the beneficiaries; is compatible with fair use/dealing/practice; does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and does not unreasonably prejudice the legitimate interests of the beneficiaries while *taking account of the legitimate interests of third parties*. Alternative 2 to this draft article also refers to the need to be 'compatible with fair practice'. Permitting such exceptions fulfils an important function in balancing the interests of the beneficiaries with other third parties and is a necessary element within such a regime. It is vital, however, that these are sufficiently restricted to protect the essential interests of the beneficiaries. Specific exemptions would be allowed, for example, non-commercial learning, teaching, and research purposes (in accordance with nationally established protocols), for the non-commercial preservation, [display], research, and presentation of TCEs in archives, libraries, museums, or other cultural institutions, and for the creation of an original work [of authorship] inspired by, based on, or borrowed from traditional cultural expressions. This last exemption is interesting since it reflects strongly the spirit of IP rules which are primarily aimed at encouraging creativity. In addition, their use for 'non-commercial cultural heritage or other

[164] Draft Art 3.3.

[165] For Draft Art 4.1, under Draft Art 4 on Administration of [Rights]/[Interests].

[166] Third alternate Art 41: '[Member States]/[Contracting Parties] may establish a competent authority, in accordance with national law, to administer the [rights]/[interests] provided [under]/[for by] this [instrument]'.

[167] This reads: '[Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] a competent authority or authorities, [with the prior informed consent or approval and involvement of] [in consultation with] [traditional cultural expressions [holders]/[owners]], in accordance with their national law [and without prejudice to the right of traditional cultural expression [holders]/[owners] to administer their [rights]/[interests] according to their customary protocols, understandings, laws and practices].'

[168] Draft Art 5 on Exceptions and Limitations at alternative 1.

purposes in the public interest, research and presentation' by public cultural institutions and the use/utilization of a TCE lawfully derived from sources other than the beneficiaries and/or known outside the beneficiaries' community are all allowed. These last two emphasize that the purpose of the Revised Provisions is to prevent the expropriation and wrongful use of TCEs currently under the control of the beneficiary community. In addition, for works already protected by IP (copyright, trademark, patent, or industrial design) rights, those permitted acts shall not be prohibited by the Provisions.

As noted above, the way in which duration of rights is traditionally dealt with under IP rules is not generally compatible with TCEs. The Revised Provisions suggest that the duration should be set by the Parties to 'last as long as the traditional cultural expressions fulfil/satisfy the [criteria of eligibility for protection] according to this [instrument]' in consultation with the beneficiaries. They are permitted to decide that protection of TCEs against 'any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong' should be of an indefinite duration.[169]

With regard to other international instruments, implementation by Parties should be 'in a manner [mutually supportive] of [other] [existing] international agreements' and it should not diminish or extinguish the rights that indigenous or local communities now hold or may acquire in the future.[170] A provision that, again, recalls the approach of the 2003 ICH Convention requires Parties to cooperate in addressing instances of transboundary TCEs, with the involvement of indigenous and local communities concerned.[171] Furthermore, the reference to capacity-building and awareness-raising is also reminiscent of the approach of the 2003 Convention[172] and, although placed as the final draft article, is a potentially significant one: it calls, inter alia, for Parties to 'provide the necessary resources for indigenous [peoples] and local communities and join forces with them' to develop capacity-building projects within their communities, that are *focused on the development of appropriate mechanisms and methodologies* to be developed with the full and effective participation of indigenous peoples and local communities. This acknowledges the fundamental importance of effective capacity-building not only in government institutions but also within the relevant communities and, importantly, the need to develop appropriate materials and methodologies for this.[173] Other draft provisions deal with the administration of rights/interests (Article 4), formalities (Article 7), sanctions, remedies and the exercise of rights (Article 8), transitional measures (Article 9), and national treatment (Article 11).

[169] Draft Arts 6.1 and 6.2. [170] Draft Art 10. [171] Draft Art 12.
[172] Articles 13 and 14.
[173] Draft Art 10.2. This recalls the approach taken in the UN Declaration on the Rights of Indigenous Peoples (2007).

A flexible approach is required in the Revised Provisions since effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection. Protection should respond to the traditional character of TCEs, namely their collective, communal, and intergenerational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; the fact that they are often vehicles for religious and cultural expression; and their constantly evolving character within a community. Special measures for legal protection should also recognize that, in practice, TCEs are not always created within firmly bounded identifiable 'communities'. Since these draft provisions concern specific means of legal protection against misuse of this material by third parties *beyond the traditional context*, they do not seek to impose definitions or categories on the customary laws, protocols, and practices of indigenous peoples and other local communities. In addition, the protection offered should not hamper the use, development, exchange, transmission, and dissemination of TCEs by the communities concerned in accordance with their customary laws and practices. No contemporary use of a TCE within the community which has developed and maintained it should be regarded as distorting if the community identifies itself with that use of the expression and any modification entailed by that use.

WIPO Draft Articles on the Protection of Traditional Knowledge (Rev.2)[174]

With regard to the protection of genetic resources (their derivatives) and TK, a negotiating text[175] was produced by WIPO for debate in the summer 2012 session of the Intergovernmental Committee. Subsequently, the Draft Articles examined here were developed for the protection of TK: what may be significant here is that these were adopted at the same Committee session as the aforementioned Revised Provisions on TCEs. Hence, TK has been to some extent decoupled from the question of genetic resources and, although placed in a separate text, has somehow been taken together with TCEs. This position makes sense in that (i) the legal issues surrounding genetic resources are rather technical and fall generally in the environmental area of IP protection[176] while (ii) there is, as this chapter acknowledges, a continuum between TCEs and TK if viewed as elements of the cultural heritage of local and indigenous communities. If we look at this latter

[174] WIPO/GRTKF/IC/27/REF/FACILITATORS TCES DOCUMENT REV. 2.

[175] Intellectual Property and the Protection of GRs [their Derivatives] and Associated Traditional Knowledge: NEGOTIATING TEXT (2012) [Doc WIPO/GRTKF/IC/20/10 PROV (Annex II)].

[176] Responding, eg, to rights and duties outlined in the UN Convention on Biological Diversity (1992).

relationship, we understand that 'culture' in this context should not be seen as a primarily artistic or aesthetic construct but as the whole way of life of a given society and including aspects such as techniques and know-how, language, values, rituals and rites, religious and spiritual beliefs, symbols, and gender relations. Furthermore, the 'traditional' element is not static since traditions (such as beliefs and knowledge) are continually evolving and are dynamic: The traditional character of TK is not therefore its antiquity but rather the way in which it is acquired and used.[177] It is important also to understand that the traditional holders of such knowledge are not confined to indigenous peoples but also include other local communities such as fishermen and rural farmers. In order to understand better the nature of TK and its value, the Draft Articles contain the following statement that is worth quoting here:

> . . . the [holistic] [distinctive] nature of traditional knowledge and its [intrinsic] value, including its social, spiritual, [economic], intellectual, scientific, ecological, technological, [commercial], educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are [fundamentally] intrinsically important for indigenous [peoples] and local communities and have equal scientific value as other knowledge systems;[178]

This not only sets out the value of TK underpinning its protection (its primary purpose) but serves also as a form of definition of TK. The value of the TK in question is primarily for these communities and is wide-ranging, being 'social, spiritual, [economic], intellectual, scientific, ecological, technological, [commercial], educational and cultural'. TK is later defined as having the following essential characteristics: it is created, and [maintained] in a collective context, by indigenous and local communities; it is directly linked (distinctively associated) with the cultural and/or social identity and cultural heritage of indigenous and local communities; it is transmitted from generation to generation, whether consecutively or not; it may subsist in codified, oral or other forms; and [or] may be dynamic and evolving.[179]

The human rights dimension of protecting this TK is suggested in the next principle (of awareness and respect) whereby respect for TK systems and for 'the dignity, cultural integrity and spiritual values of the traditional knowledge holders who conserve and maintain those systems' is called for.[180]

[177] Graham Dutfield, 'The Public and Private Domains' (n 110) at p 274 notes that: '[T]he social process of learning and sharing knowledge which is unique to each indigenous culture lies at the very heart of its "traditionality". Much of this knowledge is actually quite new but it has a social meaning, and legal character, entirely unlike the knowledge indigenous people acquire from settlers and industrialized societies'.

[178] Draft Preamble, Principle (i).

[179] Draft Art 1. These elements, again, closely echo the way that 'intangible cultural heritage' is understood in the 2003 ICH Convention at Art 2(1). It is notable that its character as cultural heritage is explicitly stated here.

[180] Draft Preamble, Principle (ii); alternative reading.

The following principle sets out a primary purpose of the instrument, namely to promote and support the conservation of (and respect for) TK systems through, inter alia, providing 'incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems'. Again, we see two important elements of the approach taken here: first, that TK is itself the result of creative processes and innovation and, second, that protecting the rights of the creators of this knowledge is essential to its continued viability.[181] Another, related, approach stated here is the need 'to recognize the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation' and the consequent need to protect, preserve, and enhance the public domain.[182] This expresses a fundamental position that TK has traditionally been located in a form of public domain as a commonly held knowledge (at least among those with customary access to it) and that classic IP rules tend to 'enclose' this knowledge by taking it out of the public domain and creating private, monopoly rights over it. Hence, protecting the interests of both the holder communities and the knowledge itself must involve ways of protecting this traditional public domain which might be viewed as a kind of 'third domain', situated between the private domain created by IP rights and the fully open and accessible public domain operated by many legal systems for non-IP protected knowledge.[183] A balance between customary control over TK and granting wider access to it is sought in the principle aimed at encouraging 'the documentation and conservation of traditional knowledge, encouraging traditional knowledge to be disclosed, learned and used' as long as it accords with customary rules/norms, the prior informed consent of TK-holders, mutually agreed terms, etc.[184] A further issue to note with regard to TK and the public domain is that, in many traditional communities, the TK-holders and/or tribal leaders play the role of custodians of the knowledge and bear responsibilities towards it, even when it is placed in the public domain which can be problematic.

[181] This is further expressed in the sixth principle noting that '[the protection of traditional knowledge should] contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations'.

[182] Draft Preamble, Principle (v).

[183] According to the Use of Terms, 'Public domain' refers to 'intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired'.

[184] Draft Preamble, Principle (ix) further notes that the draft articles should not 'restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context'.

The first four of the stated policy objectives of this instrument are very similar to those of the Revised Provisions.[185] The main new, additional element here is the final paragraph that sets out as an objective of the instrument to '[prevent] the grant of erroneous intellectual property/[patent rights]' over TK (or TK associated with genetic resources).[186] Of course, the major challenge to TK is, as we have seen previously, the granting of patent rights that effectively create a private monopoly over knowledge that has been commonly held by indigenous and local communities over generations if not millennia. Hence, this would be an important statement of purpose in any instrument designed to protect TK.[187] In cases of TK that is not confined to, attributable to, or claimed by a specific indigenous or local community, then the Party may designate a national authority to act as the custodian of the benefits/beneficiaries of the protection afforded.[188] The respective rights of the beneficiaries (that should be protected by Parties) and the actions that users should be encouraged by Parties to undertake are then set out. First, to protect the rights of beneficiaries[189] to TK that is sacred, secret, or closely held within indigenous or local communities, Parties shall (should) ensure that beneficiaries have the exclusive and collective right to take measures: to create, maintain, control, and develop their TK; to prevent the unauthorized disclosure, use or other uses of [secret] TK; to authorize or deny the access to and use and/or utilization of TK based on prior and informed consent; and to be informed of access to their TK through a disclosure mechanism in IP applications.[190] This last (which is repeated below at (d)) is extremely important since it is highly likely otherwise that TK-holders would remain unaware of the patenting, for example, of an aspect of their TK in an overseas patent office by a large multinational company; their ability to prevent such assertions of IP (many of which would be contrary to these Draft Articles) depends greatly on their being informed of such a disclosure mechanism.

The legitimate users of TK should be encouraged to undertake certain actions which involve (i) attributing the TK in question to the beneficiaries; (ii) providing beneficiaries with fair and equitable share of benefits/compensation arising from the use of the TK, based on prior informed consent or approval and involvement

[185] Namely to provide the beneficiaries (potentially local communities, indigenous peoples, etc) with the means to prevent the misappropriation/misuse/unauthorized use/unfair and inequitable uses of TK, to control ways in which their TK is used beyond the traditional and customary context, to promote the equitable sharing of benefits arising from their use with their prior informed consent or approval (and/or fair and equitable compensation), and to encourage tradition-based creativity and innovation.

[186] The inclusion of this alternative reading (making reference to genetic resources) demonstrates that the de-coupling of the issue of TK from that of GRs is not yet complete in the WIPO context. However, it should be noted that not all valuable TK, even that related to ecological resources, is associated with GRs.

[187] The issuing of patents over TK is addressed in Art 4 (see below).

[188] Draft Art 2.2.

[189] Draft Art 3.1 on scope of protection at (a)(i)–(iv).

[190] These may [shall] require evidence of compliance with prior informed consent or approval and involvement and benefit sharing requirements, in accordance with national law and international legal obligations.

and mutually agreed terms; and (iii) using (utilizing) the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible, and imprescriptible nature of the moral rights associated with the protected TK.[191] Provision is also made for TK that is still maintained by the beneficiaries and publicly available (although not widely known, sacred, or secret). In such cases, Parties should ensure/encourage users: (a) to attribute and acknowledge the beneficiaries as the source of the TK, unless the beneficiaries decide otherwise or the TK is not attributable to a specific indigenous or local community; (b) to provide beneficiaries with a fair and equitable compensation/share of the benefits from its use/utilization, based on mutually agreed terms; (c) to use/utilize the TK ' in a manner that respects the cultural norms and practices of the beneficiaries' as well as their associated moral rights; and (d) be informed of access to their TK through a disclosure mechanism in IP applications (see comments above).

A series of proactive 'complementary measures' are proposed that would enhance the more standard IP-related protection otherwise provided by these Draft Articles, which include: the development of national TK databases[192] for the defensive protection of TK; the creation, exchange, and dissemination of, and access to, databases of genetic resources and associated TK; the provision of opposition measures that will allow third parties to dispute the validity of a patent (by submitting prior art); encouraging the development and use of voluntary codes of conduct; and discouraging the disclosure, acquisition, or use by others of information lawfully within the beneficiaries' control, without their consent and in a manner contrary to fair commercial practices (as long as the TK is secret, reasonable steps have been taken to prevent unauthorized disclosure, and it has value).[193] An additional proposed measure that could present problems as regards the codification of oral information related to TK and developing databases of TK[194] given the potential for clashes with communities over the secret and/or sacred nature of such knowledge.

A disclosure mechanism in applications for the granting of IP rights through patents (and plant varieties) that concern inventions, processes, or products relating to TK is proposed.[195] The information required for this includes the country in which the applicant 'collected or received' the knowledge (or the country of origin, if different). It should also be stated whether prior informed consent or approval and involvement to access and use has been obtained.[196] However, failure to comply with this requirement for disclosure does not render

[191] Draft Art 3.1(b)(ii) is contained only in the alternative reading. Draft Art 4bis deals with the details of the 'Disclosure requirement'.

[192] Made available to national patent offices and in a standard, harmonized form.

[193] Draft Art 3bis. The 'value' here presumably refers back to the value of TK as set out above.

[194] With cooperation over databases of transboundary TK and making the information available to national IP offices. Draft Art 3bis.6 contains the important proviso that, 'Intellectual property offices [should]/[shall] ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application]'.

[195] Draft Art 4bis on the 'Disclosure requirement'.

[196] Draft Art 4bis.1.

any rights acquired under a patent granted, although other sanctions including criminal ones may be applied under national law. This question is a matter still under discussion and an alternative draft is also proposed whereby no disclosure requirement would be made except in cases where the disclosure 'is material to the patentability criteria of novelty, inventive step or enablement'. Such a formulation would considerably narrow the scope of the provision and would mean that communities are only informed of applications for patents and plant variety rights in these specific cases.

As is the case with TCEs, it is necessary to allow for some exceptions and/or limitations on the protection afforded in the Draft Articles, in order to make the system both workable and acceptable to a sufficiently broad-based group of WIPO Member States. The special exceptions are generally similar to those for TCEs, with the addition of the situation 'in the case of a national emergency or other circumstances of extreme urgency'.[197] Such exceptions/limitations may only apply to TK that is not sacred, secret, or otherwise closely held within indigenous or local communities, and requires their prior informed consent (or similar). In addition, certain specific requirements should be fulfilled that are almost exactly the same as those for TCEs.[198] Situations in which no exclusive IP right can be established are also dealt with for the use of TK that has been independently created (outside the beneficiaries' community), is derived from sources other than the beneficiary, or is known [through lawful means] outside of the beneficiaries' community.[199] Moreover, TK cannot be regarded as misappropriated or misused if it was derived from a printed publication, obtained from one or more of the TK holders with their prior informed consent or approval and involvement and mutually agreed terms for access and benefit sharing and/or fair and equitable compensation apply to the TK.[200] As much as these are important safeguards for users of TK and reflect the necessary balance of interests, they also serve to strengthen the protection of TK that merits it under these provisions by clarifying further the cases in which such protection will apply.

A similar provision (to that of the Revised Provisions on TCEs) is made for the treatment of TK that is found within the territory of more than one Party: in such cases, the Parties should endeavour to cooperate in implementing the terms of this instrument, as appropriate, with the involvement of indigenous and local communities concerned.[201] This is an extremely 'soft' requirement but is important in signalling the desirability of cross-border cooperation between Parties that share TK. As experience of implementing the 2003 ICH Convention has demonstrated, it can be extremely beneficial to provide a framework for such cooperation and this may lead to a number of joint initiatives by Parties that would otherwise

[197] Draft Art 6.3(c).

[198] The beneficiaries should be acknowledged, where possible and the use: is not offensive or derogatory to the beneficiaries; is compatible with fair practice; does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.

[199] Draft Art 6.4. [200] Draft Art 6.5. [201] Draft Art 12.

not have occurred.[202] Other provisions of the Draft Articles related to sanctions, remedies, and exercise of rights (Article 4), the administration of rights/interests (Article 5), the term of protection/rights (Article 7), formalities (Article 8), transitional measures (Article 9), relationship with other international agreements (Article 10), and national treatment (Article 11).

[202] Cases of such cooperation over shared ICH are given in Chapter 5, eg the cross-border Zápara traditions of indigenous people of the Amazon (Peru and Ecuador) element that contains shared TEK.

8

Cultural Heritage and Human Rights

Introduction

The aim of this chapter is to draw out the explicit linkages between international protection of the cultural heritage and human rights law. We understand here that the past is worthy of protection for its extrinsic value in terms of its cultural (and other) significance for a local and/or national community, its historical meanings, and, most essentially, as a central element in the construction of individual and group identity. In order to examine this proposition further, it is necessary to identify the human rights relevant to this discussion which are, in the main, cultural rights but also include other human rights that may be essential for the creation, practice, enjoyment, and enactment of and access to cultural heritage. First, some of the fundamental bases of the relationship that exists between human rights and cultural heritage are examined which demonstrate, in particular, how human rights serve as a justification for protecting cultural heritage. Then, some of the main approaches to international cultural heritage protection will be analysed with reference to existing instruments and how these reflect a human rights aspect of cultural heritage protection. Recent discourse concerning the preservation of cultural diversity and safeguarding the intangible cultural heritage has placed human rights issues more directly at the forefront of cultural heritage protection than was previously the case. For example, the preservation of cultural diversity is now recognized as a right of all humankind,[1] while safeguarding intangible cultural heritage now places a duty on States to ensure its viability.[2] This, in turn, implies the recognition of a wide range of social and cultural rights of the communities concerned in its practice and maintenance. However, it would

[1] Article 1 of the International Declaration on Cultural Diversity (UNESCO, 2001) accessed on 23 February 2015 at: <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> reads: 'This [cultural] diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. *In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations*' (emphasis added). The Preamble to the 2005 Convention on Diversity of Cultural Expressions notes, at para 2, that: 'cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all'.

[2] Article 1 of the Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO, 17 November 2003) [2368 UNTS 3] that sets out the purposes of the Convention.

be a mistake to assume that it is only in these areas that a connection between the two can be found.

There are strong connections between human rights and cultural heritage, sharing as they do certain objectives and characteristics. One interesting shared characteristic, for example, is to be found in their temporal character. We understand that heritage (its contents, interpretations, and representations) 'are selected according to the demands of the present and, in turn, bequeathed to an imagined future'[3] and, thus, the past is placed in the service of present needs and those of unborn future generations.[4] In a similar way, human rights is not only about improving our present but also, in a profound sense, about creating conditions that allow us to become the people we wish to be in the kind of society we wish to live;[5] moreover, human rights are also concerned with providing a positive legacy for the benefit of future generations. In both cases, their aspirational character reflects a human desire to develop the capacities that we have[6] and to know who we are and where we fit into the world around us. As Graham and Howard note, heritage can be understood as 'the ways in which very selective [elements] . . . become cultural, political and economic resources for the present'.[7] In other words, cultural heritage can be understood as a resource that enables individuals and communities in developing those capacities which they, implicitly or explicitly, wish to transmit to future generations. In terms of the evolution of cultural heritage law, this view reflects the shift from a 'cultural heritage of humanity' notion espoused in the 1972 World Heritage Convention to one that gives more value to the cultural heritage of 'communities, groups and . . . individuals' as does Article 15 of the 2003 Intangible Heritage Convention. This was acknowledged in the Faro Convention of the Council of Europe (2005)[8] which defines cultural heritage, inter alia, as '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'. Hence, since the

[3] Brian Graham and Peter Howard, 'Introduction: Heritage and Identity', in *The Ashgate Research Companion to Heritage and Identity* edited by Brian Graham and Peter Howard (Aldershot, UK: Ashgate Publishing, 2008) pp 1–18 at p 2.

[4] David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge University Press, 1996).

[5] Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edn (Cornell University Press, 2003).

[6] Vijayendra Rao and Michael Walton, 'Introduction', in *Culture and Public Action* edited by Vijayendra Rao and Michael Walton (The World Bank and Stanford University Press, 2004) at p 4 describe culture as being 'concerned with identity, *aspiration*, symbolic exchange, coordination, and structures and practices that serve relational ends, such as ethnicity, ritual, heritage' (emphasis added). On the notion of capacities, see: Arjun Appadurai, 'The Capacity to Aspire: Culture and the Terms of Recognition', in *Culture and Public Action* edited by Vijayendra Rao and Michael Walton (The World Bank and Stanford University Press, 2004) pp 58–84.

[7] Brian Graham and Peter Howard, 'Introduction: Heritage and Identity' (n 3) at p 2.

[8] The Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27/10/2005) [CETS No 199] defines cultural heritage as '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. It includes all aspects of the environment resulting from the interaction between people and places through time' (Art 2(a)).

UN General Assembly endorsed a 'solidarity' right to development in 1986,[9] this is a further direct relationship we can find between cultural heritage protection and human rights. More recent developments in cultural heritage treaty-making regard cultural heritage (in the 2003 ICH Convention) as a living and dynamic reality in people's lives and one that relates directly to human development.[10] The 2005 Convention supports more explicitly a right to cultural development (as well as a guarantee of other economic, social, and intellectual property rights) by requiring Parties to create an environment that encourages individuals and social groups to create, produce, disseminate, distribute, and have access to their own cultural expressions.[11]

Human rights issues have always been implicitly at the heart of much cultural heritage protection, even if this relationship has not been made explicit, and it is one that holds true for the physical 'tangible' elements of heritage as much as the intangible ones. Hence, greater involvement by local community groups in the preparation of these dossiers and their related management plans has increasingly been encouraged by the World Heritage Committee and the UNESCO Secretariat. It is also now accepted that local community groups should be compensated for any rights lost as a result of the conservation of sites and that they should share appropriately the benefits gained from the sites' conservation and management.[12] A report on the right of access to and enjoyment of cultural heritage adopted by the Human Rights Council in March 2011[13] provided, for the first time, an official endorsement of the notion that the cultural heritage is a proper subject for human rights. The report opens with the following statement that leaves no question as to the relevance of human rights to cultural heritage protection: 'As reflected in international law and practice, the need to preserve/safeguard cultural heritage is a human rights issue. Cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities and their identity and development processes'.[14] This assertion, however, immediately raises issues that will need to be addressed here and that include the following. Which and whose

[9] UN Declaration on the Right to Development, adopted by UN General Assembly Resolution 41/128 of 4 December 1986.

[10] In the early 1990s, UNESCO officially noted the need to highlight the function of the cultural heritage for the community as a living culture of the people whose safeguarding 'should be regarded as one of the major assets of a multidimensional type of development'. UNESCO, *The Third Medium-Term Plan* (1990–95) [Doc 25C/4] at para 215.

[11] Article 7.

[12] See: Sophia Labadi, *World Heritage: Challenges for the Millennium* (Paris: World Heritage Centre, UNESCO, 2007).

[13] Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*', Human Rights Council Seventeenth session Agenda item 3, 21 March 2011 [UN Doc A/HR/C/17/38]. At para 4, she stated: 'As reflected in international law and practice, the need to preserve/safeguard cultural heritage is a human rights issue. Cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities and their identity and development processes.'

[14] Human Rights Council, *Report of the Independent Expert* (n 13) at para 1.

cultural heritage deserves protection? Who defines cultural heritage and its significance? How far can/do individuals and communities participate in the interpretation, preservation, and safeguarding of cultural heritage? To what extent do they have access to and enjoy it? How can conflicts and competing interests over cultural heritage be resolved? What are the possible limitations on a right to cultural heritage? In this report, Shaheed addresses the scope and content of this right and the types of measure required for States to fulfil their obligations to support, protect, and promote the right of access to and enjoyment of the various cultural heritages located on their territories. Importantly, she also addresses the different stakeholders with regard to cultural heritage—ranging from the State and its organs to local communities and businesses—and their respective rights and duties.

However, international law for the protection[15] of cultural heritage does not respond fully to the requirements of human rights, despite the attempts over recent years to give international cultural heritage treaties a stronger human-rights orientation. One of the key elements in this process has been the greater involvement of cultural communities more closely in the various aspects of management, conservation, and safeguarding including, significantly, the identification of what is to be treated as heritage. This participatory approach can indeed be understood as one of the key means for democratizing heritage practice which, given the foundational role of democracy in modern human rights regimes, is also the essential basis for a human rights-based approach to heritage management and safeguarding. However, the strong reservation of state sovereignty regarding national policy-making in cultural heritage treaties[16] greatly limits the degree to which they can truly reflect a human rights-based approach. Indeed, human rights law is an anomaly in international law-making in the degree to which it has been able to intervene in the domain normally reserved to state sovereignty.[17] For this reason, it is also important to have a clear understanding of which human rights can also serve to protect heritage and the rights of different communities, groups, and individuals with regard to 'their' heritage, since we may have to rely on human rights rather than cultural heritage law to safeguard these.

[15] Understood in the broad sense of all the actions involved in protecting, preserving, conserving, and safeguarding, including giving social and political value to it.

[16] Paul Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage', *Macquarie Journal of International and Comparative Law*, vol 1 (2004): pp 111–34.

[17] Martin Dixon, *Textbook on International Law*, 3rd edn, reprinted (Blackwell Books, 1998). See also: Ana Filipa Vrdoljak, 'Human Rights and Cultural Heritage in International Law', in *International Law and Common Goods—Normative Perspectives on Human Rights, Culture and Nature* edited by Federico Lenzerini and Ana Filipa Vrdoljak (Hart Publishing, 2014) pp 139–73 at p 142. At p 152, she makes the point that the Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO, 17 November 2003) [2368 UNTS 3] has a split approach whereby the Preamble and purposes indicate the importance of culture and heritage to communities and individuals, but the substantive articles still strongly support state interests.

Some Key Notions Linking Cultural Heritage and Human Rights

The role of cultural heritage in constructing cultural identity

One of the most relevant aspects of cultural heritage for any discussion of human rights is the central role that it plays in the construction of cultural identity, at the level of the local community, region, or nation. It is highly germane to this discussion to note that the preservation of cultural identity is often of crucial importance to a sense of well-being and self-respect that lie at the heart of human dignity. In this way, safeguarding cultural identity can be said to lie at the heart of human rights itself.[18] What, then, does the right to cultural identity consist of? In essence, the right to cultural identity means the right to choose one's cultural identity alone or in community with others and it includes, inter alia, the right of each cultural group to preserve, develop, and maintain its own specific culture, the right not to have an alien culture imposed on one and the right to positive discrimination in favour of minorities to participate in the cultural life of the wider community. It should be remembered in this regard that every individual may ascribe to one or more cultural identities. Moreover, no community or group should impose its cultural identity on an individual who does not want to identify with it, and so self-identification is also an important aspect of the right to cultural identity. The right to have one's cultural identity respected has increasingly been regarded as of fundamental importance not only to individuals per se but also to individuals in terms of the nation or other community to which they belong.[19]

Thus, the role of cultural heritage in identity-construction works on several levels—that of the individual (who may enjoy multiple identities), the social group, or community[20] and the people or nation. Even, it is possible to assert that there is also a universal human identity—that of humankind—based on the shared heritage of the 'outstanding' cultural properties of the World Heritage List, for example, or the value of the diversity of different cultural heritages. This, then, suggests a further interesting shared characteristic of human rights with cultural heritage (linked through the notion of identity) that they may both be simultaneously universal and specific in character. It is, of course, on this last level that much international cultural heritage law operates as a positivist system created by sovereign States and based on the principle of international cooperation.

[18] Eugene Kamenka, 'Human Rights: Peoples' Rights' in *The Rights of Peoples* edited by James Crawford (Oxford: Clarendon Press, 1988) at pp 127–40 explained this relationship as follows: 'the importance to human beings of the sense of identity, given not so much by material improvement, but by customs and traditions, by historical identification, by religion… [That sense of identity] is, for most people, essential to their dignity and self-confidence, values that underlie in part the concept of human rights itself'.

[19] Most commonly framed in relation to the rights of cultural minorities and indigenous people within unitary States.

[20] Here, a social group might be a gender-based one with shared cultural elements while a community is usually a larger entity, based on linguistic, ethnic, and/or religious affiliations.

The essence of 'the nation' is intangible, a psychological sense of belonging of which the twin elements of cultural heritage and language are key constituents.[21] Anderson[22] took this idea further by typifying the nation state as an 'imagined community' which is a political community that frequently employs pre-modern ethnic identities and symbolism.[23] A good example of such nation-building on the basis of a mythological link with the past is the identification of the (post-Ottoman) modern Republic of Turkey with ancient Anatolia and the Hittites, accompanied by a rejection of the Persian script. Since international law is a system built upon the nation state,[24] preservation of the cultural identities of States—whether real or imagined—is crucial to its continuing viability. The modern State is a territorial entity in which the people and the land are united through a shared landscape, history, and memories. In this, the cultural heritage of a State and its people can be seen as constituting the symbolic landscape of the State.[25] This constitutive role of cultural heritage in building national identity is also reflected in international cultural heritage treaties.[26]

The significance of cultural heritage to the identities of nations, peoples, and other cultural communities is one of the main justifications for the international protection of cultural heritage. The 1968 UNESCO Recommendation on Cultural Property Endangered by Public Works[27] underlines this point, describing cultural property as 'the product and witness of the different traditions and spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world'.[28] It should therefore be preserved as a vehicle through which 'peoples may gain consciousness of their own dignity'. UNESCO's 1970 Convention on the illicit movement of cultural property also mentions the

[21] William Connor, 'A Nation is a Nation, is a State, is an Ethnic Group, is a…' ch 7 in *Nationalism* edited by John Hutchinson and Anthony D Smith (Oxford University Press, 1994) pp 34–6.

[22] Benedict Anderson, 'Imagined Communities', in *Nationalism* edited by John Hutchinson and Anthony D Smith (Oxford University Press, 1994) pp 89–95.

[23] Eric Hobsbawn, 'The Nation as an Invented Tradition' ch 12 in *Nationalism* edited by John Hutchinson and Anthony D Smith (Oxford University Press, 1994) pp 76–82. A good example of such nation-building on the basis of a mythological link with the past is the identification of the (post-Ottoman) modern Republic of Turkey (founded by Mustafa Kemal Atatürk in 1923) with ancient Anatolia and the Hittites. In reality, there is no historical or archaeological link between the Seljuks and Ottomans who settled in Anatolia from the tenth century AD and the ancient Hittites who inhabited that region *c.*3000 BC.

[24] It is a system of law that is made by States and that depends on the consent of States to be bound by its obligations to be viable. *Akehurst's Modern Introduction to International Law* edited by Peter Malanczuk, 7th revised edn (Routledge, 1997) at p 3.

[25] Anthony D Smith, 'The Origins of Nations' ch 22 in *Nationalism* edited by John Hutchinson and Anthony D Smith (Oxford University Press, 1994) pp 147–54. This is a fact explicitly recognized in many, if not most, national cultural heritage legislation and often in a country's Constitution. Vrdoljak, 'Human Rights and Cultural Heritage in International Law' (n 17) notes at p 142 that: 'Each State seeks to define itself through a unique cultural identity that is constituted by its undisputed possession of [cultural] property.'

[26] Eg, the Preamble to the Convention on the Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970) [823 UNTS 231] notes that: 'cultural property constitutes one of the basic elements of civilisation and national culture'.

[27] Adopted by UNESCO General Conference on 19 November 1968. [28] Preamble.

importance of the cultural property in question to the identity of the people to which it belongs, ie the country of origin.[29]

Since the safeguarding of human dignity is a fundamental notion upon which human rights are predicated, it would seem that this should be viewed in some way as a human right as well as a purely 'cultural heritage' issue. However, what is missing is any clear statement in a human rights context of this proposition[30] and Prott warns that this is a challenging area to legislate as a result of the complexity of the notion of cultural identity and its relationship to that of 'people' or 'community'.[31] The way in which this right with regard to national cultural identity might be expressed is as follows. The cultural development of peoples (whether minorities or majorities) must be considered within the framework of the right of peoples to self-determination, which is the fundamental right in the absence of which other human rights cannot really be enjoyed. Hence, when we combine the individual right to cultural identity with the right of a people to self-determination,[32] this would suggest the existence of some right to safeguard and express the cultural identity of a people (or nation).[33] Hence, we would have (a) the right of the members of a cultural group (including a national community) to preserve, develop, and maintain their own specific culture and cultural heritage and (b) the right to have this identity respected by others (including by other States).

The complexity of cultural identity issues, and thus of the implications of granting a right to cultural identity, can be well illustrated by apparent conflicts between the principles underpinning cultural heritage protection. For example, the 'Elgin Marbles' (architectural features removed from the Parthenon in Athens) have a great symbolic importance for Greek identity as a nation and a people while also being regarded as part of the common heritage of mankind. Thus we have the specific right of one people to a special relationship with their cultural heritage

[29] Convention on Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (n 26) in the Preamble.

[30] The only direct expression of rights of peoples relating to their cultural identity is in the 'Algiers Declaration' (1976) which is a non-binding instrument produced by a private association of international and human rights lawyers. It contains such potential rights as (1) the right to respect for cultural identity (at Art 19) and (2) the right of a people not to have an alien culture imposed upon it (at Art 15). For more on this, see: Lyndel V Prott, 'Cultural Rights as Peoples' Rights in International Law', in *The Rights of Peoples* edited by James Crawford (Oxford: Clarendon Press, 1988) at pp 93–106.

[31] Prott, 'Cultural Rights as Peoples' Rights' (n 30) at p 97 states: 'The concept of "cultural identity" is difficult for precisely the same reason as the concept of a "people" is difficult: it is hard to think of any satisfactory definition of people that would not use some form of cultural criteria. Similarly, it is difficult to think of any concept of culture…which would not need to use the concept of "people" (or "group" or "community" or some other synonym) in its definition.'

[32] Enshrined in joint Art 1 of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (1966), the right to self-determination is regarded as the most fundamental of human rights, a *sine qua non* without which the other human rights can be properly guaranteed.

[33] It would still be possible to conceive of that right as formulated in terms of a right attaching to individuals as members of the aforesaid people or nation, in the same way that Art 27 of the ICCPR refers to 'members' of cultural minorities.

while also the right of all to the equal enjoyment of the cultural heritage of mankind. This becomes even clearer when one considers the protection of sites of special interest to a particular group. This can be seen as some sort of 'special status' right (such as the right to develop one's own culture) ascribed to indigenous and minority groups whose culture or even survival is threatened. It remains true even where persons from outside that group also have an interest in its preservation. Take, for example, the Aboriginal rock art at the Kakadu National park in Australia which is listed as a World Heritage Site under the 1972 World Heritage Convention of UNESCO.[34] Here, rock art was still practised until very recently in a tradition that dated back thousands of years. In view of their richness and tradition, this rock art has a universal significance for humankind, but it also holds an immense special significance for Australian Aborigines for whom the art symbolizes the uniqueness and value of their cultural identity.

The idea of diversity

The notion of respect for the individual and human dignity implies, in part, respect for cultural differences, although the desire to achieve universalism in human rights standards resulted in a failure to recognize the real diversity that exists between different systems.[35] Globalization has created the dilemma as to how to protect the cultural traditions and identities of vulnerable groups in the face of homogenizing cultural influences. This issue has been highlighted by recent international recognition of the value of cultural diversity and the concomitant need to preserve it as an essential factor in achieving sustainable development.[36] The cultural diversity of the peoples of the world has been characterized as a universal heritage of humankind[37] with an importance to the human culture akin to biological diversity for the world's ecology. Thus any loss or destruction of a distinct culture through cultural genocide or simple neglect of cultural rights represents a loss to all humankind. The 1966 UNESCO Declaration on international cultural

[34] UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)].

[35] Lyndel V Prott, 'Understanding One Another on Cultural Rights', in *Cultural Rights and Wrongs* edited by Halina Niec (Paris: UNESCO Publishing, 1998) pp 161–75 at p 170. The African Charter of Human and Peoples' Rights (Banjul, 1981) adopted 27 June 1981. [OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986] is an interesting example of regional diversity in human rights instruments. The text is expressed in terms both of rights and duties, the latter including the duty of the individual to preserve and strengthen African cultural values. (Art 29(7)) and the Preamble refers to, '[t]he virtues of their historic tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights.')

[36] The Preamble at para 3 states: 'Considering the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development'.

[37] Universal Declaration on Cultural Diversity (UNESCO, 2001). Vrdoljak, 'Human Rights and Cultural Heritage in International Law' (n 17) at p 139. She continues by asserting that rather than causing fragmentation of international law, as feared, the linkage of culture with human rights has shown up existing instability and weaknesses in the international system and serve as 'a common good that may serve to reformulate the values and aspirations which bind citizens with a State, and individuals within international society' (at p 141).

cooperation[38] formally recognized that 'each culture has a dignity and value that must be respected and preserved', which is also an acknowledgement of the value of cultural diversity. Similarly, the 1982 Mexico City Declaration[39] asserted that, internationally, recognition of the value of cultural diversity can be seen as asserting 'the equality and dignity of all cultures' and the right of each people to affirm and preserve its own cultural identity. One way in which the international community can guarantee this right is to ensure the restitution to the country of origin of illicitly removed cultural artefacts.

More recent developments have demonstrated greater emphasis being placed on cultural diversity as a common good, one that Vrdoljak suggests is 'encapsulated in a new humanism in which the protection of culture is increasingly conceptualized through the prism of human rights' and that has found its definitive expression in UNESCO's Declaration on cultural diversity which makes clear the linkage between preserving cultural diversity and human rights.[40] It states that 'the defence of cultural diversity is an ethical imperative inseparable from respect for human dignity' and requires a commitment to human rights and fundamental freedoms, especially the rights of indigenous peoples and minorities. [41] The need for respect for individual dignity implies, in part, respect for cultural differences and this can, of course, be expressed in terms of regarding cultural diversity as a value per se. The Istanbul Declaration (2002) that was adopted in the run-up to the negotiation of the 2003 Intangible Heritage Convention makes reference to 'the multiple expressions of intangible cultural heritage [that] constitute the fundamental sources of cultural identity of peoples and communities . . . [and] are an essential factor in the preservation of cultural diversity'.[42] Here then, the preservation of cultural identity is directly linked with safeguarding the related cultural heritage of the peoples and communities concerned. Since this Declaration closely preceded the adoption of the 2003 Convention, it is explicit in linking safeguarding of intangible cultural heritage with human rights standards[43] and also represents the closest linkage yet between the right to cultural identity and cultural heritage protection law. The definition it gives for intangible cultural heritage acknowledges that this heritage is one that provides 'communities and groups and, in some cases, individuals' with 'a sense of identity and continuity'.[44]

[38] UNESCO Declaration on the Principles of International Cultural Cooperation (1966) Gen Conf Res 5.61, UNESCO Doc 28 C/Res 5.61 (16 November 1966) at Art 1.

[39] Declaration of the World Conference on Cultural Policies (MONDIACULT), Mexico City, 1982.

[40] Universal Declaration on Cultural Diversity, 2001 (n 1).

[41] Article 4.

[42] *Intangible Cultural Heritage—a Mirror of Cultural Diversity*, Final Declaration of the Third Round Table of Ministers of Culture, Istanbul, 16–17 September 2002 at para 1.

[43] It makes reference in the first paragraph of its Preamble to human rights instruments, specifically the Universal Declaration of Human Rights (1948) [GA Res 217A (III), UN Doc A/810 at 71 (1948)], International Covenant on Civil and Political Rights (1966) [GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52; 999 UNTS 171 and 1057 UNTS 407; 6 ILM 368 (1967)], and the International Covenant on Economic, Social and Cultural Rights (1966) [GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49; 993 UNTS 3; 6 ILM 360 (1967)].

[44] Article 2(1).

The heritage of indigenous peoples and diasporae

Although much, if not all, of the rest of the discussion here is relevant to it, it is appropriate to treat indigenous heritage as a special case.[45] An initial and fundamental point that needs to be made here is that the category of 'cultural heritage' itself is not a meaningful one for indigenous peoples for whom no distinction is made between, for example, natural and cultural elements or even tangible and intangible ones. As Daes (1997)[46] makes clear in her report, 'heritage' for indigenous groups is a much broader notion than that usually ascribed in international law and that protection of indigenous heritage requires that it be seen as a single, integrated whole, pertaining to the whole community and enjoyed by that community permanently and without alienation:

> [It includes] everything that belongs to the distinct identity of a people . . . all those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.

Hence, much cultural heritage theory and law is based on premises that are inappropriate for indigenous heritage. The same is true also of the theoretical individualism of human rights (and intellectual property) law that denies the existence of collectively held rights.

In addressing the basis of indigenous claims to special treatment, Lowenthal[47] makes the point that, although indigenous peoples base many of their land and resource-based claims on the idea of 'being there first', in reality '[f]irst-comer claims are no less anachronistic than other identities; the identities they compel are newly constructed . . . All ancestral roots are ultimately of equal age . . . To fend off strangers and newcomers, natives insist they have always been there'. Of course, this in no way denies the historical experience of indigenous peoples around the world of having been dispossessed, marginalized, forcibly assimilated, and abused in a multitude of ways by later, European incomers.[48] It is the last part of Lowenthal's statement that holds the key—indigenous claims to 'being first' have served as a defence against such misappropriations and it is exactly because of this historical experience of dispossession of their land and heritage (and even, at times, their own children) that the international community is increasingly accepting of the need for special rights to protect their interests and to off-set generations of discrimination. Indigenous peoples merit special treatment—including in relation to their heritage, sacred places, secret knowledge, human remains, etc—because they have been so disadvantaged by the mainstream, national societies in which they reside for so long. Restoring their cultural heritage to them, ensuring their access to it, respecting their customary

[45] This is discussed in more detail below.

[46] Erica-Irene Daes, *The Protection of the Heritage of Indigenous People* (Geneva/New York: United Nations, 1997).

[47] Lowenthal, *The Heritage Crusade* (n 4) at p 182.

[48] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996).

laws associated with it, and even restoring land rights is part of this process of restitution.

Certain specific points regarding indigenous heritage should be made here. First, as the UN Declaration on Indigenous Peoples' Rights (UN, 2007)[49] makes clear, heritage cannot be separated from questions concerning land rights, control over natural resources, and self-determination.[50] Such claims are frequently couched in terms of demands for the restitution of heritage objects that have been removed by 'European' scientists in the past. The artefacts, rock art, and human remains of indigenous people are often of considerable archaeological and/or cultural importance while, at the same time, lying at the core of their personal identity and religious system.[51] Some jurisdictions have made attempts to address this conflict between indigenous identity based on heritage and the scientific and cultural interests of the rest of society.[52] The Native American Graves and Repatriation Act (1991) in the United States stands out here as the first piece of such legislation to incorporate indigenous values into its framework and it has seen the return of control over a large number of ritual and cultural objects from US museums as well as grave sites to Indian tribes.[53]

The question of human remains held by museums—often of indigenous origins—has created a difficult ethical dilemma for the curators of museums in which such remains are deposited.[54] The ethical code of conduct of the UK Museums Association (2002) attempts to address this conflict between scientific and other, human, values. It calls on museums and their staff to 'dispose of human remains with sensitivity and respect for the beliefs of the communities of origin' and demands that they 'recognise the humanity of all people' in all

[49] Article 12 states at para 1 that, 'indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and *have access in privacy to their religious and cultural sites*; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains' (emphasis added).

[50] With regard to cultural heritage, Art 31 stipulates that: 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions'.

[51] See: Dean B Suagee, 'Tribal Voices in Historical Preservation: Sacred Landscapes, Cross-Cultural Bridges and Common Ground', *Vermont Law Review*, vol 21 (1996): p 145; Laurajane Smith, 'Empty Gestures? Heritage and the Politics of Recognition', in *Cultural Heritage and Human Rights* edited by Hilaine Silverman and D Fairchild Ruggles (Springer Science, Business and Media, 2007) at pp 159–71.

[52] Elizabeth Evatt, 'Enforcing Indigenous Cultural Rights', in *Cultural Rights and Wrongs* edited by Halina Niec (Paris: UNESCO Publishing, 1998) at pp 57–80.

[53] William S Logan, 'Cultural Diversity, Heritage and Human Rights', in *The Ashgate Research Companion to Heritage and Identity* edited by Brian Graham and Peter Howard (Aldershot, UK: Ashgate Publishing, 2008) at pp 439–54.

[54] Laurajane Smith, 'Empty Gestures?' (n 51); see also: Gordon L Pullar, 'The Qikertarmuit and the Scientist: Fifty Years of Clashing World Views', *University of British Columbia Law Review* Special Issue, vol 119 (1995): pp 125–31.

their dealings.[55] However, this remains a tricky issue and one that, above all, highlights the need for dialogue and real engagement with the indigenous communities concerned.

The dilemma created by the international recognition of 'universally significant' cultural heritage is especially acute with regard to indigenous heritage. For example, Kakadu National Park in Australia (discussed above) which is listed as a World Heritage Site and so is regarded as having a universal significance for all people and nations. At the same time, the rock art found here provides a direct link back to their ancestors spanning thousands of years and so it is, at the same time a place of immense spiritual significance for Australian Aborigines, symbolizing their unique and specific cultural identity. Here, then, the indigenous rights of access and even, possibly, of keeping secret and denying access to others to a sacred site[56] are set against rights of the whole of humankind framed by international law to the preservation and enjoyment of this heritage. The 2007 UN Declaration contains an interesting attempt to strike a balance in such cases in the Preamble, by affirming that, 'all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind'.

With regard to diasporae, history has seen the movement of large numbers of people over vast territories since the first hominid migrations as Orser (2007) notes, and more recent migrations have resulted in the meetings of cultures around the globe. This raises some interesting dilemmas for those concerned about the cultural rights which diasporae may claim with regard to the cultural heritage of their country of origin. Silberman[57] draws out the fundamental significance of this reality: 'We live in a time of movement, diaspora, cultural displacement, and the creation of new cultural forms that—I would suggest—profoundly alter the traditional heritage concepts of coherent national narratives.' This has been reflected in some of the international discussion on cultural diversity issues. For example, when UNESCO was discussing the multilingualism and the protection of mother languages[58] the question of how to extend linguistic rights to diasporae gave rise to much debate and, ultimately, remained unresolved. Such discussions raise serious and difficult questions regarding the right of one State to intervene in the internal affairs of another State with regard to the rights of a diaspora sharing its own cultural heritage. These days, newly formed diasporae are predominantly formed of displaced peoples and refugees and economic migrants. As such, they

[55] Museum's Association, *Code of Conduct* (London: HMSO) at paras 6.16 and 7.7, respectively.

[56] William S Logan, 'Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection' in *Cultural Heritage and Human Rights* edited by Hilaine Silverman and D Fairchild Ruggles (Springer Science, Business and Media, 2007) at pp 33–52 describes the conflict between the Mirrar traditional landowners and the Australian Government over the issuing of a uranium mining permit in this area and UNESCO's involvement in this dispute at pp 47–8.

[57] Neil Silberman, 'Heritage Interpretation and Human Rights: Documenting Diversity, Expressing Identity, or Establishing Universal Principles?', paper presented at ICOMOS Annual Meeting in Oslo, November 2010.

[58] At an Information Workshop on *Standard-setting Instruments Promoting Multilingualism* held at UNESCO, Paris on International Mother Language Day, 21 February 2008.

also enjoy human rights specific to their culture and heritage as protected by special status instruments for these classes of persons. The International Convention on Migrant Workers' Rights, for example, specifically protects the cultural rights of migrant workers in the following formulation: '1. States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. 2. States Parties may take appropriate measures to assist and encourage efforts in this respect.'[59]

Since each diaspora has a cultural heritage both in their homeland and their adopted country, other salient questions arise. For example, should members of diasporae have rights when it comes to decisions about the management and use of sites and properties in their (and their ancestors') original homeland? And if so, what are these rights? Moreover, does a member of a diaspora settled in New Zealand, for example, acquire rights with regard to the lands and cultural properties of the Maori people or any of the other heritage that pre-dates their arrival?[60] In the case of displaced persons, is their heritage in the land and history that they have left behind, or in the new one where they now reside? Of course, this raises questions in the eyes of many States as to the first loyalties of migrants, mirroring the general disquiet felt over the loyalty of minorities in general.[61] Such questions go far beyond the simple question of how to treat the cultural heritage and rights of diasporae and go to the heart of what constitutes 'national' cultural heritage and who has a stake in it. It is worth noting here that the 2003 Intangible Heritage Convention allows for the inscription on the Representative List of such heritage of transboundary ICH, thus recognizing that cultural boundaries and the frontiers of States are not always consonant with each other.

Exclusion and deliberate destruction of heritage

As much as the constitutive role of cultural heritage in the construction of national and/or local identities has many positive social and political outcomes, it

[59] Article 31. In addition, Art 7 sets out the principle of non-discrimination with regard to human rights (including the rights related to cultural heritage): 'States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion . . . national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status'. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) [UN Doc A/RES/45/158; 2220 UNTS 93; 30 ILM 1517 (1991)].

[60] Charles E Orser, Jr, 'Transnational Diaspora and Rights of Heritage', in *Cultural Heritage and Human Rights* edited by Hilaine Silverman and D Fairchild Ruggles (Springer Science, Business and Media, 2007) at pp 92–105.

[61] It should be noted here that the rights accorded to minorities under Art 27 (ICCPR) apply irrespective of the permanence of the group in question and do not require recognition of the minority by the State. See: Rhona K Smith, *Textbook on International Human Rights*, 3rd edn (Oxford University Press, 2007) at p 306.

can also shore up inequitable power-relationships within a State where the dominant cultural group[62] imposes its own view of the shared cultural heritage on all others in society. Although the General Assembly of the United Nations rejected the inclusion of 'cultural genocide' in the drafting of the UDHR (1948), it is an important term to keep in mind when dealing with the preservation of human cultural heritage. Power is central to the construction of heritage and communities frequently clash over the way in which this is represented in symbols that represent the identity of one group and exclude another. Sometimes, several cultural or religious communities may lay claim to the same location as 'belonging' to their heritage which can lead to denial of the right of access to certain groups to heritage sites. The effect that such exclusion has on the excluded cultural community is important here. A prime example of this concerns the holy sites in Jerusalem (*Beit ul-moghaddas* in Arabic) which contain some of the holiest sites of Jews, Christians, and Muslims.[63] These three religious communities have all been excluded at some time or other from their holy site and inter-communal conflicts have erupted periodically over them.

Similar inter-religious tensions in India between Hindus and Muslims have led not only to exclusion but also to the destruction of the physical fabric of cultural heritage. The Babri Mosque in Ayodhya (Uttar Pradesh), built by Shah Babur in 1528, was destroyed in 1992 by militant Hindus from the VHP party. This act of destruction resulted in extremely serious clashes between Muslims and Hindus and many deaths.[64] A similarly corrosive mix of religious and political ideology also lies at the heart of such egregious acts as the destruction of the Bamyan Buddhas (Afghanistan) in 2001 by the Taliban who objected to depictions of human forms. Even more significantly, they wished to eradicate material evidence of the existence of a pre-Islamic culture in Afghanistan, an act politically designed to separate Afghan history from its Buddhist past.[65] This action provided the impetus for UNESCO to adopt the Declaration concerning the intentional destruction of cultural heritage.[66]

[62] Whether a numerical majority or not.

[63] These are: the Western Wall of the Second Temple for Jews, the Holy Sepulchre (the tomb of Jesus) for Christians, and both the Dome of the Rock (the site of Muhammad's Night Journey) and the site of the Al-Aqsa Mosque for Muslims. Rana PB Singh, 'The Contestation of Heritage: The Enduring Importance of Religion', in *The Ashgate Research Companion to Heritage and Identity* edited by Brian Graham and Peter Howard (Aldershot, UK: Ashgate Publishing, 2008) at pp 125–42. See also: Keith Whitelam, *The Invention of Israel: The Silencing of Palestinian History* (London: Routledge, 1998).

[64] Nandini Rao and C Rammanohar Reddy, 'Aydohya, the Print Media and Communalism', in *Destruction and Conservation of Cultural Property* edited by Robert Layton, Peter G Stone, and Julian Thomas (London: Routledge, 2001) at pp 139–55.

[65] Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamyan and International Law', *European Journal of International Law*, vol 14 (2003): p 619.

[66] In the first preambular para it defines 'intentional destruction' in II as: 'an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law'.

In the most serious cases of inter-communal conflict, the cultural heritage may be used as a weapon of war and the human rights dimension of preventing such acts of deliberate destruction was explicitly recognized in the 1954 Hague Convention (UNESCO 1954).[67] The bombing of the Al-Askari Mosque in Samarra (Iraq) in February 2006, a place of major holy significance for Shiites, was such a case of destruction of a site of exceptional religious and cultural importance. This, in turn, led to attacks on Sunni mosques in reprisal. Also occurring in a time of armed conflict, we have seen the destruction by Serb forces of mosques and of important historical monuments such as the Ottoman bridge at Mostar in Bosnia in 1993, a highly symbolic act since this sixteenth-century bridge had linked Christian and Muslim neighbourhoods. They also destroyed archives that held information confirming the cultural (and religious) identity of the Muslim population of that area. Through such actions, the Serbs were attempting to eradicate any historical memory of the existence of Muslims in that area and so we can clearly regard them as part of a campaign of ethnocide.[68] Other actions applied in campaigns of ethnocide are to change traditional place names and even family names in order to reflect the new, dominant culture and remove all traces of a previous distinct ethnicity and/or culture. The fact that the family and place names of indigenous peoples were often changed by the incoming colonizers of their lands shows clearly the human rights dimension of such actions. At the heart of this issue lies the fact that such religious and cultural heritage is often indispensable for a community's cultural practices and even their continuing existence as a cultural group.

Cultural heritage that contravenes human rights

Another sense in which cultural heritage has the potential to lead to actions that violate human rights is in the case of traditional cultural practices that contravene human rights standards. Hence, although the main human rights texts make a strong claim for universal standards,[69] there remains an apparent conflict between

[67] The Preamble states: 'Mindful that cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights'.

[68] Patrick J Boylan, 'The Concept of Cultural Protection in Times of Armed Conflict: From the Crusades to the New Millennium', in *Illicit Antiquities—the Theft of Culture and the Extinction of Archaeology* edited by Neil Brodie and Kathryn Walker Tubb (London: Routledge, 2002) at pp 43–108; Council of Europe, *War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina*, 4th Information Report presented to the Committee on Culture and Education (Strasbourg: Council of Europe, 1993) [Document 6999]. See also: Francesco Francioni, 'Culture, Heritage and Human Rights: an Introduction', in *Cultural Human Rights* edited by Francesco Francioni and Martin Scheinin (The Hague: Martinus Nijhoff, 2008) at pp 1–16.

[69] The Charter of the United Nations, San Francisco, 26 June 1945 [[1945] ATS 1; 59 Stat 1031; TS 993; 3 Bevans 1153] commits the Organization to promoting '*universal* respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language or religion'; the 1948 UDHR proclaimed itself to be 'a common standard of achievement for all peoples and nations'.

these universal standards and cultural relativism at the heart of the human rights related to cultural heritage since relativist arguments are themselves based on cultural differences.[70] This is a highly complex question in human rights theory and is not one that can be explored here in much detail. However, it seems appropriate to rehearse in brief some of the main arguments and the potential responses to them. This potential difficulty was recognized in the 2003 Convention such that only ICH that complied with universal human rights would be defined as such for the purposes of the Convention.[71]

A large number of traditional cultural practices can be viewed in this light and it is not always easy to decide on which side of the 'human rights line' a cultural manifestation falls. Of course, such practices as female infanticide or cannibalism are clear human rights violations but others that involve, for example, sexually segregated rituals or secret knowledge held by a highly privileged elite are difficult to judge. Furthermore, such cases also raise the very sensitive question as to who should be given the power to decide this—is it only the cultural community itself that perpetuates such practices or some outside agency?[72] These cases need to be dealt with in a manner that takes account of the broader social impacts of such practices on all members of the community and, in particular, the power relationships at play.[73] In making such determinations, the possibility of dissenting voices (especially of women and minority groups) and marginalization within cultures must always be considered.[74] Ultimately and importantly, conflicts between the rights of individuals and their communities or minorities and dominant communities need to be addressed through societal dialogue and within the broader rubric of cultural policies, including those for cultural heritage protection.

[70] This is succinctly expressed by Rodolfo Stavenhagen, 'Cultural Rights: A Social Science Perspective', in *Cultural Rights and Wrongs* edited by Halina Niec (Paris: UNESCO Publishing, 1998) pp 1–20 as follows: 'stressing the diversity of cultural values runs counter to the major thrust of human rights thinking in the world today, which holds the universality of human rights to be the basic underpinning of the human rights edifice'.

[71] According to the definition in Art 2(1).

[72] For more detailed discussion of this issue, see: Toshiyuku Kono and Julia Cornett, 'An Analysis of the 2003 Convention and the Requirement of Compatibility with Human Rights' in *Safeguarding Intangible Cultural Heritage—Challenges and Approaches* edited by Janet Blake (Leicester, UK: Institute of Art and Law, 2007) at pp 143–74.

[73] We need to be able to analyse such situations in such a way that we understand whether such practices cause discrimination, marginalization, and/or exclusion of other, often subaltern, members of the community. For more detailed discussion of this issue, see: Janet Blake, 'Gender and intangible cultural heritage', in UNESCO, *Gender Equality—Heritage and Creativity* (Paris: UNESCO, 2014) at pp 49–59. This issue is discussed in more detail in Chapter 5 with reference to the question of the gender dynamics of ICH.

[74] Madhavi Sunder, 'Cultural Dissent', *Stanford Law Review*, vol 54 (2001): p 495. Laurajane Smith, 'Heritage, Gender and Identity', in *The Ashgate Research Companion to Heritage and Identity* edited by Brian Graham and Peter Howard (Aldershot, UK: Ashgate Publishing, 2008) pp 159–80.

It has been asserted that cultural diversity (of which cultural heritage is a major component) inevitably comes into conflict with universal human rights standards[75] and it is, of course, true that certain cultural traditions such as forced marriage and physical mutilation can never be tolerated. The Convention to Eliminate Discrimination against Women (1979), for example, recognizes that 'stereotypes, customs and norms' can be detrimental to the interests and rights of women. It calls on States Parties to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.[76] It is, however, possible to reconcile most cultural traditions with human rights standards and to take the view that cultural diversity makes a greater contribution globally than it causes harm and that '[it contributes] to the fund of human experience on which all individuals and groups can draw on in the ongoing processes of change and growth'.[77] Moreover, conflicts of rights are common in the field of human rights[78] and these can usually be resolved by applying an in-built hierarchy of rights.[79] Of course, there will always be difficult cases that fall into a grey area, such as traditional cultural practices that involve gender-based segregation where the existence of clear discrimination cannot be identified.

However, when protecting cultural heritage through a cultural rights-based approach, it is always important to bear in mind the following warning from Donnelly. He notes that 'culture' is 'constructed through selected appropriations from a diverse and contested past and present' and that 'those appropriations are rarely neutral in process, intent, or consequences' and, moreover, this 'traditional culture' that is being appealed to here either no longer exists or never did in the idealized form it is presented. Consequently, this can open the way to 'culturalist' (cultural relativist) arguments that obscure troubling contemporary political realities by 'relying on appeals to a distant past' such as the pre-colonial African village, Native American tribes, and traditional Islamic societies.[80] Hence, it is vital to have a very clear idea of (i) where the line should be drawn between those cultural practices that discriminate and harm the interests of various social groups and even individuals and (ii) how to apply an analysis to such cases that will illuminate more complex and obscure examples.

[75] Logan, 'Cultural Heritage, Diversity and Human Rights' (n 53) pp 439–54.

[76] Article 5.

[77] Henry Steiner and Philip Alston, *Human Rights in Context Law, Politics and Morals* (Oxford: Clarendon Press, 1999) at p 1547.

[78] Such as the common conflict between the right to privacy and the public interest to disclose private information.

[79] Richard Dworkin, *Law's Empire* (London: Fontana, 1986).

[80] Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edn (n 5) at pp 101–2.

Human Rights Applicable to Cultural Heritage

Culture and cultural rights

When considering which human rights are relevant to cultural heritage it is natural to look first to cultural rights. Before considering these rights, it is important to understand the conception of 'culture' that underlies them. In 1968,[81] a UNESCO Expert Meeting defined culture as 'the essence of being human' which leaves little doubt of its connection with human rights. A similar approach is taken in the more recent Fribourg Declaration on Cultural Rights which states that culture, 'covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life *through which a person or a group expresses their humanity* and meanings that they give to their existence and to their development' (emphasis added).[82] A useful categorization of 'culture' for the purposes of identifying cultural rights that can be applied usefully to cultural heritage is as follows. First, there is 'culture as capital' which represents the accumulation of the material heritage of humankind in its entirety; the relevant cultural right in this case is the right of the individual to equal access to this cultural capital. The second category is 'culture as creativity' (of scientific and artistic creations) and the associated rights of individuals freely to create their cultural works and to enjoy the moral and material benefits of this. It also implies the right of all to enjoy full access to these scientific and artistic creations. The third view of culture is an all-embracing 'anthropological' one that sees it as the sum total of all material and spiritual activities and products of a given social group that distinguishes it from other social groups.[83] This last, broad, conception of culture is that espoused by the General Comment on the right to participate in cultural life as encompassing, inter alia, 'ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express themselves'.[84]

[81] *Cultural Rights as Human Rights* (Paris: UNESCO, 1970). The *Final Declaration* of this meeting regarded culture as 'the totality of the ways in which men (sic) create designs for living . . . it is the essence of being human . . . Culture is everything which enables man to be operative and active in his world.'

[82] Fribourg Declaration on Cultural Rights (Institute of Human Rights, University of Fribourg, 2007) at Art 2.

[83] Stavenhagen, 'Cultural Rights: A Social Science Perspective' (n 70).

[84] Committee on Economic, Social and Cultural Rights (CESCR) General comment No 21 (2009) on *The Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, Doc E/C.12/GC/21. This reads in full: 'ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express themselves, and build their world view representing their encounter with the external forces affecting their lives. Culture

From this, we can see that the view of culture that underpins the main universal human right of access to and enjoyment of cultural heritage is one that includes many elements we now understand to be intangible cultural heritage as well as tangible ones.

Cultural rights are to be found throughout a large number of different instruments which may be international or regional, containing 'soft' or 'hard' law[85] and have always been implicitly present within the human rights canon from its inception.[86] They were given formal expression in the 1948 Universal Declaration on Human Rights (UDHR)[87] and, later, these universal cultural rights acquired a treaty-binding character in Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Here, Parties recognized the right of everyone to take part in cultural life and noted that the full realization of this right requires the conservation, development, and full diffusion of science and culture and the undertaking to respect the freedom necessary for scientific research and artistic creativity.[88] The right to participate in cultural life set out here should be understood to include having access to and enjoyment of one's own cultural heritage and that of one's community. Accessing and enjoying cultural heritage is an important feature of being a citizen, a member of a community, and a member of the wider society. According to the Committee on Economic, Social and Cultural Rights (CESCR), the obligation to respect the right to take part in cultural life 'includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group . . . to have access to their own cultural and linguistic heritage and to that of others'.[89] This 'entails taking into consideration the multiple heritages through which individuals and communities express their humanity, give meaning to their existence, build their worldviews and represent their encounter with the external forces affecting their lives'.[90] Moreover, the right to participate in cultural life implies that individuals and communities have access to and enjoy cultural heritages that are meaningful to them, and that their freedom to continuously (re)create cultural heritage and transmit it to future generations should be protected.

shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities'.

[85] Janusz Symonides, 'Cultural Rights: A Neglected Category of Human Rights', *International Social Science Journal*, vol 50 (1998): pp 559–71 at p 562. They include, eg, instruments such as the African Charter on Human and Peoples' Rights (1981) and the non-binding Algiers Declaration of 1976 that is referred to below.

[86] Prott, 'Cultural Rights as Peoples' Rights' (n 30) at p 97.

[87] Article 27 sets out the main cultural rights as (1) to participate freely in the cultural life of the community and (2) to enjoy the benefits of scientific progress and the moral and material benefits of their individual creativity.

[88] Article 15(1), (2), and (3).

[89] See: CESCR General comment No 21 (n 84) in particular at paras 49(d) and 50.

[90] Human Rights Council, 'Report of the Independent Expert' (n 13) at para 6.

These human (cultural) rights are expressed as universal rights, namely rights held by all people, in all places at all times with regard to culture. At the same time, human rights law also provides for specific or special status rights to be enjoyed by members of cultural minorities and, further to these, some rights exclusively enjoyed by indigenous persons (both of these are discussed below). In this paradigm: all individuals enjoy the universal rights set out in this section; members of cultural minorities enjoy universal rights plus their special status rights; and members of indigenous communities (assuming they constitute a minority within the State) enjoy universal human rights, the rights of minorities as well as special rights that only they hold. Furthermore, both the 1966 Covenants assert the right of self-determination.[91] By virtue of that right, 'they…freely pursue their economic, social and cultural development' which, when linked to the political right of self-determination, can then be understood to grant a people the right to preserve and develop their cultural identity.[92] It is also from this article that cultural rights can be understood to have a collective as well as an individual dimension to them.

The key concept in this relation is, again, human dignity:[93] the UDHR (1948) makes it clear that States are responsible for the guarantee of the cultural rights of any individual in view of their importance to human dignity. The provisions on cultural rights have a significant impact on cultural heritage.[94] First of all they entail a negative obligation of all States to abstain from conduct aimed at the destruction, damage, alteration, or desecration of cultural objects or spaces[95] that are of significant importance for the practice and enactment of a people's culture. Second, they also entail a positive obligation to take steps to protect cultural groups and communities against the risk of destruction or damage to heritage that is essential to their continued cultural identity. This applies even more strongly when such objects or sites are indispensable for the practices and enactment of people's culture. As noted above, the rights relevant to cultural heritage include those applicable only to certain social groups as well as universal ones. For example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) articulates in Article 13 that States have an obligation to ensure women have the right to participate in all aspects of cultural rights.[96] The Convention on the Rights of the Child applies this same concept to children in Article 31.[97] However, the CEDAW is ratified by a number of

[91] Joint Art 1.

[92] Halina Niec, 'Casting the Foundation for the Implementation of Cultural Rights', in *Cultural Rights and Wrongs* edited by Halina Niec (Paris: UNESCO Publishing, 1998) pp 93–106.

[93] ECOSOC has stressed that 'the obligations to respect and to protect freedoms, cultural heritage and cultural diversity are interconnected'. See: CESCR General comment No 21 (n 84).

[94] Francesco Francioni, 'Culture, Heritage and Human Rights: An Introduction' (n 68) at p 9. Shaheed has noted also that 'people cannot enjoy culture without accessing and enjoying cultural heritage', Human Rights Council, 'Report of the Independent Expert' (n 13) at para 37.

[95] These may be a library, a temple, a civic monument, or a sacred site for indigenous peoples.

[96] Convention on the Elimination of All Forms of Discrimination against Women (United Nations, 18 December 1979).

[97] Convention on the Rights of the Child (United Nations, 2 September 1990).

countries with specific reservations that women's rights are subject to cultural or religious beliefs.[98] The rights of ethnic, religious, and linguistic minorities are also protected in the 1966 Covenants[99] such that States cannot prohibit minority groups from developing their culture, unless it is contrary to international standards. This would provide a clear justification for several provisions of cultural heritage treaties.

Rights of minorities

As has been referred to above, one set of human (cultural) rights that are deeply implicated in the identification, protection, safeguarding, and management of cultural heritage are the special status rights granted to members of cultural (ethnic, religious, and linguistic) minorities by Article 27 of the ICCPR and the rights enjoyed specifically by indigenous persons and peoples. Since these are not universal rights, I have chosen to treat them separately in order to make clear the distinction that should be drawn between the two sets of rights, namely universal and special status rights. There has been, in the past, an unfortunate tendency to conflate the two when speaking of cultural heritage and human rights which is understandable given that a large number of human rights-related issues of cultural heritage concern minority and indigenous heritage.

First, with regard to the heritage of *minority communities* and their human rights to it, Article 27 of the ICCPR sets out that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

If we examine the debate held in the Human Rights Sub-commission on Minorities leading up to the drafting of Article 27, we see that in defining of the term 'minority' for the purpose of this Article[100] the notions of 'historical connectedness' and 'traditions' are key ones and these directly link to that of the past.[101] From this we can understand that a sense of connectedness with a shared past and traditions, provides a vital element in identifying the ethnic, religious,

[98] Joel Richard Paul, 'Cultural Resistance to Global Governance', *Michigan Journal of International Law*, vol 22, no 1 (2000): p 18.

[99] Article 27 of the ICCPR.

[100] A notion that can be understood as equivalent to the modern idea of the cultural community as employed in the 2003 Intangible Heritage Convention (UNESCO, 2003).

[101] The Sub-Commission on Prevention of Discrimination and Protection of Minorities produced the following definition at its fifth session: '(i) the term minority includes only those non dominant groups in a population *which possess and wish to preserve stable ethnic, religious and linguistic traditions or characteristics* markedly different from those of the rest of the population; (ii) such minorities should properly include a number of persons sufficient by themselves to preserve such traditions and characteristics' (emphasis added).

and linguistic minorities who are the subjects of Article 27 and so the past—as expressed in terms of cultural heritage—is a prerequisite for the enjoyment of the rights granted by that article. This is seen as a subjective element in the definition of 'minorities' and, interestingly, these subjective aspects are essential since, without it, a minority for the purposes of Article 27 cannot exist and cannot hold this right. Moreover, it would create a very dangerous precedent if it were possible for governments and others to be able to identify 'minorities' on purely objective criteria (their language, their dress, their culinary traditions, etc) without the group in question seeking this identification for themselves and one that could open the door to serious abuses.[102] Again, this fundamental notion underlying Article 27 bears a strong parallelism with the purposes of heritage: heritage has meaning for those who believe that it does and who identify with it as their own.

Under Article 27, then, the right of ethnic, religious, and linguistic minorities to practise their culture and traditions is specifically supported, albeit in a negative sense that they 'shall not be denied this right'. This set of rights is further elucidated in the UN Declaration on ethnic, religious and linguistic minorities[103] which requires States Parties to protect the cultural identity of minorities within their territories and to encourage the conditions for the promotion of that identity (at Article 1). Article 4.2 then calls upon Parties to 'take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs'.[104] Of course, the notion of enabling 'favourable conditions' is a very broad one, but it is possible to identify some minimum standards here, such as: allowing these communities to have their heritage recognized as such; ensuring the continued survival of minority heritage; ensuring access by minority communities to their heritage; and involving minorities in policy- and decision-making affecting their heritage. As Francioni notes,[105] these provisions also entail a positive obligation to take steps to protect cultural groups and communities against the risk of destruction or damage to religious or historical property that is indispensable for those communities' cultural practices and indeed for their continuing existence as a cultural group. Here, then, we have a statement of the duty of States *at the very minimum* not to interfere with the ability of minorities—cultural communities—to 'enjoy their own culture' which would clearly involve having access to their cultural heritage and the ability to continue to create and maintain it.

[102] Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991).

[103] UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (United Nations, 1992).

[104] Moreover, Art 4 states that limitations placed by national legislation cannot go beyond what is allowed under international human rights law, ie States cannot prohibit groups from developing their culture, unless it is contrary to international standards.

[105] Francesco Francioni, 'Culture, Heritage and Human Rights: An Introduction' (n 68) at p 9.

Rights of indigenous peoples

Indigenous heritage comprises a holistic conception of heritage that includes 'natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected',[106] is enjoyed by the community permanently and without alienation, and forms an important basis for what Anaya refers to as their 'cultural integrity'.[107] For indigenous people, their cultural identity is a collective one and, therefore, their heritage is something held in common, inherited from their ancestors, and to be protected as a collective good. The UN Declaration on Indigenous Peoples' Rights (2007) also demonstrates the broad scope of indigenous heritage and it makes clear that the protection of indigenous heritage cannot be treated separately from their claims to land rights, control over natural resources, and self-determination. The Declaration contains a provision directed specifically towards indigenous peoples' rights with regard to their heritage:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[108]

Again, the broad scope of this heritage is clear including, inter alia, human and genetic resources, natural elements and the knowledge associated with these. The human right that indigenous peoples enjoy in relation to their heritage is the right 'to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains'.[109] This would appear to go further than the right of access to and enjoyment of cultural heritage contained in the (universal) right to participate in cultural life, suggesting that much cultural heritage protection law is based on the premise of a concept of 'heritage' that is not appropriate to indigenous heritage. As has been seen in the previous chapter, this is true also of the intellectual property rights associated with that right since they fail to acknowledge the idea of a form of creativity that is not only collective and with no clearly identifiable creator or 'author', but

[106] The definition of 'indigenous heritage' given by the UN Special Rapporteur for Indigenous Peoples in Daes, *The Protection of the Heritage of Indigenous People* (n 46) is quoted on page 280.

[107] Anaya, *Indigenous Peoples in International Law* (n 48) at pp 131–41. At p 131, he explains that: 'The non-discrimination norm, viewed in the light of broader self-determination values, goes beyond ensuring for indigenous *individuals* either the same civil and political freedoms accorded to others… It also upholds the right of indigenous *groups* to maintain and freely develop their cultural identities in co-existence with other sectors of humanity.'

[108] UN Declaration on Indigenous Peoples' Rights (United Nations, 2007) [GA Res 61/295, UN Doc A/RES/47/1 (2007)] at Art 11.

[109] Article 12.

that is also intergenerational. Article 1 of the 2007 Declaration states unequivocally that 'Indigenous peoples have the right to the full enjoyment, *as a collective or as individuals*, of all human rights and fundamental freedoms' (emphasis added). This recognition of collective rights goes further than that found in any other global human rights instrument.

As a response, the international community has recently developed a specific legal strategy to address indigenous peoples' rights, including those related to their heritage. The philosophy underlying the special legal approaches to protecting indigenous peoples is based on appreciation of the historical experience of indigenous peoples of dispossession, marginalization, forcible assimilation, and other forms of abuse by European invaders.[110] As the UN Declaration (2007) on the rights of indigenous peoples[111] recognizes in its Preamble: 'indigenous peoples have suffered from historic injustices as a result of, inter alia, the colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests'. The right of indigenous peoples not to be forcibly assimilated or their culture to be destroyed is asserted in Article 7. The special treatment provided for here extends to their heritage, sacred places, secret knowledge, and human remains, etc. Resulting actions include restoring their cultural heritage to them, ensuring their access to it, respecting their customary laws associated with it, and even restoring land rights as part of this wider process of restitution.[112] As noted above, an important aspect of indigenous peoples' claims with regard to their land and culture is the collective nature of the rights claimed.

The sole piece of binding international law, thus far, that provides for protection of some human rights and rights related to heritage of indigenous peoples is the 1989 ILO Convention on indigenous and tribal peoples.[113] In its Preamble, it recognizes 'the aspirations of these peoples to exercise control over their own institutions, ways of life…and to maintain and develop their identities, languages and religions'. This responds directly to the strong desire of indigenous peoples to preserve their cultural identities—including their cultural heritage and associated practices—and to have an active participation in the policy-making framework for

[110] Anaya, *Indigenous Peoples in International Law* (n 48). The Preamble to the Indigenous and Tribal Peoples Convention No 169 adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session [ILOLEX No 169; 1650 UNTS 28383], notes in its Preamble, 'the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards'.

[111] UN Declaration on Indigenous Peoples' Rights (n 108).

[112] An important example of national legislation that has incorporated indigenous values into its protective framework is the Native American Graves and Repatriation Act (1991) in the United States. As a result of its adoption, control over a large number of ritual and cultural objects from US museums as well as grave sites has been handed over to Indian tribes.

[113] Convention on the Rights of Indigenous and Tribal Peoples (n 110). This treaty is, however, poorly supported by the international community and has failed to secure many ratifications, making the 2007 UN Declaration a particularly important text.

this. Moreover, the 'special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories' is recognized.[114] The rights they hold in relation to these lands include safeguarding their rights over the natural resources of these lands (Articles 14 and 15), which are often essential to the continuance of their cultural practices and traditional ways of life. This is a recognition of collective rights that goes further than that found in any other global human rights instrument.

The Convention also calls upon respect for the customary laws and practices regarding, inter alia, social organization and the transmission of land rights of these peoples. The important issue of the restitution of indigenous heritage is dealt with in the requirement for States to provide redress, including through restitution, 'with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs' with the participation of indigenous peoples. Moreover, States Parties 'shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms' developed in conjunction with the indigenous peoples concerned.[115] Further rights regarding heritage are set out as follows: 'Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.' The final element is an interesting one since it underlines the great importance of place names and personal names for personal and community identity.[116]

The provision with most significance for safeguarding the cultural heritage of indigenous peoples is Article 31 that states:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Again, we see here that what is commonly understood as cultural heritage is inextricably connected with natural environmental resources and their associated knowledge such that 'heritage' when applied to indigenous people is an expansive and holistic notion. The treaty calls for the strengthening and promotion of '[h]andicrafts, rural and community-based industries . . . and traditional activities

[114] Article 13. This intimate connection between land and heritage is also emphasized in the 2007 Declaration in Art 25 which asserts that 'indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources'.

[115] Article 11(2). [116] Article 12(1).

of the peoples concerned, such as hunting, fishing, trapping and gathering'[117] and, so, addresses aspects of cultural creativity and intangible heritage. The connection between preserving and safeguarding indigenous heritage and the customary institutional framework is recognized in the right of indigenous peoples 'to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs'[118] as long as these are in accordance with international human rights standards. Indigenous peoples who are divided by international borders 'have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes'. This provision accepts the reality of transboundary indigenous heritage where it straddles national borders and suggests that the States involved should not place obstacles in the way of such contacts, whether physical cross-border contacts or through other forms of communication.[119]

Character of the Human Rights Related to Cultural Heritage

A common misapprehension about human rights is the idea that a moral good must, necessarily, give rise to a legal human right. It is easy to make this assumption and, perhaps, it is a particularly appealing one in relation to cultural heritage. However, we should be careful to guard against assuming that the moral rightness of the survival of a particular cultural heritage or practice automatically creates some human right to this. Rights must be created through a legally acceptable route and not by simple acclamation.[120] As we are reminded by human rights theorists, '[hu]man rights as we know them today are the rights of lawyers, not the rights of philosophers'.[121] It is a system of positive and enforceable rights with rights-holders, addressees (the parties that are assigned duties/responsibilities), and scopes which focus on freedom, protection, and benefit. In this section, the main elements of this system, as it applies to cultural heritage and with a focus on cultural rights, are presented.

Rights-holders

Human rights as traditionally conceived are rights held by individuals and as individual members of communities (under Article 27 of the ICCPR), with the

[117] Article 23(1). [118] Article 34.

[119] An example of such transboundary heritage is the inscription on the Representative List of UNESCO's 2003 Intangible Heritage Convention of the oral culture of the Zapata people, which was jointly nominated by Bolivia and Ecuador.

[120] Prott, 'Understanding One Another on Cultural Rights' (n 35).

[121] James W Nickel, *Making Sense of Human Rights*, 2nd edn (London: Blackwell Publishing, 2007) at p 7.

exception of the right to self-determination which 'peoples' exercise who qualify for enjoying full statehood. In most cases, self-determination in its classical international law sense[122] is not really relevant to a discussion of heritage. However, indigenous peoples may argue for a limited self-determination giving control over its internal aspects (ancestral lands, natural resources, political system, cultural policy, etc) but not the external aspect of statehood. Hence, in almost all cases, we are considering here individual rights-holders of both the universal human rights that apply to all and those special status rights held by (individual) members of minorities, women, children, migrants, and disabled people. It is also worth reminding ourselves here that, although members of minorities enjoy special rights to heritage and will be the most likely to need to call on their right to protect and safeguard their heritage, all members of a society hold the right to access and enjoy cultural heritage. However, the logic of these rights includes a collective dimension and Shaheed has noted recently that:

> the existence of collective cultural rights is a reality in international human rights law today, in particular in the United Nations Declaration on the Rights of Indigenous Peoples. In addition, the Committee on Economic, Social and Cultural Rights, in its general comment No. 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15, para. 8) and general comment No. 21 (para. 15), underlined that cultural rights may be exercised alone, or in association with others or as a community.[123]

The collective rights she refers to here are of a limited kind: those related to indigenous peoples and intellectual property rights which have traditionally granted copyright protection, for example, to collectivities as well as to individuals. In reality, however, supporting cultural rights can also mean ensuring the survival of a culture, especially minority cultures, but this is predicated (in a technical sense) on the value of those cultures to the individual culture-holders. Most commentators agree that cultural rights must help protect the group; otherwise, the individual could not protect their own collective rights.[124] In order to achieve an approach that answers more effectively to the human rights of all members of society, the policy- and decision-making model must shift from what is in most

[122] With the extremely rare exception of establishing a new State on the basis of a distinct national heritage, eg as in the case of Kosovo. On the right to self-determination generally, see: Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995).

[123] Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights (Farida Shaheed)' submitted pursuant to resolution 10/23 of the Human Rights Council, adopted at the 14th session of the Human Rights Council, 22 March 2010 [Doc. A/HRC/14/36]. CESCR General Comment 21 (n 84) at para 7 supports the view that, 'all indigenous peoples…have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms'.

[124] This was the view taken by the HRC in its Commentary on Art 27 of the ICCPR, although accepting the notion that the collectivity also needed to exist for the guarantee of these rights. See also: Prott, 'Cultural Rights as Peoples' Rights in International Law' (n 30) at p 167.

cases a strictly State-driven one to one that allows for the inclusion of a range of different voices and that is more participatory in character.[125] At the same time, it must also be borne in mind that the 'community cultural heritage' does not always answer the needs and aspirations of all its members. Smith has made clear, for example, that 'heritage is gendered, in that it is too often "masculine", and tells a predominantly male-centred story promoting a masculine . . . vision of past and present'.[126] We should be especially careful in assuming that the identities created by heritage are positive and empowering ones for all members of the community in question (including the national community).[127] This, then, implies that participatory approaches need to take account also of the degree of democracy (or otherwise) within communities and find ways to ensure as many voices are heard as possible.

Shaheed makes the point that there may be different degrees or levels of access to and enjoyment of cultural heritage depending upon the diverse interests of individuals and groups with regard to specific cultural heritages.[128] This is an observation that carries profound implications for policy-making if we wish to ensure a human rights-based approach to cultural heritage protection and safeguarding. Local and cultural communities, for example, often feel a connection with their heritage that overrides any other interests, whether national or otherwise, and this should be given value. As a result, priority of access to and enjoyment of the cultural heritage should be given based on distinctions drawn between different interest groups or stakeholders, as follows. First, priority is given to the originators or 'source communities' who consider that they are the custodians and/or owners of a specific cultural heritage, the people who maintain and transmit a cultural heritage, and/or have taken responsibility for it. Second, individuals and (local) communities who consider the cultural heritage in question to be an integral part of the life of the wider community, but who may not be actively involved in its maintenance. Third, come scientific experts and artists and, fourth, the general public (the national society) who access the cultural heritage of others.[129] To this list, at the end, we could add the international community (acting on behalf of humanity) and, taking account of recent developments in cultural heritage law,[130] regional or sub-regional communities.

[125] Antonio A Arantes, 'Diversity, Heritage and Cultural Practices', *Theory Culture Society*, vol 24 (2007): pp 290–6.

[126] Laurajane Smith, 'Heritage, Gender and Identity' (n 74) at p 159.

[127] Feminist archaeology, eg, has increasingly focused on rediscovering and rewriting the history of archaeology to reflect the important role played by women. See: Lynn Meskell, 'Archaeology of Identity', in *Archaeological Theory Today* edited by Ian Hodder (Cambridge: Polity Press, 2001) pp 187–213 at p 194.

[128] CESCR General Comment 21 (n 84) at para 54: 'However, varying degrees of access and enjoyment may be recognized, taking into consideration the diverse interests of individuals and communities depending on their relationship to specific cultural heritages'.

[129] Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights' (n 123) at para 62.

[130] Namely, the importance accorded to regional and sub-regional shared cultural heritage by the 2003 Intangible Heritage Convention and such regional agreements as the 2005 Faro Convention of the Council of Europe.

Scope of the rights

The right to participate in cultural life,[131] can be characterized as a freedom. This is a choice of every individual not only to participate in cultural life but also the right *not* to do so; this latter can be significant, for members of certain cultural groups who feel that the group's norms and/or practices violate their individual human rights.[132] To guarantee this right, the State must abstain from interfering in the exercise of cultural practices and/or access to cultural goods and services and also take positive action to ensure the necessary preconditions for participation, facilitation, and promotion of cultural life, and access to and preservation of cultural goods. CESCR General Comment 21 notes that '[t]he decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality'.[133]

There are understood to be three main and interrelated components of the right to participate or take part in cultural life as: (a) participation in, (b) access to, and (c) contribution to cultural life.[134] *Participation* relates to the right of everyone (alone, or in association with others) 'to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice'.[135] Moreover, everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity. The notion of a*ccess* covers in particular the right of everyone (alone, or in association with others or as a community) 'to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity'.[136] Third, c*ontribution to cultural life* refers to 'the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the

[131] Article 15 of the ICESCR. Other rights guaranteed in this article are: the right to enjoy the benefits of scientific progress and its applications (Art 15, para 1(b)); the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary, or artistic production of which they are the author (Art 15, para 1(c)); and the right to freedom indispensable for scientific research and creative activity (Art 15, para 3). See further: CESCR General comment No 21 (n 84). The character of cultural rights is discussed in further detail in: Janet Blake, *Exploring Cultural Rights and Cultural Diversity—An Introduction with Selected Legal Materials* (UK: Institute of Art and Law, 2014) at pp 55–60.

[132] Such as the right to choose one's own spouse. At para 22 its states that 'no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity'.

[133] CESCR General comment No 21 (n 84) at para 7.

[134] CESCR General comment No 21 (n 84) at para 15.

[135] CESCR General comment No 21 (n 84) at para 15(a).

[136] CESCR General comment No 21 (n 84) at para 15(b). It continues: 'Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities'.

community'.[137] This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration, and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.[138] Hence, the third element relates to some internal aspects of self-determination.

For the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination, the following conditions are necessary: (a) *availability* of cultural goods and services that are open for everyone to enjoy and benefit from (eg libraries, museums, theatres, cinemas, and sports stadiums), the arts in all forms, the shared open spaces essential to cultural interaction, and the intangible cultural goods (such as languages, customs, traditions, social values, etc) which make up identity and contribute to cultural diversity; (b) *accessibility* which implies the existence of effective and concrete opportunities for individuals and communities to enjoy culture fully and without discrimination, within physical and financial reach of both urban and rural areas; (c) *acceptability* of the laws, policies, strategies, programmes, and measures adopted for the enjoyment of cultural rights to the individuals and communities involved and based on consultation with them; (d) *adaptability* through the flexibility and relevance of strategies, policies, programmes, and measures adopted by the State Party in any area of cultural life and their respectfulness of the cultural diversity of individuals and communities; (e) *appropriateness*, whereby a specific human right is realized in a way that is respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.[139] The CESCR stressed the need to take into account, as far as possible, cultural values attached to, inter alia, food, the use of water, the way health and education services are provided, and the way housing is designed and constructed. In addition, they singled out certain persons and communities as requiring special protection: women; children; older persons; persons with disabilities; minorities; migrants; indigenous peoples; and persons living in poverty.[140] Applying this to cultural heritage, Shaheed describes the right of access to and enjoyment of cultural heritage as including the following elements: '[it] includes the right of individuals and communities to, inter alia, know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage and the creation of others. It also includes the right to participate in the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes.'[141]

[137] CESCR General comment No 21 (n 84) at para 15(c).

[138] See: UNESCO Universal Declaration on Cultural Diversity (2001) (Art 5); Fribourg Declaration on Cultural Rights (2007) (Art 7).

[139] This responds to the so-called '4A scheme', composed of four elements—availability, accessibility, acceptability, and adaptability—as elaborated by Professor Katarina Tomasevski, Special Rapporteur on the Right to Education [UN Doc E/CN.4/1999/49].

[140] CESCR General comment No 21 (n 84) Part E at paras 25–39.

[141] Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights' (n 123) at para 79.

The nature of the obligations

The right to participate in cultural life entails, as a minimum obligation, the creation of an environment within which a person individually, in association with others, or within a community or group, can participate in the culture of their choice. This then results in certain core obligations that are applicable with immediate effect: (a) to take legislative and any other necessary steps to guarantee non-discrimination in the enjoyment of the right; (b) to respect the right of everyone to identify or not identify themselves with one or more communities; (c) to respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights; (d) to eliminate any barriers or obstacles that inhibit or restrict a person's access to their own or other cultures, without discrimination or barriers of any kind; and (e) to allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them.[142]

The obligations placed on States are categorized in terms of the actions to 'respect', 'protect', and 'fulfil'. The *obligation to respect* a human right requires States to refrain from interfering, directly or indirectly, with the right in question (eg the right to develop a culture). The *obligation to protect* requires States to prevent third parties from interfering with that right (eg to protect one's moral rights to traditional medicinal knowledge). The *obligation to fulfil* requires States to take appropriate measures for the full realization of the right (eg to ensure access for all to the cultural heritage) and to improving the conditions under which this right can be enjoyed. Lastly, it is important that the rights-holders can seek redress when their rights are violated and this requires the institution of appropriate mechanisms and access to justice. Since conflicts between a variety of stakeholders (including the State) are common, it is important that appropriate procedures be established to arbitrate such matters in a just and non-discriminatory fashion.[143] Certain specific measures can be identified under *the obligation to respect* that are relevant to cultural heritage, such as the right freely to choose one's own cultural identity, to belong or not to belong to a community, and have their choice respected; this includes the right not to be subjected to any form of forced assimilation, to be able to express one's cultural identity freely, and to exercise their cultural practices and way of life. It also involves: the ability to enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive, and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind; the freedom to create, individually, in association with others, or within a community

[142] In particular, States Parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

[143] CESCR General comment No 21 (n 84).

or group;[144] access to one's own cultural and linguistic heritage and to that of others;[145] and free and active participation, in an informed way and without discrimination, in any important decision-making process that may impact on his or her way of life and cultural rights. The *obligation to protect* requires States to take measures to prevent third parties from interfering in the exercise of these rights listed and, in addition, to undertake the following: respect and protect cultural heritage in all its forms, in times of war, peace, and natural disasters; respect and protect the cultural heritage of all groups and communities (in particular the most disadvantaged and marginalized individuals and groups) in economic development and environmental policies and programmes; respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals, and other forms of expression; and adopt and enforce legislation to prohibit discrimination based on cultural identity.

The *obligation to fulfil* can be subdivided into the obligations to facilitate, promote, and provide. Facilitating the right of everyone to take part in cultural life includes a wide range of positive measures (financial and other) that contribute to the realization of this right, such as: adopting policies for the protection and promotion of cultural diversity, and facilitating access to a rich and diversified range of cultural expressions; enabling persons belonging to diverse cultural communities to engage freely in their own cultural practices and those of others, and to choose freely their way of life; and taking appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture. Promoting the right requires States to take effective steps to ensure that there is appropriate education and public awareness concerning the right to take part in cultural life, particularly in rural and deprived urban areas, and taking account of the specific situation of minorities and indigenous peoples. This includes education and awareness-raising on the need to respect cultural heritage and cultural diversity. Fulfilment of the right requires States to provide all that is necessary for individuals or communities to take part in cultural life when they are unable, for reasons outside their control, to realize this right for themselves or with the means at their disposal. This would include, for example: the enactment of appropriate legislation and the establishment of effective mechanisms; the inclusion of cultural education at every level in school curricula, in consultation with all concerned; and guaranteed access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas, and theatres and to cultural activities, services, and events.[146]

[144] This obligation is closely related to the duty of States Parties, under Art 15, para 3, 'to respect the freedom indispensable for scientific research and creative activity'.

[145] This includes the right to be taught about one's own culture as well as those of others. States Parties must also respect the rights of indigenous peoples to their culture and heritage.

[146] For more details of these obligations, see: CESCR General comment No 21 (n 84) at paras 48–54.

Non-discrimination principle

Given the nature of cultural heritage and the diversity of individuals, groups, and communities that create, practise, and maintain it, the operation of the non-discrimination principle with regard to the right to participate in cultural life is of significance. The CESCR addressed the requirement of non-discrimination generally with regard to economic, social, and cultural rights[147] and stated that, 'the principles of non-discrimination and equality are recognized throughout the Covenant'.[148] For example, Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the rights enshrined in the Covenant.[149] Discrimination is understood here to constitute 'any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights'.[150] It adds that discrimination also includes incitement to discriminate and harassment and also makes reference to both *direct and indirect* discrimination: the former occurs when an individual is treated less favourably than another person in an equivalent situation on the basis of a prohibited ground (eg in employment, education, or cultural institutions); the latter relates to laws, policies, or practices which seem, prima facie, to be neutral but have a disproportionate impact on the exercise of economic, social, and cultural rights (eg requiring a birth certificate for school enrolment). Some individuals or groups of individuals may face discrimination on more than one of the prohibited grounds, such as women belonging to an ethnic or religious minority, and this 'cumulative discrimination' has a particularly damaging impact on individuals that requires special consideration.

[147] CESCR General comment No 20 on 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' by the Committee on Economic, Social and Cultural Rights at its Forty-third session 2–20 November 2009 [UN Doc E/C.12/GC/20].

[148] Paragraph 3 notes that: 'The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as… education and participation in cultural life'.

[149] CESCR General comment No 16 on 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural. Rights', adopted at the Thirty-fourth session of the CESCR on 11 August 2005 [UN Doc E/C.12/2005/4] notes that: 'Women are often denied equal enjoyment of their human rights, *in particular by virtue of the lesser status ascribed to them by tradition and custom*, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage' (emphasis added).

[150] The prohibited grounds include sex, race, language, ethnicity, and religion. Similar definitions are found in the International Convention on the Elimination of All Forms of Racial Discrimination (UN, 1965) [660 UNTS 195; 5 ILM 352 (1966), reprinted in 21 ILM 58 (1982)] (at Art 1); Convention on the Elimination of All Forms of Discrimination against Women (UN, 1979) [GA res 34/180, 34 UN GAOR Supp (No 46) at 193; 1249 UNTS 13; reprinted in 19 ILM 33 (1980)] (at Art 1); and Convention on the Rights of Persons with Disabilities (CRPD) adopted on 13 December 2006 during the 61st session of the General Assembly by resolution [A/RES/61/106] (at Art 2). The Human Rights Committee comes to a similar interpretation in its General comment No 18, paras 6 and 7.

Violations of these rights

The right may be violated as a result of the direct action of the State or other national entities or institutions, including those that are in the private sector, and/or are insufficiently regulated. Such violations often occur when States prevent access by individuals or communities to cultural life, practices, goods and services or through the omission or failure of the State to take the measures necessary to comply with its obligations (as set out above). Violations may also occur through omission, such as through the failure to take appropriate steps to achieve the full realization of the right of everyone to take part in cultural life. A violation also occurs when a State fails to take steps to combat practices harmful to the well-being of a person or group of persons.[151] Furthermore, the introduction of deliberately retrogressive measures in relation to the right to take part in cultural life could also constitute a violation of the right unless they can be fully justified by reference to the whole of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[152]

Human Rights as Expressed in Cultural Heritage Instruments

Naturally, the most directly relevant human rights for cultural heritage protection and safeguarding are the cultural rights articulated in the Universal Declaration and the two 1966 Covenants.[153] However, the total range of rights 'with a cultural dimension' is much more extensive than these and lists of 'cultural rights' have been developed that include as many as 50 or more potential such rights.[154] Hence, when discussing the rights of relevance to cultural heritage, a list based solely on cultural rights is overly restrictive, and we need to include other human rights of relevance to culture and heritage, such as the right to education, the right to information, and the right to freedom of opinion and expression. At the same time, it is helpful to base this discussion on a relatively restricted list of human rights culled from international and regional instruments. Prott provided a workable list containing ten human and cultural rights that have a direct or indirect relevance to protecting cultural heritage.[155] The last five of these rights all have a

[151] These harmful practices include those attributed to customs and traditions, such as female genital mutilation and allegations of the practice of witchcraft.

[152] CESCR General comment No 21 (n 84) at paras 60–65.

[153] The right to participate in cultural life (including the intellectual property rights) and the rights of minorities.

[154] Symonides, 'Cultural Rights: A Neglected Category of Human Rights' (n 85). Eg, when requested by the Council of Europe in 1993 to enumerate cultural rights, Bridget Leander produced a list that ran to over 50 potential rights identified from a variety of international instruments.

[155] These are: the right to freedom of expression, with the concomitant rights of freedom of religion and association (ICCPR Arts 19 and 22, respectively); the right to education (ICESCR Art 13(1)); the right of parents to choose the kind of education given to their children (ICESCR Art 13(3)); the right of every person to participate in cultural life (ICESCR Art 15(1)); the right of protection of artistic, literary, and scientific works (ICESCR Art 15(1)); the right to preserve and develop a culture (1966 UNESCO Declaration on the Principles of International Cultural

clear and direct association with the cultural heritage. Of these, according to Prott, the three rights to preserve and develop a culture, to respect for cultural identity and of a people not to have an alien culture imposed on it appear to be related to the unique identity of a people or cultural group. The right of a people to its own artistic, historical, and cultural wealth and the right of equal enjoyment of the common heritage of mankind, on the other hand, are more to do with property ownership issues and thus are of a different order.

The first right—that of freedom of expression—is an over-arching and fundamental right that is essential for the practice, production, and enjoyment of much cultural heritage, especially when it is associated with minority and indigenous groups within society. In that sense, it can be seen as a necessary precondition for the international protection and safeguarding of different aspects of cultural heritage. Next, the right to education is a basic prerequisite for having the capability to participate in cultural life, to be involved in much cultural heritage-related creative activity, and even for appreciating and enjoying the cultural heritage. In addition, the right of parents to choose the kind of education their children receive relates in particular to the right of minorities and indigenous peoples to mother-tongue and culturally appropriate education that fosters further cultural development. Interestingly, both the 2003 and 2005 Conventions of UNESCO make direct reference to education, capacity-building, and awareness-raising. The references found in the 2003 ICH Convention,[156] in particular, include non-formal means of education and make clear that the target group in many cases is a cultural community and this may well imply mother-tongue language education as well as culturally appropriate educational methodology.

The right of every person to participate in cultural life is understood to include the right of access to and enjoyment of one's own heritage, that of one's community and the national heritage, as well as the heritage of humankind. In this context, access and enjoyment of cultural heritage are interdependent concepts—one implying the other. They are seen to include, inter alia, to know, understand, enter, visit, make use of, maintain, exchange, and develop cultural heritage, as well as to benefit from the cultural heritage and creations of others, without political, religious, economic, or physical encumbrances. The CESCR has developed a specific notion of access which, if applied to cultural heritage would require the following: (a) physical access to cultural heritage; and through digital technologies (b) economically affordable access; (c) the right to seek, receive,

Cooperation, Art 1(2) and 1981 African Charter on Human and Peoples' Rights, Art 22(1)); the right of equal enjoyment of the common heritage of mankind (1981 African Charter on Human and Peoples' Rights, Art 22(2)); the right to respect for cultural identity (1976 Algiers Declaration, Art 19); the right of a people not to have an alien culture imposed on it (Algiers Declaration, Art 15); and the right of a people to its own artistic, historical, and cultural wealth (Algiers Declaration, Art 14). The 1976 Algiers Declaration has no legal status as such; the text is included as an annex to *The Rights of Peoples* edited by James Crawford (Oxford: Clarendon Press, 1988). See: Prott, 'Cultural Rights as Peoples' Rights in International Law' (n 30) at p 97.

[156] Article 14.

and impart information on cultural heritage, without borders; and (d) access to decision-making and monitoring procedures, including administrative and judicial procedures and remedies.[157] It should, of course, be understood that a fundamental requirement on States flowing from this is the general obligation to protect, preserve, and safeguard the cultural heritage of different groups, communities, and peoples. This has been expressed in terms reminiscent of a human rights-based obligation as early as the 1954 Hague Convention[158] which, in its reference to 'people' and not States, and of 'the cultural heritage of all mankind', is regarded by Francioni to 'underscore its connection to human rights and to foreshadow the idea of an integral obligation owed to the international community as a whole (erga omnes) rather than to individual states on a contractual basis'.[159]

The idea of access and enjoyment must also imply community participation in the identification, interpretation, and development of cultural heritage, as well as the design and implementation of preservation/safeguarding policies and programmes. An overlapping principle of enjoyment of and access to cultural heritage is non-discrimination, with special attention to disadvantaged groups. Of course, different individuals and communities are seen as having a more or less direct relationship to this heritage and, consequently, stronger or weaker rights in this regard. Distinctions should be made between (a) source communities which consider themselves as the custodians/owners of a specific cultural heritage, who are keeping cultural heritage alive and/or have taken responsibility for it; (b) individuals and communities, including local communities, who consider the cultural heritage in question an integral part of the life of the community, but may not be actively involved in its maintenance; (c) scientists and artists; and (d) the general public accessing the cultural heritage of others. Shaheed[160] notes that power differentials must also be taken into consideration since they affect the ability of individuals and groups to contribute effectively to the identification, development, and interpretation of cultural heritage for official protection, as a consequence, this process can exclude them and their heritage. Hence, the participation of individuals and communities in cultural heritage should include fully respecting the freedom of individuals to participate or not in one or several communities, to develop their multiple identities, to access their cultural heritage as well as that of others, and to contribute to the creation of culture.[161]

Since the retention (or restitution) of cultural objects is necessary to the participation in cultural life in order to guarantee the access that is an essential part of this right, the 1970 Convention of UNESCO and the 1995 Convention

[157] See the report of Professor Katarina Tomasevski, Special Rapporteur on the Right to Education [UN Doc E/CN.4/1999/49].

[158] It states in its Preamble that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'.

[159] Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction', *European Journal of International Law*, vol 22, no 1 (2011): pp 9–16 at p 13.

[160] Human Rights Council, 'Report of the Independent Expert' (n 13) at para 6.

[161] Human Rights Council, 'Report of the Independent Expert' (n 13) at para 10.

of UNIDROIT[162] both contribute to the enjoyment of this right. The 2003 Convention can be seen to promote the right of participation in all aspects of cultural heritage identification, protection, and management through its emphasis on the role of communities, groups, and individuals in all aspects of safeguarding as well as practising ICH.[163] Indeed, the human rights context of this Convention is primarily related to the economic, social, and cultural rights (as guaranteed by the 1966 Covenants) of the cultural communities, especially their right to develop their cultures, and the requirement, mentioned several times throughout the Convention,[164] that the identification and safeguarding of ICH should be carried out in participation with the relevant community, group, and/or individual. However, on the deficit side, the overall approach of the treaty is a statist one whereby the institutional mechanisms are wholly intergovernmental in nature, with no committee of independent experts, for example, and only Parties are competent to nominate items for the international lists. The 1972 Convention itself is increasingly moving in the direction of this right in its updated Operational Guidelines that now include communities and tradition-holders as important stakeholders in inscribed properties. In a similar vein, the 2005 Convention encourages the 'active participation of civil society' in efforts to achieve the objectives of the Convention namely the protection and promotion of diversity of cultural expressions.[165] The 2005 Convention also places on Parties the requirement to create an environment that encourages individuals and social groups to create, produce, disseminate, distribute, and have access to their own cultural expressions:[166] hence, it guarantees also the right to cultural development as well as a guarantee of other economic, social, and intellectual property rights. This Convention goes even further in recalling that 'cultural diversity flourish[es] within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures', thus drawing a direct link between democracy, social justice and cultural pluralism, and the value of cultural diversity.[167] However, as has been discussed in Chapter 6, the 2005 Convention is rather confused in its orientation, having been originally conceived of as a human rights-oriented treaty (inspired by the 2001 Declaration on cultural diversity) but resembling more closely a trade-related treaty in its final form.[168]

[162] Both are discussed in detail, in Chapter 2.

[163] Francioni, 'The Human Dimension of International Cultural Heritage Law' (n 159) notes at p 14 that: 'The link with human rights, and in particular with the collective dimension of the right to access, perform and maintain a group's culture, underlies the adoption in 2003 and the remarkable success of the Convention for the Safeguarding of Intangible Cultural Heritage … The qualitative shift of this convention consists in bringing the focus from the protection of the cultural object to the social structures and cultural processes that have created and developed the "intangible" heritage.'

[164] Articles 2(1), 11(b), 12, and 15. [165] Article 11. [166] Article 7.

[167] Furthermore, Principle 1 of the 2005 Convention on respect for human rights and fundamental freedoms reads: 'Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed'.

[168] Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Leiden, 2007).

The right of protection of artistic, literary, and scientific works is obviously an intellectual property-related right and it is thus, in relation to UNESCO's normative activities, most closely answered by the Universal Copyright Convention of 1952 that protects the economic and moral rights of authors of artistic and literary works.[169] The 1989 Recommendation on Traditional Culture and Folklore also addresses the intellectual property rights aspect of this heritage and seeks to extend copyright protection to creators and interpreters of folklore (who often do not fall within the traditional copyright definition of 'authors'). The 2005 Convention naturally deals with intellectual property questions, given its subject matter of 'those expressions that result from the creativity of individuals, groups and society and have a cultural content'. In the Preamble, it notes the importance of intellectual property rights to sustaining those involved in cultural creativity (paragraph 16).

The right to develop a culture is found in both the UNESCO Declaration on the Principles of International Cultural Cooperation (1966) and the African Charter of Human and Peoples' Rights.[170] However, the 2003 ICH Convention can be seen as the archetypal expression of this right in the cultural heritage canon since, throughout the Convention text, it supports the right of cultural communities to continue to practise, maintain, and transmit their traditional culture. The 2005 Diversity Convention, moreover, requires Parties to create an environment that encourages individuals and groups to create, produce, disseminate, distribute, and have access to their own cultural expressions.[171] The central role of cultural heritage in the construction of cultural identity means that, by definition, instruments designed to protect and safeguard this heritage recognize also the right to respect for cultural identity. The 1970 UNESCO Convention does so by recognizing the need for peoples and communities to have control over important elements of their cultural property in view of that group's identification with such objects. The 1972 World Heritage Convention as much as it celebrates the global significance of specific cultural places, also takes account of the special value of those places to particular cultural communities. This is especially true of those cultural properties listed for their associated intangible values.[172] The 2003 ICH Convention explicitly states in its definition the role of ICH in providing communities and groups 'with a sense of identity and continuity' and the 2005 Convention defines 'cultural content' (of cultural expressions) as the symbolic, artistic, or cultural values 'that originate from or express cultural identities'.[173] Furthermore, the requirement for the 'recognition of the equal dignity of and respect for all cultures'

[169] Of course, the Berne Convention for the Protection of Literary and Artistic Works, opened for signature 9 September 1886 (as amended in 1914, 1928, 1948, 1967, 1971, and 1979) [25 UST 1341, 828 UNTS 221] discussed in Chapter 7 is another very significant treaty in this regard.

[170] Articles 1(2) and 22(1), respectively. [171] Article 7.

[172] Eg, the *Bandiagara* site in Mali, inscribed in 1989 on the basis of criteria v and vii (one of which is cultural and the other natural). It not only contains some beautiful architectural elements (houses, granaries, altars, sanctuaries and *Togu Na*, or communal meeting-places) but is also a space for age-old social traditions, including masks, feasts, rituals, and ceremonies involving ancestor worship, that are of special importance to the local community.

[173] Articles 2(1) and 2, respectively.

in paragraph 16 of the Preamble to the 2005 Convention also implies this right. One aspect of the right to develop a culture is found in a related right, namely the right of a people to have access to and enjoyment of its own artistic, historical, and cultural wealth. This right is most closely answered by the 'retentionist' approach of the 1970 Convention which takes the fundamental position of the over-arching right of the state of origin to claim the return and/or restitution of stolen and illegally exported items of cultural property.[174] It is, of course, no coincidence that the 1970 Convention, and the Algiers Declaration (1976) in which this right is more explicitly expressed, were both adopted in the 1970s. They reflect a post-colonial ideology of the times that saw the return of cultural objects removed during the period of colonial domination as an essential step in reasserting national pride and identity. With regard to the restitution of cultural property stolen in times of armed conflict, the connection can also be made with the peremptory norm of international law prohibiting genocide, as explored by Vrdoljak.[175]

Although the right of a people not to have an alien culture imposed on it[176] can again be viewed as reflecting a strongly post-colonial position, it is actually the more recent Conventions of UNESCO that have responded most directly to this right. By giving importance to the heritage of often marginalized cultural communities, the 2003 Convention can be seen to support the right of members of ethnic, religious, and linguistic minorities to enjoy their culture in community with each other.[177] This is, of course, another way of stating the right asserted here, ie of not having an alien culture of a dominant group imposed on them. What is most significant here is the requirement placed on Parties to involve cultural communities directly in identifying elements of ICH for inventorying (Articles 12 and 15), thus reducing the power of the State (and, hence, the dominant culture) to determine what is to be regarded as ICH for the purposes of the Convention. In the 2005 Convention, the principle of equal dignity of and respect for all cultures (Principle 3) notes that, 'the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures'. This presupposes, then, the right of a people or nation not to have an alien culture imposed on it.

The right of equal enjoyment of the common heritage of mankind is found in the African Charter (Article 22(2)). The notion of the 'common heritage of

[174] For more on this and the notion of 'cultural nationalism', see: John H Merryman, 'The Nation and the Object', *International Journal of Cultural Property*, vol 3 (1994): pp 61–76. According to Vrdoljak, 'Human Rights and Cultural Heritage in International Law' (n 25), a preliminary draft referred in its Preamble to Art .27 of the UDHR as requiring States to protect the cultural property on their territory against illicit export and transfer (UNESCO Doc SHC/MD/3 at paras 9 and 10). However, it remains a heavily State-oriented treaty while, although the 1995 UNIDROIT Convention does allow for greater recognition of the interests of non-State groups in accessing the heritage in question, it remains heavily State-centred.

[175] Ana Filipa Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity', *European Journal of International Law*, vol 22, no 1 (2011): pp 17–47 in which she notes that: 'By repeatedly sanctioning the restitution of cultural property following various wars, the international community has implicitly recognized that seizure and destruction of cultural heritage are an integral part of international wrongful acts.'

[176] As formulated in the Algiers Declaration (1976).

[177] As guaranteed by Art 27 of the ICCPR.

mankind' is prevalent throughout cultural heritage instruments, although it has evolved greatly over the last 50 years. The 1954 Hague Convention, for example, notes in the Preamble that 'damage to cultural property belonging to any people whatever means damage to the cultural heritage of mankind'. The 1972 World Heritage Convention is predicated on the principle that certain properties of 'outstanding universal value' are to be protected as a world heritage. Hence, both instruments take as the justification for protecting the cultural heritage in question the fact that it has an importance to all of humanity, rather than because it contributes per se to the totality ofcultural diversity (eg the position of the 2005 Convention). As has been noted above, however, concept of a global culture or heritage, here, is a contradictory one since what makes it of universal significance as such also makes it of great special significance to a people or nation.[178] More recently, the 2003 ICH Convention has characterized the safeguarding of that heritage as a 'common interest of humanity' and the main international list it establishes is called the Representative List of the Intangible Cultural Heritage of Humanity. Here, in contrast, we have a notion that 'the common interest' of humanity in safeguarding this heritage is based on its contribution to cultural diversity, ie not for itself alone but as a part of a greater whole. The idea of the 'representativeness' of the list underlines that cultural diversity per se is treated as an important value of the international community with regard to cultural heritage. The notion of 'representativeness' upon which that list is predicated is significant here since it reflects an ambition to reflect the *diversity of ICH worldwide* and not, as such, the special or intrinsic value of each element, namely it is not simply a 'hit parade' of outstanding items.[179]

Since both the common heritage of mankind (and the associated common interest of humanity in preserving cultural diversity) is a global notion, then a right of equal enjoyment to this would imply some sense of international (intra-generational) equity and, hence, a form of solidarity right. As such, the principle of international cooperation and assistance found both in the 1972 and 2003 Conventions (Articles 19–26 and 19–24, respectively) and the principle of international cooperation and solidarity as expressed in the 2005 Convention[180] are of relevance here. The principle of equitable access 'to a rich and diversified range of cultural expressions from around the world' (Article 2(7)) that constitute the cultural diversity characterized in the Preamble of the 2005 Convention as a 'common heritage of humanity' is the clearest expression of this right in any international cultural heritage instrument to date.

[178] Examples can be given from cultural properties inscribed on the World Heritage List, such as the Parthenon, Stonehenge, and Angkor Wat.

[179] This makes it very different in its underlying philosophy from the World Heritage List of the 1972 Convention.

[180] Article 2(4).

Conclusion

It is clear from the above discussion that the relationship that exists between cultural heritage and human rights is one of mutuality. On the one hand, cultural heritage itself contributes to human rights by playing a constitutive role in identity formation and as a basic component of cultural diversity, to name two examples. On the other, in view of the 'soft law' character of much international cultural heritage law and the way in which States have reserved their sovereign jurisdiction in negotiating cultural heritage treaties, human rights may often prove the most effective avenue for communities and individuals to protect and safeguard their cultural heritage. Furthermore, some degree of disconnect may occur between cultural heritage and the community and individuals concerned as a result of the pressures of modernity, globalization, tourism, etc. This dislocation is an important human rights issue and requires the community and individuals themselves, especially source communities,[181] to be empowered to safeguard their own heritage. Questions of cultural heritage issues should not be limited to technical issues of preservation and protection but must also involve the role cultural heritage plays in society and people's lives.

We can identify certain cultural and other human rights that have found expression in various cultural heritage protection and safeguarding instruments. These, then, have been accepted by the international community as valid rights to be guaranteed within the framework of those treaties. From the above analysis, we can therefore extend the range of cultural rights now recognized by States beyond the narrow set of specifically 'cultural' rights enshrined in the ICESCR and ICCPR[182] to include some or all of the rights enumerated above. This is a dynamic and developing area of human rights law which, despite its many theoretical challenges, is likely to gain further acceptance and prominence in the future through the growing understanding of the central role played by culture in development, especially sustainable development. It is, therefore, a useful exercise to examine a range of international treaties, not only in the field of cultural heritage protection, in order to identify trends for the future development in this area. For example, the guarantees for local and indigenous communities with regard to their traditional ecological knowledge contained in Article 8(j) of the UN Convention for Biological Diversity (1992) and similar recognition of local farmers' rights in the FAO Treaty on Plant Genetic Resources (2001) point to an increasing acceptance of the collective nature of some of these rights.

Further work is needed in clarifying the content and nature of these rights and we need to be ready to look at a wide variety of areas of law if we wish to resolve these continuing uncertainties. Importantly, for this book, the area of cultural heritage law has already proved itself to be a fruitful source of such developments—with the adoption of the 2003 Intangible Heritage Convention

[181] Namely, those that produced the heritage.
[182] Mainly Art 15 of the ICESCR and Art 27 of the ICCPR.

by UNESCO and the 2005 Faro Convention by the Council of Europe—and will no doubt continue to be so. The deeply mutual relationship between human rights and cultural heritage law presented in this chapter, would further underline this potential of developments in the cultural heritage field to percolate slowly into human rights instruments in the future and vice versa.

9

Regional Trends and Approaches

Introduction

This chapter deals jointly with regional approaches to safeguarding and protecting cultural heritage and some likely future trends in cultural heritage policy- and law-making, since the nature of setting policies and law in the regional context allows for greater freedom and ambition than on the global scale. Within regions (and sub-regions) countries are likely to have clearer shared values as well as shared challenges and this can allow for more innovative approaches to protection and regulation. This is true not only in the cultural heritage field, but is particularly noticeable in the case of environmental regulation. For example, the 1979 'Berne' Convention[1] is an extremely important wildlife protection Convention, not only as a regional one but also as an international one since, unusually, it places clear and unequivocal binding obligations on Parties, and the 2003 African Convention on the conservation of nature and natural resources[2] has been described by Kiss and Shelton as 'the most modern and comprehensive of all agreements concerning natural resources', covering 'all aspects of environmental conservation and resource management'.[3] In another field of law, human rights, we also see how the European regional system is able to allow for petitions by individual citizens to the European Court of Human Rights against their governments, a possibility not conceivable on the global scale.

However, it should be noted that some regions have been more successful than others in mobilizing for regional protection policies and regulation while others, such as western Asia and central Asia, have generally been less effective in this.[4] As we have seen in Chapter 5 (on intangible cultural heritage), this lack

[1] 'Berne' Convention on the Conservation of European Wildlife and Their Natural Habitats (Berne, 19 September 1979, in force 1982) [UKTS No 56 (1982)]. Despite the relatively early date of its adoption, this Convention takes an approach to conservation that is close to that required by sustainability.

[2] Convention on the Conservation of Nature and Natural Resources, adopted by the African Union at Maputo, Mozambique on 11 November 2003 accessed 23 February 2015 at: <http://www.au.int/en/content/african-convention-conservation-nature-and-natural-resources-revised-version>.

[3] Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law* (The Hague: Martinus Nijhoff, 2007) at p 184. They note that the Preamble proclaims the conservation of the global environment to be a common concern of humankind and the conservation of the African environment a primary concern of all Africans.

[4] There is no binding environmental protection treaty for this region, eg, with the exception of such treaties as the Tehran Convention for the protection of the environment of the

of sub-regional cooperation can even lead to disputes over claims to particular ICH elements inscribed on the Representative List. It is also important to note that both Europe and Africa have experienced, and Africa continues to do so, armed conflict on ethnic lines in which cultural heritage has been a symbolic element. Hence, for these regions, protecting cultural heritage has included harnessing its potential for inter-cultural/inter-ethnic dialogue and increased social cohesion rather than as a divisive factor.[5] This chapter concentrates on the three regions of Africa, the Americas, and Europe that have the most highly developed regional policies and regulatory approaches towards the protection and safeguarding of cultural heritage, with region-specific viewpoints that will be explained below. Some mention will also be made of relevant developments in Southeast Asia, the Arab States, and the Muslim world. It is also possible to identify certain commonalities between them that, as mentioned above, have had or have the potential for a significant influence over the development of global international law in this field. Differences can also be identified in the objectives and orientation of the cultural heritage policies of the three regions, with the main focus of the Organization of American States being on indigenous heritage, the African Union concerned mostly with 'heritage as a common living culture of African Peoples' liberated from the colonial era, while the Council of Europe's approach is more firmly based on built heritage and cultural landscapes.[6]

According to Vrdoljak, these regional approaches taken alongside the reports of the Independent Expert on Cultural Rights 'have the potential to have a transformative impact on our understanding of cultural heritage and its legal protection at the multilateral level, from previous emphases on States and national cultures to human rights and cultural diversity'.[7] These instruments share the objective of developing a culture within (local, national, regional) society that fosters inter-cultural and inter-generational dialogue and an understanding of and a respect for human rights.[8] Another extremely significant common approach that signals a paradigm shift in cultural heritage policy- and law-making is that the relationship between States and other stakeholders, in

Caspian Sea region or the Kuwait Convention for the Persian Gulf region that have very limited geographical scope.

[5] Ana Vrdoljak, 'Human Rights and Cultural Heritage in International Law' in *International Law for Common Goods—Normative Perspectives on Human Rights, Culture and Nature* edited by Federico Lenzerini and Ana Filipa Vrdoljak (Hart Publishing, 2014) pp 139–73 notes at p 170: 'It is significant that Africa and Europe, two continents which have been riddled with violent ethnic and religious conflict in recent decades, have adopted multilateral framework conventions focusing on the promotion of cultural diversity and human rights, and heralding a reinterpretation of the protection of cultural heritage.'

[6] Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013) at p 67.

[7] Vrdoljak, 'Human Rights and Cultural Heritage in International Law' (n 5) at p 171.

[8] See Art 2(3) of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27/10/2005) [CETS No 199] ('Faro Convention'); para 4(5) of the ASEAN Declaration on Cultural Heritage adopted by ASEAN in Bangkok, Thailand on 25 July 2000; and para 3(4) of the Charter for African Cultural Renaissance adopted by the African Union at Khartoum on 24 January 2006 (not yet in force).

particular the cultural or heritage communities, is now perceived quite differently and that the main rights-holders (and duty-holders) are no longer the States acting through their cultural organs but communities, groups, and even individuals.[9] This has had a clear influence over cultural heritage law-making within UNESCO, for example, with the result that both the 2003 Intangible Heritage Convention and the 2005 Convention on Diversity of Cultural Expressions both have a much greater and more central role for communities, groups, individuals, civil society organizations, etc than was traditionally the case. Moreover, since these regional instruments are intended to be read in conjunction with existing cultural heritage treaties, the existing treaty obligations then enjoy an additional human rights dimension,[10] such as through increased participation by groups and communities in their implementation or the integration of cultural heritage protection into such aims as cultural diversity and inter-communal dialogue.

Regional Systems of Protection

Africa: the African Union

An important wider context within which policies and laws are developed for the protection of cultural heritage is that of human rights and, in the African context, the key background document is the African Charter on Human and Peoples' Rights (1981) commonly known as the 'Banjul Charter'.[11] In its Preamble, it sets out two points of particular relevance to cultural heritage from the African perspective, first noting 'the virtues of their historical tradition and the values of African civilization' and considering that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'. Hence, we have the idea that there is a specifically 'African' cultural heritage and, second, that African citizens owe duties in return for the rights they enjoy under this Charter. In this case, the duties of interest here are to 'strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society' and to contribute as much as possible to 'the promotion and achievement of African unity'.[12] It is not clear exactly how this is to be achieved and there are serious ambiguities in the drafting, such as the failure to specify what 'African values' are and the (probably unintended) implication that, if there are 'positive' African values there are, presumably, negative ones too.

[9] This is made clear in the 2005 Faro Convention of the Council of Europe in Arts 1 and 4 and the ASEAN Declaration (2000) at Arts 3, 8, and 14, for example.

[10] Vrdoljak, 'Human Rights and Cultural Heritage in International Law' (n 5).

[11] Adopted 27 June 1981, [OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986].

[12] Article 29 in Chapter II on 'Duties'.

Despite these criticisms of the actual text of this article, it does, however, suggest an interesting viewpoint that there is an identifiable African heritage that all Africans have a responsibility to protect and promote; the duty to promote African unity appears, in some way, to be linked with this and this suggests that promoting cultural heritage and the African identity associated with it will also contribute to a sense of African unity. One of the human and peoples' rights set out in the Banjul Charter of obvious relevance here is the 'right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.[13] Interestingly, there is a linkage made between cultural heritage and development in this article since, in its second paragraph, it sets out the (apparently related) duty of States, individually and collectively, 'to ensure the exercise of the right to development'.

The Charter for African Cultural Renaissance is one of the most significant contemporary treaties of the African Union that has implications for both policy-making and regulation of cultural heritage in that region.[14] The Preamble states that the guiding instruments include the African Charter on Human and Peoples' Rights (1981), the UNESCO Declaration of Principles of International Cultural Co-operation (1966), and UNESCO's cultural heritage treaties of 1954, 1970, 1972, 2001, 2003, and 2005. It defines 'culture' as: 'the set of distinctive linguistic, spiritual, material, intellectual and emotional features of the society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs' and that any African cultural policy 'should of necessity enable peoples to evolve for increased responsibility in its development'.[15] Although the individual right of each person to enjoy free access to culture is also noted here,[16] it is clear that the emphasis is more strongly on the inalienable right of 'any people' to set its own cultural policies according to their own values, which represents an important aspect of self-determination in the face of the 'depersonalization of part of the African peoples' following slavery and colonization.[17] Moreover, the message here is strongly that a sense of 'African brotherhood (sic) and solidarity' should outweigh any ethnic, national, or regional differences.[18] A further notable emphasis is placed here also on the importance of languages as a 'mainstay and media of tangible and intangible cultural heritage in its most authentic and essentially popular form and also as a factor of development'.[19] This is interesting since African countries have traditionally viewed languages and linguistic diversity as an essential element in their cultural heritage in a way that European countries, for example, have not,

[13] Article 22(1).

[14] Adopted by the African Union at Khartoum on 24 January 2006; not yet in force (as of 23 February 2015).

[15] Preamble para 1.

[16] Preamble para 3. Article 3 underlines the human rights orientation by stressing the assertion of 'the dignity of African men and women' as a primary objective of the Charter, alongside promotion of freedom of expression and cultural democracy.

[17] Preamble paras 2 and 4. [18] Preamble para 6. [19] Preamble para 5.

while some other countries in western and southern Asia have traditionally been hostile to overt support for linguistic diversity since they fear its potential to damage the unity of the State. Among the objectives of the Charter is to preserve and promote the African cultural heritage and this can be linked with the objective of integrating cultural objectives into development strategies[20] to place cultural heritage protection firmly within a broader development strategy. This is also seen as part of the wider picture of globalization and the capacity of culture (including and, possibly, in particular cultural heritage) to provide African peoples with the resources to enable them to cope with the demands of the contemporary world.

The role of both traditional knowledge and languages in this is also given prominence in this agreement[21] and protecting and developing tangible and intangible cultural heritage are set out as a basic principle for setting cultural policy within the framework of cultural development.[22] As a point that has significance in view of more recent developments in international cultural heritage law-making, this Charter contains the explicit recognition (by States) of a significant number of non-institutional actors who are instrumental in cultural development, including designers, private developers, associations, local governments, the private sector, etc.[23] This goes beyond simple recognition and Parties are called upon here to build the capacity of this range of stakeholders (through festivals, training courses, etc) so that they can contribute more effectively to the cultural development process. It is also interesting to note here that both youth and elders and traditional leaders are singled out as important stakeholders whose potential to contribute to this should be recognized and fostered.[24] The protection of 'African cultural heritage' is addressed directly in five articles[25] which are interesting in that, in contrast to the more implicit treatment of cultural heritage above, tend to concentrate on ending the looting and trafficking of African cultural property, seeking its return to the countries of origin, seeking the return of archives and historical documents removed from African countries, and ensuring the appropriate conditions to house them on their return. Apart from the proposal to establish an African World Heritage Fund and the specific encouragement on African States to become Parties to the 2003 Intangible Heritage Convention,[26] this is very much an approach set in the 1970s and does not really attempt to respond to the role of cultural heritage in development and contemporary society.

[20] Article 3(d) and (g).

[21] The objective of promoting 'the popularization of science and technology *including traditional knowledge systems* as a condition for better understanding and preservation of cultural and natural heritage' is stated at Art 3(i). Article 4 also calls for 'strengthening the role of science and technology, including endogenous systems of knowledge, in the life of the African peoples by incorporating the use of African languages'. Articles 18 and 19 (comprising Part IV of the Charter) are concerned specifically with protecting and promoting languages.

[22] Article 10(2).

[23] Article 11(2). This reflects the increasing recognition of the role of non-State actors in UNESCO's 2003 and 2005 Conventions.

[24] Articles 13 and 14.

[25] Articles 25–29 in Chapter V of the Charter.

[26] Articles 25 and 29, respectively. The latter also encourages ratification of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague, 1954).

A long-term policy document with implications for the protection and promotion of cultural heritage in Africa is Agenda 2063,[27] adopted by the African Union Commission of the African Union in 2013[28] and that is dedicated to an 'enduring Pan African vision of "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena" '.[29] It is aimed at building an Africa that is 'self-confident in its identity, heritage, culture and shared values'[30] and Aspiration 2 is entitled 'An Integrated Continent, Politically United Based on the Ideals of Pan Africanism and the Vision of Africa's Renaissance'.[31] It is thus a policy foresight document[32] aimed at moving towards a paradigm shift based on discussion among the various stakeholders. It articulates the aspiration that Africa 'will witness the rekindling of solidarity and unity of purpose that underpinned the struggle for emancipation from slavery, colonialism, apartheid and economic subjugation', hence situating it firmly in a post-colonial framework.[33] The central role envisaged for cultural heritage in the future development of the continent is made clear in Aspiration 5 that is entitled 'An Africa with a Strong Cultural Identity, Common Heritage, Values and Ethics'. This includes the goal that 'Pan Africanism and the common history, destiny, identity, heritage, respect for religious diversity and consciousness of African people's and her diaspora's will be entrenched' and that Africa's 'diversity in culture, heritage, languages and religion shall be a cause of strength'. In addition, '[c]ulture, heritage and a common identity and destiny will be the centre of all our strategies so as to facilitate for a Pan African approach and the African Renaissance'.[34]

Among the 'critical enablers' for Africa's development is the 'ownership of an African narrative… to ensure that it reflects continental realities, aspirations and priorities and Africa's position in the world' along with finding 'an African approach to development and transformation through 'learning from the diverse, unique and shared experiences and best practices of various countries and regions as a basis of forging an African approach to transformation'.[35] A linkage, then, is made here between cultural heritage and setting national and regional sustainable development plans. As such, this policy document emphasizes that the protection and promotion of cultural heritage on the African continent today is within the broader context of 'Pan-Africanism and African Renaissance', namely a total recovery of an African identity and dignity.[36]

[27] Adopted by the African Union Commission of the OUA/AU in the *Solemn Declaration of the Assembly of Heads of State and Government of the African Union* at Addis Ababa, on 26 May 2013 and presented to the AU Summit in January 2014.

[28] The Third Edition is available online, accessed on 23 February 2015 at: <http://agenda2063.au.int/en/documents/agenda-2063-africa-we-want-popular-version-3rd-edition>.

[29] Agenda 2063 (n 28) at para 4.

[30] Agenda 2063 (n 28) at para 7.

[31] Agenda 2063 (n 28) at para 21.

[32] Operationally, a rolling plan of 25 years, 10 years, 5 years, and short-term action plans.

[33] Agenda 2063 (n 28) at paras 40 and 44.

[34] Agenda 2063 (n 28) at paras 40 and 44.

[35] Agenda 2063 (n 28) at para 73(g) and (h).

[36] See: Speech by Dr Nkosazana Dlamini-Zuma, Chairperson of the African Union Commission (AUC) to the 3rd Africa-South America (ASA) Summit, on 22 February 2013, at the Sipoppo Convention Centre, Malabo, Republic of Equatorial Guinea.

The Americas: Organization of American States (OAS)

The broader legislative context for cultural heritage policies and law in the Americas was initially set out in the American Declaration of the Rights and Duties of Man.[37] In its Preamble, it states that '[s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power'. This sets out a non-binding moral and political obligation on the Member States to preserve culture, including cultural heritage. The American Convention on Human Rights (1969),[38] similarly with the aforementioned Banjul Charter of the African region, expresses explicitly the relationship between duties and rights and states that '[e]very person has responsibilities to his family, his community, and mankind'[39] which might be interpreted to include duties towards the cultural heritage, not only at the national and regional level but even at the universal level of humanity.

The OAS has certain key positions towards cultural policy-making that have significant impacts on the way in which cultural heritage is viewed and treated. The following statement from that Organization contains many of these: 'We acknowledge the positive contribution of culture in building social cohesion and in creating stronger, more inclusive communities, and we will continue to promote inter-cultural dialogue and respect for cultural diversity in order to encourage mutual understanding, which helps reduce conflict, discrimination and the barriers to economic opportunity and social participation.'[40] Here, then, we see the high value placed on cultural diversity (which includes policies towards strengthening indigenous cultural heritage), inter-cultural dialogue within American States and the concomitant strengthening of social cohesion and creation of inclusive communities. These approaches are reflected in the constitutional laws of many Latin American countries in which protection of cultural and linguistic diversity, especially of indigenous peoples, and the objective of increased social dialogue and cohesion are prominent elements.[41] How this relates to heritage is made explicit in an OAS Declaration which recognizes 'the important link between development and culture' and the need to provide 'support for culture in its many dimensions contributes to, among other things, *the preservation and protection of national heritage*, the enhancement of the dignity and identity of our people, the creation of decent jobs, and the overcoming of poverty' (emphasis added).[42] A similar strong concern over the illicit movement of cultural property

[37] Adopted at the Ninth International Conference of American States, 1948 [119 UNTS 3, entered into force 13 December 1951].

[38] Adopted at San Jose in November 1969 and entered into force on 18 July 1978 [OAS Treaty Series No 36, 1144 UNTS 123; OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)].

[39] Article 32.

[40] OAS Declaration of Port of Spain, 2009. Similarly, the OAS Declaration of Québec (2001) considers that: 'the cultural diversity that characterizes our region to be a source of great richness for our societies. Respect for and value of our diversity must be a cohesive factor that strengthens the social fabric and the development of our nations.'

[41] Eg, as is expressed in the constitutional law of Mexico.

[42] OAS Declaration of Mar del Plata, 2005.

to that expressed in the African context is obvious here too where 'the need to strengthen strategies to prevent the illicit trafficking in cultural property which is detrimental to the preservation of the collective memory and cultural heritage of societies and threatens the cultural diversity of the Hemisphere' is acknowledged as a key policy objective.[43] As with Africa, the cultural and linguistic diversity of countries in the Americas is also viewed as an important aspect of cultural heritage to be protected and promoted.[44]

The linkage between culture and development, with an acknowledged role for cultural heritage, is also made explicit in recent policy-making in the American Hemisphere. The fifth Inter-American Meeting of Ministers of Culture and Highest Appropriate Authorities held in 2011[45] adopted a Final Report entitled Culture, Common Denominator for Integral Development in which they affirmed that 'culture is a common denominator for the integral development of the peoples of the Americas' and 'plays a central role in the economic, social, and human development of their communities'.[46] In this they recognized the contribution of culture, as a bearer of identity, values, and meaning, to the fight against poverty, promoting dialogue and social cohesion and creating stronger and more inclusive communities.[47] It then makes explicit the importance of safeguarding and promoting both tangible and intangible cultural heritage in order to achieve 'the integral and sustainable development' of communities in the American Hemisphere.[48]

The main treaty of the OAS for cultural heritage protection—the 'San Salvador' Convention[49] of 1976—is much older and betrays a very different set of priorities from this more recent policy document. Its main thrust is the need to take steps, at both the national and international levels, to ensure the most effective protection of and retrieval of cultural treasures in the face of the looting of cultural heritage that the continent was facing.[50] In addition, the definition it gives

[43] OAS Plan of Action Québec, 2001.

[44] OAS Plan of Action Québec, 2001. At the Third Inter-American Meeting of Ministers of Culture and Highest Appropriate Authorities, 13–15 November 2006, Montreal, Canada [OAS Doc OEA/Ser.K/XXVII.3 CIDI/REMIC-III/doc.13/07, 9 April 2007]. Topic 1 of the First Plenary session was 'Preservation and Presentation of Cultural Heritage' and discussions examined key elements in cultural heritage preservation: disaster planning, preservation in a digital age, and the preservation of intangible cultural heritage.

[45] *Final Report* of the Fifth Inter-American Meeting of Ministers of Culture and Highest Appropriate Authorities on 9–10 November 2011 at OAS Headquarters, Washington, DC [OAS Doc OEA/Ser.K/XXVII.3 CIDI/REMIC-III/doc.6/11 rev. of 3 April 2012].

[46] Preamble, para 3. [47] Preamble, para 4. [48] Preamble, para 7.

[49] Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador), approved on 16 June 1976, through Resolution AG/RES 210 (VI-O/76) adopted at the Sixth Regular Session of the General Assembly, Santiago, Chile.

[50] Hence, Art 1 states that: 'The purpose of this Convention is to identify, register, protect, and safeguard the property making up the cultural heritage of the American nations in order: (a) to prevent illegal exportation or importation of cultural property; and (b) to promote cooperation among the American states for mutual awareness and appreciation of their cultural property.' Article 3 requires a high protection of the cultural property covered from illicit export and import, Art 7 provides for internal registration and other measures to support this, the prevention of illegal excavation is provided for by Art 9, and Art 10 requires Parties to take all measures to prevent illegal export and import of cultural property, with supporting measures provided for in Arts 11 and 12.

of cultural property concentrates mainly on the monuments, archaeological sites, and movables that are the main (cultural) subjects of UNESCO's 1970 and 1972 Conventions,[51] although it also makes specific reference to those 'belonging to American cultures existing prior to contact with European culture' as well as 'remains of human beings, fauna, and flora related to such cultures'. This underlines the fact that indigenous cultural heritage—understood in an expansive sense to include such elements—was a high priority at that time as well as today and incorporates the natural as well as the cultural heritage. Here, again, an almost exclusive emphasis placed on indigenous forms of cultural heritage can be observed, which might be viewed as 'mythologizing of a common, pre-Columbian indigenous American identity (specific from that of European colonizers)'.[52] In 1989, the General Assembly of the OAS requested the Inter-American Commission on Human Rights (IACHR) to prepare a legal instrument on the rights of 'indigenous populations'. The Draft American Declaration on the Rights of Indigenous Peoples was approved by the Commission in 1997[53] and submitted to the OAS General Assembly, which established a Working Group in 1999 to consider the draft further.[54] The Office of the Rapporteur on the Rights of Indigenous Peoples has advised the Working Group on the process of discussion of the draft declaration since 2000 and the participation of indigenous representatives in this process was increased in 2001.[55]

The most recent version available for this draft Declaration is that agreed in 2011[56] and it contains several provisions of interest for cultural heritage. In the Preamble, setting out the broader context of the instrument, the importance of indigenous peoples' respect for the environment and ecology is respected as well as the value of their cultures, knowledge, and practices to sustainable development and to living in harmony with nature: these, of course, form part of the intangible

[51] Article 2.

[52] Lixinski, *Intangible Cultural Heritage in International Law* (n 6) at p 69. He further states that: 'The idea is that… one must look at American cultures and their tangible and intangible heritage as the historical result of a series of interactions among different cultures, most of which are indigenous. The conservation of indigenous cultural heritage must be a priority, it is argued, because pre-Columbian cultures are the common and shared heritage of American identity.'

[53] Approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 1333rd session, 95th Regular Session.

[54] In 2000, the IACHR approved a report entitled *The Human Rights Situation of the Indigenous People in the Americas* [OEA/Ser.L/V/II.108 Doc. 62, 20 October 2000]. Chapter II contains the text of the Proposed American Declaration on the Rights of Indigenous Peoples.

[55] General Assembly Resolution No 1780, dated 5 June 2001 recommended that the Permanent Council pursue 'mechanisms for the accreditation and the appropriate means of participation in its deliberations of representatives of indigenous peoples so that their observations and suggestions may be taken into account'.

[56] Permanent Council of the Organization of American States Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. Thirteenth Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington DC—18–20 January 2011) Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples (Outcomes of the Thirteenth Meetings of Negotiations in the Quest for Points of Consensus, held by the Working Group) [Updated upon the conclusion of the Thirteenth Meeting of Negotiations] [OAS Doc OEA/Ser.K/XVI GT/DADIN/doc.334/08 rev. 6, 20 January 2011].

cultural heritage of indigenous peoples.[57] Thus far, the main article dealing with the protection of cultural heritage (combining that, notably, with protection of intellectual property) is still under negotiation. In essence, the draft asserts that indigenous peoples 'have the right to the full recognition and respect for their property, ownership, possession, control, development, and protection of their tangible and intangible cultural heritage and intellectual property' as well as of its 'collective nature, transmitted through millennia, from generation to generation'.[58] This is interesting in the way it makes a distinction between the ownership, possession, and control of cultural heritage and, of course, the linkage it makes between their heritage and intellectual property, since much of the latter is to be found in the former.[59] Such a linkage has been found to be problematic in the case of intangible cultural heritage as tending to limit the nature of protection and even the subject of protection, however it remains an important demand of indigenous peoples who, historically, have experienced the mining of their intellectual property in the form of traditional ecological knowledge, for example, and seek to protect this alongside more 'standard' forms of cultural heritage. Furthermore, their right to develop their cultural heritage is also mentioned, making the link firmly between heritage and identity. Another point worth noting is the requirement on States to act 'in conjunction with indigenous peoples' to ensure that both national *and international* agreements protect indigenous peoples' cultural heritage and intellectual property.

Other relevant articles of this draft Declaration concern the right of indigenous peoples to 'use, develop, revitalize, and transmit to future generations their own histories, languages, oral traditions, philosophies, systems of knowledge, writing, and literature' and use their own names for individuals, communities, and individuals.[60] The right to express their spirituality and beliefs[61] includes the right 'to practice, develop, transmit, and teach their traditions, customs, and ceremonies' in public or privately, individually or collectively, and rights over 'sacred sites and objects, including their burial grounds, human remains, and relics'. The draft Declaration also affirms the right to their own health systems and practices,[62] including the protection of natural resources, such as plants and animals, necessary for this which could also be broadly interpreted as relating to indigenous heritage and its social role. Two noteworthy elements in this instrument are: (i) the affirmation of collective rights of indigenous peoples as 'indispensable for their existence, well-being, and integral development as peoples' which includes their right to their own cultures, professing and practising their spiritual beliefs, and

[57] Paragraph 3. The example we have seen in Chapter 5 of the Zápata element inscribed on the RL of the 2003 Intangible Heritage Convention is testament to this.

[58] Draft Art XXVIII.

[59] The intellectual property referred to here 'includes, *inter alia*, traditional knowledge, ancestral designs and procedures, cultural, artistic, spiritual, technological, and scientific, expressions, genetic resources including human genetic resources, tangible and intangible cultural heritage, as well as the knowledge and developments of their own related to biodiversity and the utility and qualities of seeds and medicinal plants, flora and fauna'.

[60] Article XIII. [61] Article XV. [62] Article XVII.

using their own languages;[63] and (ii) the right to cultural identity and integrity which includes the 'right to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations'.[64] Here, then, we can see that the right of indigenous peoples to their cultural heritage, enjoyed as a collective as well as an individual right, forms part of their right to cultural integrity, includes an 'ancestral heritage' passed down from innumerable previous generations, and is essential to their future existence. This right to cultural survival is also allied with traditional forms of property and land ownership[65] whereby 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship to their lands, territories, and resources' which, of course, creates a potential linkage between control over land and resources with cultural heritage that is much stronger than in the case of non-indigenous heritage.

Europe: Council of Europe

As far as Europe is concerned, the majority of important policy and legal instruments for the protection and safeguarding of cultural heritage have emanated from the Council of Europe, an organization with a much broader geographical spread (and cultural diversity) than the European Union and which has the protection and promotion of human rights as one of its main mandates.[66] Indeed, as with nature conservation law,[67] the Council of Europe has been at the forefront of many important evolutions in cultural heritage law-making. The founding documents of the Council of Europe referred to the need to protect a 'common heritage' of the European nations as a means of protecting human rights, fostering democracy, and ensuring peace. This assumed the existence of a common 'European identity' upon which further integration and cooperation within Europe could be built and heritage has played a significant role in seeking to identify and consolidate such a common identity.[68]

The Council of Europe's approach has traditionally been based on a holistic approach that ignores the distinction made in UNESCO law-making, for

[63] Article VI. [64] Article XII. [65] Article XXIV.

[66] As noted in Recommendation 1990 on the right of everyone to take part in cultural life (Council of Europe, Parliamentary Assembly, 2012) at para 12, 'The right to take part in cultural life is pivotal to the system of human rights. To forget that is to endanger this entire system, by depriving human beings of the opportunity to responsibly exercise their other rights, through lack of awareness of the fullness of their identity'.

[67] Eg, the 'Berne' Convention (1979) (n 1).

[68] Eg, the European Plan for Archaeology launched in 1994 was part of this process and was explicitly linked to the idea of a single and identifiable 'European Heritage'. It is notable that one of the main events of this Plan was a conference held in 1995 in the British Museum on Bronze Age Europe, chosen as the archaeological period in which Europe was most integrated in terms of trade and communications.

example, between tangible and intangible forms of heritage.[69] Another characteristic that is notable in the Council of Europe approach is the importance it places on civil society involvement in heritage conservation and even, in some cases, as more important than government support.[70] The Council of Europe's 1990 Recommendation on the right of everyone to take part in cultural life sets out clearly this relationship as follows:

> Common cultural wealth is a matter for all public and private stakeholders, but the State must assume its crucial role. As the major cultural agent, the State not only has a responsibility to ensure a wide supply of cultural services, through all its public institutions, but also acts as an initiator, promoter and regulator of synergies between public institutions and organisations in the non-profit and private sectors which contribute to the protection and promotion of cultural heritage, to artistic creative endeavour, and to the public access to the full range of cultural and artistic resources.[71]

Allied to this has been a traditionally strong support for volunteer involvement in protection of cultural heritage that is not seen in many parts of the world to the same degree. The 1990 Recommendation also had a set of Guidelines annexed to it for developing policies that ensure effective participation in cultural life. Suggested policy approaches for the 'inter-temporal aspect' of culture, namely heritage, are to revive traditional local skills, sources and examples of artistic creation of former generations as well as promoting 'activities related to the collective memory' through developing the role of museums and other cultural institutions.[72] Culture in terms of 'inter-spatial and digital arts' is also addressed here and relevant policies include the implementation of national programmes to digitize the cultural heritage through, inter alia, the Europeana web portal developed by the European Commission which provides multilingual access to a wide range of cultural heritage.[73] In relation to language policies and multilingualism, the European Charter for Regional or Minority Languages (1992) is also a relevant instrument that sets out the importance of languages and linguistic diversity to ensuring the shared values that constitute Europe's cultural heritage.[74]

[69] Lixinski, *Intangible Cultural Heritage in International Law* (n 5) at p 76.

[70] Interestingly, the African Cultural Charter (1976) also mentioned cultural heritage as the responsibility of peoples, the State being a facilitator in the process.

[71] Recommendation 1990 (n 64) at para 3.

[72] Paragraphs 32 and 35 of the Guidelines for developing policies to ensure effective participation in cultural life.

[73] Paragraph 28 of the Guidelines for developing policies to ensure effective participation in cultural life.

[74] In a fashion similar to the African regional approach. The first two preambular paras note that: 'the aim of the Council of Europe is to achieve a greater unity between its members, particularly for the purpose of safeguarding and realising the ideals and principles which are their common heritage' and that 'the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions'. In a similar vein, Art 22 of the Charter of Fundamental Rights of the European Union (2000) on 'Cultural, religious and linguistic diversity' affirms that '[t]he Union shall respect cultural, religious and linguistic diversity'.

The main treaties of the Council of Europe addressing the cultural heritage are: the Convention for the Protection of the Architectural Heritage of Europe,[75] the European Convention on the Protection of the Archaeological Heritage (revised, 1992),[76] the European Landscape Convention,[77] and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society ('Faro' Convention).[78] Of these, the last is one that merits particular attention since it is a highly innovative treaty that sets clearly contemporary policy approaches towards safeguarding cultural heritage in the European context which are, in certain aspects, notably different from those taken at the global (UNESCO) level.

First, the Granada Convention for the architectural heritage of Europe (1985) was aimed at reflecting the very rich and diverse nature of Europe's architectural heritage, challenges posed by its conservation, and the differences in official attitudes towards it among the different European regions. The architectural heritage was felt at that time to be the most immediately perceptible part of European cultural heritage. Interestingly, the role that the architectural heritage can play in cultural development at the local, national, and European levels was also stressed, taking account of the inclusion of heritage in town planning and development policies already achieved and that its conservation can contribute to economic development. In addition, the advantages for the future viability of this heritage of using it for contemporary needs—what would nowadays be termed its 'sustainable use and conservation'—is also noted. Hence, cooperation at all levels between town planners, developers, and conservationists is required and it is important for the public to participate and be informed.[79] Moreover, this Convention makes clear reference to the need for investment, public and private financing arrangements, and vocational training, which again demonstrate a high degree of foresight.

The European Convention on the archaeological heritage (1992) was a revised and updated version of the original 1969 Convention of this title. It makes reference to the notion of a common European heritage, viewing the archaeological heritage as a source of information on the evolution of humans in Europe and of 'the European collective memory'. The 'archaeological heritage' is defined according to three criteria: (1) it must contain a trace which comes from past human existence; (2) it must be capable of enhancing our knowledge of human history and its relation with the natural environment; and (3) it must be ascertained mainly through investigation of an archaeological nature or deliberate discovery. The list of elements of this heritage covers a wide range and includes, inter alia, burial sites as well as city walls, and sites or objects situated on land or underwater. The Convention incorporated concepts and ideas that, although new at that time, have now become accepted practice. It moved away from the idea that the main

[75] Adopted at Granada, 3 October 1985 [CETS No 121].
[76] Adopted at Valletta, 16 January 1992 [CETS No 143].
[77] Adopted at Florence, 20 October 2000 [CETS No 176].
[78] Adopted at Faro, 27 October 2005 [CETS No 199].
[79] Mirroring approaches much more developed and more fully articulated in the 2005 Faro Convention (see below).

threat to the archaeological heritage was from clandestine excavation towards recognizing the danger posed by major public works (motorways, high-speed train links, car parks, etc) and land planning schemes (reforestation, land consolidation, etc). Hence, it impacted not only on legislation directed towards archaeological materials, but also general cultural heritage legislation, as well as that dealing with diverse areas such as the environment, town planning, public works, building permits, etc.[80] The Convention emphasizes the *scientific* importance of the archaeological heritage (rather than as a source of culturally interesting objects) while scientific excavation is itself seen as a largely destructive activity and so to be used only as a last resort in searching for that information.[81] The context of material culture found is regarded as important to the archaeological heritage as the objects themselves: and, if removed from the original context, may lose its scientific value. Much of the Convention is concerned with the system that Parties must establish to regulate activities affecting this heritage, but it also highlights both the importance of public education (for developing better public awareness) and the nature of public interest in this heritage: since this heritage gives people an understanding of where they have come from and what has shaped them, the public has a great interest in its protection and archaeological work is ultimately for the benefit of the general public. This notion of public interest and its reciprocal responsibilities towards heritage is developed much further in the Faro Convention (2005).

Another treaty that has as its main subject matter a material aspect of cultural heritage is the European Convention on cultural landscapes (2000) which has a potential scope covering not only natural and rural landscapes (as these had traditionally been understood) but also including urban and semi-urban areas. In addition, protection under the Convention is not limited to the cultural or natural components of the landscapes but extends also to the interrelationships among these: in this sense, it is analogous to the ecosystem approach taken in more recent environmental law. The general purpose of the Convention is to encourage public authorities to adopt policies and measures[82] for protecting, managing, and planning landscapes throughout Europe, in order to (i) maintain and improve landscape quality and (ii) lead the public, institutions, and local and regional authorities to recognize the value and importance of landscape and to take part in related public decisions.[83] One of the fundamental bases for this treaty was the idea that, for European citizens, the *quality of their surroundings* is an important heritage value, and that the cultural and natural values linked to European landscapes are, in their quality and diversity, part of Europe's common heritage.[84]

[80] This is acknowledged in the Preamble. Article 5 also addresses the relationship between development projects and preservation of the archaeological heritage.

[81] Article 1. It also notes that both destructive and non-destructive scientific techniques are available to be used.

[82] At local, regional, national, and international levels.

[83] Council of Europe, *Explanatory Report* (to the European Landscape Convention).

[84] Council of Europe, *Explanatory Report* (to the European Landscape Convention) at para 30: 'In their diversity and quality, the cultural and natural values linked to European landscapes are part of Europe's common heritage, and so European countries have a duty to make collective provisions for the protection, management and planning of these values.'

However, since a wide variety of factors is eroding this quality and diversity in many landscapes, the quality of people's everyday lives and well-being is adversely affected. This linkage between heritage values and quality of life would seem to express a peculiarly European sensibility regarding cultural heritage. In addition, the need for a more democratic approach to the treatment and protection of these landscapes is asserted, especially in response to technical and economic developments affecting it, and popular participation in decision-making is therefore encouraged.

The most recent European cultural heritage treaty and potentially the most far-reaching in terms of its influence is the Framework Convention on the Value of Cultural Heritage for Society (Faro Convention, 2005). As a Framework Convention, it sets out principles and broad areas for action as agreed between the States Parties, but none of its provisions can directly convey rights to individuals simply as a result of national ratification: unlike ordinary Conventions, it does not create obligations for specific actions, and this requires States Parties to introduce new legislation to achieve.[85] Such Conventions can be seen, therefore, as setting out broader policy objectives and as an encouragement to Parties to undertake the legislative development necessary to implement them. In the case of this Convention, this policy framework is placed within a context of assigning rights and responsibilities towards cultural heritage and its potential contribution towards sustainability. The Faro Convention is notable in its strong foundations in human rights whereby the concept of the 'common heritage of Europe' which is, again, relied upon is conceived in terms of (i) shared experience and (ii) commitment to fundamental values, in particular human rights and democracy.[86] Hence, heritage is a 'resource' for the exercise of freedoms and a right to cultural heritage,[87] predicated on the right to participate in cultural life, is asserted.[88]

This 'focus on values, rather than the constitutive elements of heritage' is also a way of avoiding commodification of heritage.[89] Cultural heritage is characterized as a common good, not something that is preserved for its own sake or even for its scientific value, and for which the widest possible democratic participation is required.[90] Defined in these terms, the European cultural heritage is seen as a primary resource for democratic engagement in support of cultural diversity and

[85] *Explanatory Report* (to the Faro Convention) in a preliminary note states: 'This is a Framework Convention. It sets out principles and broad areas for action which have been agreed between states Party. No provision of this Convention is capable of conveying rights to individuals solely through national ratification without legislative action by individual states Party. The Convention's operation will be subject to the usual rules for international treaties as set down in the Vienna Convention on the Law of Treaties (1969)'.

[86] Article 3. As Lixinski notes in *Intangible Cultural Heritage in International Law* (n 5) at p 78, 'instead of preserving difference, heritage here is used to create commonality'.

[87] Preamble, para 3 and Art 2. Article 4 sets out the rights and responsibilities of individuals in respect of cultural heritage.

[88] Article 1.

[89] Lixinski, *Intangible Cultural Heritage in International Law* (n 5) at p 80.

[90] Preamble, para 5. Article 1(c), in addition, states that the ultimate purpose behind the conservation of cultural heritage and its sustainable use is the development of a more democratic human society and the improvement of quality of life for everyone.

sustainable development. In relation to these ideas, it has a distinctive approach from that of UNESCO's global treaties and other instruments: with regard to cultural diversity it places an emphasis on how cultural heritage can be used sustainably to create economic and social conditions favourable to the survival of diverse communities.[91] In addition, in relation to tangible and intangible cultural heritage, its primary focus is on ascribed values rather than on the material or immaterial elements that constitute heritage.

The notion of 'cultural capital' and its relationship to sustainable development is one of the important innovations in this Convention: The rich and diverse cultures of modern Europe derive from this 'cultural capital' through the application of human ingenuity and effort. As such, it is a source of prosperity for the diverse communities present in Europe. As a corollary to this, the value of cultural heritage as a factor in sustainable development is emphasized,[92] reminding us that respect for diversity and identity is inherent in the concept of sustainability. As a consequence, measures taken to safeguard cultural heritage are not some peripheral activity, but constitute essential actions for sustaining and utilizing assets that are vital both to the quality of contemporary life and to future progress. Hence, the Convention integrates the various dimensions of cultural heritage protection into the sustainable management of the cultural heritage itself.[93] Furthermore, it sets up a continuum between the various dimensions of cultural heritage and its economic aspects, thus corresponding to the multi-dimensional nature of the concept of 'value'.[94] Through this, it recognizes that cultural heritage comprises a value that goes beyond any contemporary utility and that its economic exploitation must not jeopardize the heritage assets—cultural capital—themselves. As a consequence, the rights of communities and future generations must be respected which may find other purposes for heritage which might otherwise be lost.[95] This is reminiscent of an aspect of sustainable development whereby we should safeguard natural resources since future generations are likely to have new technologies that will allow for a more optimal utilization of these resources than is possible today. Again stressing the human rights context within which this treaty is operating, the importance of respecting the right to information as a basis for sustainability is also noted.

Another key concept introduced in this Convention is that of 'heritage communities'[96] which again underpins the democratic approach it espouses and responds to the requirement for cultural citizenship. This is based on the notion that, without a community to create, practise, and maintain it, there can be no

[91] *Explanatory Report* (n 85).
[92] Preamble, para 2. [93] Article 9.
[94] Article 10. This is somewhat similar to the combined economic and cultural character of cultural heritage promoted in the Convention for the Protection of the Diversity of Cultural Contents and Artistic Expressions adopted by UNESCO on 20 October 2005 at the 33rd session of the General Conference.
[95] Lixinski, *Intangible Cultural Heritage in International Law* (n 5).
[96] Not to be confused with the idea of the 'heritage community' as made up of scholars and other experts.

cultural life.[97] Importantly, a heritage community for the purposes of this treaty[98] is not one based necessarily on fixed, shared characteristics such as language, religion, or ethnicity, but is one whose membership can shift and change[99] and whose cooperation with other similar communities in Europe can be beneficial. This can be seen as an evolution of the concept of volunteerism that was promoted by the Council of Europe in the 1980s and 1990s. A related notion is, of course, that of participation in heritage safeguarding and management, as well as the concomitant responsibilities that go with this. This takes forward the key idea of involving all members of society in a form of democratic governance of the cultural heritage, a process in which national and federal governments and local authorities are seen as playing a leadership role but not wholly dominating it. Hence, Parties should be the initiators of national safeguarding policies and actions[100] and the requirements for them to encourage public and democratic access to cultural heritage are set out.[101] The way in which the education and training sectors interact with cultural heritage and how digital technologies can be employed to achieve the objectives of access to heritage (including through democratic engagement) and economic progress are also addressed.[102]

Other important values promoted in the Faro Convention include the character of landscape and the environmental dimensions of cultural heritage. In this, it enjoys a specificity of approach that distinguishes it from other European and global instruments, employing the concept of the 'cultural environment' in which the cultural heritage aspects of environment are understood as a necessary resource both for territorial cohesion and quality of life.[103] This emphasis on quality of life related to the cultural environment picks up on a notion already expressed in the Landscapes Convention but it is, again, taken further here. Hence, continuity in the cultural environment should be ensured, but through a process in which quality is also pursued.[104] The achievements of contemporary creativity should, together with the environment into which they are inserted, form the cultural heritage of tomorrow: For example, contemporary architectural structures should respect the (heritage) values of the pre-existing cultural environment.

South-east Asia: ASEAN

The ASEAN Charter (2007)[105] links the promotion of sustainable development with environmental protection, natural resource sustainability, and preservation

[97] This is the logic of Art 27 of the Universal Declaration of Human Rights and also a fundamental approach taken in the 2003 Intangible Heritage Convention in its references to 'communities, groups and . . . individuals'.

[98] Article 2(b).

[99] A heritage community may have a geographical basis or be linked to a language, a religion, shared humanist values, past historical links, etc. However, it may also arise out of a common interest of another type, such as a shared interest in archaeology or in a particular festive event.

[100] Article 11. [101] Article 12.

[102] Articles 13 and 14, respectively. The latter also involves the question of multilingual access to information in cyberspace.

[103] Article 8 on 'Environment, heritage and quality of life'. [104] Article 8(d).

[105] The Charter of the Association of Southeast Asian Nations, adopted by ASEAN in Singapore on 20 November 2007.

of cultural heritage[106] and includes amongst its purposes the promotion of 'an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region'.[107] Furthermore, respect for the different cultures, languages, and religions of the peoples of ASEAN while emphasizing their common values 'in the spirit of unity in diversity' is set out as a principle of the Charter.[108] Given that the ASEAN motto is '*One Vision, One Identity, One Community*'[109] it would seem that unity may have precedence here over diversity, although the following principle requires ASEAN to be 'outward-looking, inclusive and non-discriminatory'.[110] This understanding is further supported by the call for ASEAN to 'promote its common ASEAN identity and a sense of belonging among its peoples in order to achieve its shared destiny, goals and values'.[111]

The main relevant instrument of ASEAN is the Declaration on cultural heritage,[112] a non-binding policy document, which defines its subject matter broadly and includes such elements as: significant cultural values and concepts, oral aspects of heritage (folklore, traditional arts and crafts, languages, etc), and popular cultural heritage and popular creativity in mass cultures (industrial or commercial cultures).[113] As with the African and European regional instruments, the human rights context of this instrument is again made clear in the statement that 'that all cultural heritage, identities and expressions, cultural rights and freedoms derive from the dignity and worth inherent in the human person in creative interaction with other human persons'. This reference to the creative human interaction adds an interesting dimension that underlines the fact that the cultural rights (and other rights related to cultural heritage), although expressed in international documents as rights enjoyed by individuals, require social and cultural interactions to be made real. In addition, this human rights dimension is linked to the notion of 'creative communities of human persons' who are both the main agents of 'these heritage, expressions, and rights' and so should also be the main beneficiaries of and participate in their realization.[114]

Among the main articles of the Declaration, there is an attempt to find a balance between the 'increasing dominance of materialist culture' by reaffirming 'human spirituality, creative imagination and wisdom, social responsibility and ethical dimensions of progress' which is under the rubric of 'Affirmation of ASEAN cultural dignity'. The way it is expressed moves beyond a purely

[106] Article 1(9) reads: 'To promote sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples'.

[107] Article 14.

[108] Article 2(l). [109] Article 36. [110] Article 2(m). [111] Article 35.

[112] ASEAN Declaration on Cultural Heritage adopted by ASEAN in Bangkok, Thailand on 25 July 2000.

[113] Article 1(a), (d), and (f).

[114] Preamble, para 3 reads in full: 'Affirming that all cultural heritage, identities and expressions, cultural rights and freedoms derive from the dignity and worth inherent in the human person in creative interaction with other human persons and that the creative communities of human persons in ASEAN are the main agents and consequently should be the main beneficiary of, and participate actively in the realization of these heritage, expressions and rights'.

individual notion of human dignity to the idea of a collective or communal dignity held in common by all citizens of ASEAN Member States. Such values should be harnessed 'positively' in order to 'provide direction and a vision for authentic human development'.[115] This introduces a further, potentially controversial, idea that the values underpinning this 'ASEAN cultural dignity' are those which may contribute to 'authentic' human development as opposed, one assumes, to less authentic forms of human development. Whether one agrees with this or not, however, still makes an interesting connection between cultural dignity, of which cultural heritage plays a large part, as a basis for full and human development. This notion of an identity shared by ASEAN peoples and nations is also linked explicitly with cultural traditions as a part of ICH and awareness raising is called for that will validate ASEAN cultural strengths and resources, in particular 'historical linkages and shared heritage and a sense of regional solidarity'.[116]

There is also a strong sense running through the Declaration text that ASEAN cultures are experiencing loss and that living cultural traditions 'of creative and technical excellence' are rapidly deteriorating in the face of several factors, including the tropical climate, inappropriate development, illicit trafficking, and homogenizing forces of globalization. Hence, it is necessary to sustain 'worthy traditions and folkways' and protect their bearers in the face of such threats as industrial globalization and mass media through 'promoting creative diversity and alternative world views and values'.[117] Here, again, we see a region-specific view of culture and heritage in which such value judgments about the heritage can be made (by States) and where there is a strong sense of being under siege from a wave of homogenizing culture from outside the region.[118] Of course, this is not a world-view that allows much room for alternative realities within it and, therefore, could be seen as rejecting cultural and other forms of diversity[119] as much as it champions it. An interesting provision is that those cultures with a global reach should not deprive local, national, and regional cultures of their own 'development dynamics' and reduce them to 'relics of the past'.[120] Although it is not clear from this article whether this refers to ASEAN Member States or other countries whose cultures have a global reach, the following paragraph which calls on Member Countries to ensure that their cultural laws and policies empower all peoples and communities towards human development would suggest it is the former. Again, as in the aforementioned Faro Convention (2005), a clear and

[115] Article 7. Such a view would challenge mainstream human rights thinking (which is predicated on the notion of individual rights) and mirrors the thinking developed by some ASEAN countries in the late 1990s of a specific set of 'Asian values' that differed from the dominant 'universal' values underpinning human rights.

[116] Preamble, para 4 and Art 6. [117] Article 3.

[118] In the Preamble at para 8 it notes that '[i]ncreasing dominance of market forces, mass production, consumerism of contemporary industrial society undermine human dignity, freedom, creativity, social justice, and equality'.

[119] These could include gender diversity which is one aspect of the broader cultural diversity related to heritage. See: UNESCO, *Gender Equality, Heritage and Creativity* (Paris: UNESCO, 2014).

[120] Article 8.

direct linkage is made between cultural growth and economic sustainability and the consequent requirement for ASEAN States to 'integrate cultural knowledge and wisdom into their development policies'.[121]

Non-geographically based organizations

Although the Organization of the Islamic Conference (OIC) is not strictly speaking a regional organization, but rather a grouping of States based on a shared religion, it is worth looking at the approach it takes to setting cultural heritage law and policy. A central objective of its Charter[122] is to consolidate unity and solidarity among (Muslim) Member States which is to be based, of course, on shared religious values such as moderation and tolerance, but also to foster 'Islamic symbols and common heritage'.[123] Furthermore, it aims to support Muslim minorities and communities living outside the Member States (presumably in non-Muslim majority countries) to preserve their dignity, cultural, and religious identity: this is interesting since it is always a moot point as to how far any State can intervene in the affairs of another in order to support and promote the cultural heritage of diaspora and migrant communities, for example.[124] Another organization that does not strictly fulfil the criteria of a 'regional' body is the Non-Aligned Movement (NAM), comprising Member States from various regions of the world that have common interests as States of the global South.[125] The key text of this organization is the Declaration on cultural diversity adopted in 2007.[126] In its Preamble, cultural diversity and the pursuit of cultural development 'by all peoples and nations' are seen as 'a source of mutual enrichment for the cultural life

[121] Article 12.

[122] Charter of the Organization of the Islamic Conference, revised Charter adopted at the Eleventh Islamic Summit held in Dakar on 13–14 March 2008 in order, inter alia, to include a stronger human rights dimension.

[123] Preamble.

[124] Article 1(16) restates this objective as: 'To safeguard the rights, dignity and religious and cultural identity of Muslim communities and minorities in non-Member States'.

[125] As of May 2012, there were 120 Member States as follows: Afghanistan, Algeria, Angola, Antigua and Barbuda, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Côte d'Ivoire, Cuba, Democratic People's Republic of Korea (DPRK), Democratic Republic of Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Lao Peoples' Democratic Republic, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Palestine, Panama, Papua New Guinea, Peru, Philippines, Qatar, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, São Tomé and Príncipe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Somalia, South Africa, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Tanzania, Thailand, Timor Leste, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, and Zimbabwe. There were also 17 Observer States and 10 Observer Organizations.

[126] Declaration and Programme of Action on Human Rights and Cultural Diversity adopted by the Non-Aligned Movement in Tehran on 4 September 2007, accessed online on 23 February 2015 at: <http://namiran.org/16th-summit/>.

of humankind':[127] in this, we find not only a similar stress on cultural development based on cultural diversity, but also a similarly nuanced approach to the relationship between cultural diversity and humanity (or unity) that is taken by ASEAN. This is further drawn out and given an explicit connection with cultural heritage in a later paragraph whereby the dignity and value of each culture is acknowledged as deserving of recognition, respect, and preservation, but alongside the conviction that there is a 'common set of universal values' shared by all cultures which all form part of 'the common heritage belonging to humanity' in their rich variety and diversity and in the reciprocal influences they have on each other.[128] Although this instrument is also set firmly within a human rights-based framework, it is also suggestive of the need to balance 'national and regional particularities and various historical, cultural and religious backgrounds' against the universality of human rights.[129] A further way in which this instrument is similar to that of the ASEAN approach is in its strongly defensive position vis-à-vis a homogenizing, global culture that threatens the diversity and specificity of the cultures and heritage of NAM Member States.[130]

Conclusion

In conclusion, the regional agreements described above have demonstrated certain important trends in cultural heritage law-making, not all of which have been or will be picked up by the international community to apply on a global scale. Some of these are too region-specific ever to secure universal acceptance, others would require too great a degree of intervention in the affairs of the State to be possible on this scale. It is, however, possible to identify certain of these trends that may well lead to further developments in international cultural heritage law such as, for example, the way in which the connection between cultural heritage and the environment is conceived, moving from the relatively restricted notion of cultural landscapes to the broader one of the cultural environment. A second area relates to the way in which relationships between the State and various stakeholders in cultural heritage protection are viewed and the relative roles of each and, in particular the State vis-à-vis other actors, in implementing protective and safeguarding measures. In this regard, the

[127] At para III. [128] At para VII.

[129] Paragraph XVIII reads: 'Reaffirming that all human rights are universal, indivisible, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis, and that, *while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind*, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms' [emphasis added]. At para 21 of the main body text, it reiterates that, 'all human rights are equal and that the exercise of any right should not be at the expense of the enjoyment of other rights'.

[130] This is strongly expressed in the 'International commitment to respect cultural diversity' as follows at para 7 where Member States: ' Expressed their determination to prevent and mitigate cultural homogenization as well as uniculturalism in the context of globalization, through increased intercultural dialogue and exchange guided by enhancing respect for and observance of cultural diversity'.

idea of 'heritage communities' as developed in the European context is an innovative approach that may well not be easily applicable to all systems since it assumes a flourishing civil society and a high degree of democratic participation, but it could encourage future consideration at the international level as to the nature of the 'community' and its 'participation' that have become central notions in more recent international cultural heritage law-making.[131] In addition, the human rights framework within which all these regional agreements seek to place their regulation of cultural heritage is another notable point, despite the fact that these express very different conceptions of human rights themselves and the rights and responsibilities that flow from them and also of the relationship between cultural diversity and universal standards. These conceptions range from the collective rights proposed in African instruments, to the notion of communal identity of ASEAN, and the collective dignity of indigenous peoples expressed by the American instruments, to the highly individualistic view espoused in Europe where the whole idea of cultural heritage protection is couched as a democratizing force. One other obvious shared concern, even if the specifics of the approaches differ, is the need to integrate cultural heritage safeguarding better with developmental objectives. As is expressed in various ways throughout these texts, a major challenge facing the different regions of the world is how they can harness cultural heritage in order to ensure more sustainable forms of development.

As a final consideration, a broader issue relating to (global) international cultural heritage law, which is potentially a point of contrast with regional law, concerns the legal status of global obligations for the protection, promotion, and safeguarding of cultural heritage. The central question to ask here is how far the obligations placed on States by this body of law, which is predominantly a treaty-based system, are strictly binding on States Parties such that their violation would give rise to state responsibility under international law. It can be said that, in the case of most of the cultural heritage treaties dealt with thus far in this book, the majority of their provisions set up what are known as 'soft law' obligations that are more of an exhortatory than a binding character.[132] It has been argued that the general duty on States to protect the world cultural (and natural) heritage contained in Article 4 of the World Heritage Convention is one that is owed to all States Parties to the Convention and has been 'established for the protection of a collective interest of the group'.[133] Thus, this obligation would be,

[131] In both the 2003 Intangible Heritage Convention and the 2005 Convention on Diversity of Cultural Expressions of UNESCO.

[132] This is either because they lack obligatory language or a legal content that gives rise to specific obligations.

[133] The 1972 Convention's Preambular para 7 notes that 'it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value' and, in Art 6(1), 'the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is duty of the international community as a whole to co-operate'. As Roger O'Keefe notes in 'World Cultural Heritage: Obligations to the International Community as a Whole?', *International and Comparative Law Quarterly*, vol 53, no 1 (2004): pp 189–209 at p 190: 'By virtue of its non-synallagmatic nature, and of the Convention's express textual references to a universal interest in the preservation of the cultural heritage in question, the obligation laid down in Article 4 is an obligation owed to all States Parties to the Convention and "established for the protection of a collective interest of the group", in the

in principle, enforceable by all States Parties and, in a case where one Party fails to fulfil this obligation, other Parties (whether alone or acting together) have the right to compel it to do so or to call for it to stop the 'internationally wrongful act' through international judicial proceedings or other countermeasures allowed them by international law.[134]

However, Carducci argues that to assert the existence of obligations owed to other Parties under the 1972 Convention will require arguments to be made with respect to specific cases through future international rulings.[135] Moreover, as O'Keefe points out, it is not always easy to identify a breach of the Convention and undertaking either judicial proceedings or countermeasures can prove extremely problematic in practice.[136] An example that is instructive here is that of the deliberate and egregious destruction by the Taliban of the Bamyan Buddhas in Afghanistan. Although it was a clear breach of Afghanistan's obligations under Article 4 of the Convention,[137] the international community reacted through diplomatic means rather than seeking to take measures based on the international responsibility of Afghanistan over this failure to comply with its obligations under the Convention. In addition to this, there are few customary legal obligations in the field of cultural heritage law[138] and, although the language of the Preamble and the stated purposes of the treaty suggest that there may exist a 'collective interest' of the international community as a whole in the protection of heritage, the legal implications of this are not clear: The characterization of the cultural heritage under the World Heritage Convention as a 'common heritage of mankind' does not in itself constitute any customary obligation to protect it in peacetime. As a consequence of this, Parties recognize the duty of the international community as a whole to cooperate for its protection and the idea that its outstanding

words of Article 48 (1)(a) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. It is an obligation erga omnes partes, to use the traditional terminology.'

[134] According to Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA res 56/83, 12 Dec 2001 (ARSIWA). For details on the countermeasures open to other Parties, see: *Akehurst's Modern Introduction to International Law* edited by Peter Malanczuk 7th revised edn (London: Routledge, 1997) at pp 254–6.

[135] Guido Carducci, 'Articles 4-7 National and International Protection of the Cultural and Natural Heritage', in *The 1972 World Heritage Convention* edited by Francesco Francioni (with the assistance of Federico Lenzerini) (Oxford University Press, 2006) at p 102.

[136] O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 135). The wording of Art 4 allows for a wide range of discretion to the implementing Party as to what measures are appropriate for its implementation (it uses language such as 'where appropriate' and 'to the utmost of its own resources') and cases can only be heard before the International Court of Justice if both (or all) Parties to the case consent to this.

[137] Afghanistan had ratified the World Heritage Convention on 20 March 1979 and had nominated the monuments located in the Bamyan valley for inclusion in the World Heritage List on 21 December 1981 [UNESCO Doc WHC-01/CONF.208/23, 2]. According to O'Keefe, the fact that the Taliban was recognized as the Government of Afghanistan by only three States and was not the government accredited to the UN is irrelevant to the State responsibility of Afghanistan in this matter. See also: Francioni and Lenzerini, 'The Destruction of the Buddhas of Bamyan and International Law', *European Journal of International Law*, vol 14 (2003): p 619.

[138] Most of which derive from international humanitarian law, the law of armed conflict.

universal value 'is a concern that goes beyond the territorial state concerned'.[139] However, we cannot automatically assume from this that any direct obligation is placed on third parties to cooperate for the protection of world heritage.

This means that international law of the cultural heritage is likely to remain one in which the number of strictly binding treaty-based obligations are few and where the customary norms are extremely limited and almost exclusively related to law operating in the event of armed conflict. Within such a context, the role of regional law may become more important since the possibility of developing binding obligations in the regional and sub-regional contexts is generally higher. This is not to state, however, that international cultural heritage law can achieve little. It is hoped that the reader will come away from this book with the sense that, despite its clear legal challenges and limitations, international cultural heritage law has succeeded in stimulating a great deal of legal and related developments in countries around the world that have contributed to the overall status of protection of this highly important resource of individuals, groups, communities, nations, and even humankind as a whole. It has also certainly encouraged the creation of policy frameworks for this end, in some cases highly innovative ones that go far beyond the more limited requirements of the treaty texts themselves. This highlights another important aspect of law-making in any field: the fact of drafting and negotiating an international treaty is an educative and awareness-raising process and one that can directly feed into the development of national legislation. A good example of this can be seen with the 2003 Intangible Heritage Convention which has been attacked, in part, for its soft law character. This treaty has had a noticeable impact even in the first eight years after its entry into force (from 2006 to 2014) in the number of Parties that have either revised existing legislation to accommodate safeguarding of this heritage and the requirements of the Convention, or have introduced new legislation to do this. In addition, a number of Parties have developed new cultural policies and policies in other areas (rural development, environmental protection, etc) that are heavily influenced by this Convention. In this way, one of the main impacts of such instruments may well be educative, encouraging both internal policy and legislative development and regional or international cooperation frameworks. To a lawyer of the more 'classical' school this may not seem to be sufficiently like 'law', but it undoubtedly realizes important achievements in an area of great complexity and sensitivity and one in which States negotiating new agreements will always seek to reserve the majority of matters to their own sovereign jurisdiction.

[139] Carducci, 'Articles 4-7 National and International Protection of the Cultural and Natural Heritage' (n 135) at p 122.

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